and gross revenues used in this section are defined in § 90.912.

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 90

[PR Docket No. 93–144; GN Docket No. 93–252; PP Docket No. 93–253; FCC 97–224]

Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In the *First Report and Order* and *Eighth Report and Order* in PR Docket No. 93–144, GN Docket No. 93–252, and PP Docket No. 93–253, the Commission adopted final service and competitive bidding rules for the upper 200 channels of the 800 MHz Specialized Mobile Radio (SMR) band. In the *Second Further Notice of Proposed Rulemaking,* the Commission sought comment on additional service and competitive bidding rules for the remaining 800 MHz SMR spectrum and the General Category channels. After carefully reviewing the comments and petitions the Commission received following the issuance of the *Further Notice of Proposed Rulemaking,* the Commission addresses the Petitions for Reconsideration in this order.

EFFECTIVE DATE: September 29, 1997.

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SUPPLEMENTARY INFORMATION: This *Memorandum Opinion and Order on Reconsideration* in PR Docket No. 93–144, GN Docket No. 93–252, and PP Docket No. 93–253, adopted June 23, 1997, and released July 10, 1997, is available for inspection and copying during normal business hours in the FCC Dockets Branch, Room 230, 1919 M Street, NW., Washington, DC. The complete text may be purchased from the Commission's copy contractor, International Transcription Service, Inc., 2100 M Street, NW., Suite 140, Washington, DC 20037 (telephone (202) 857–3800).

I. Background

1. In the 800 MHz Report and Order, 61 FR 6138 (February 16, 1996), the Commission restructured the licensing framework that governs the 800 MHz SMR service. For the upper 200 channels, the Commission replaced site- and frequency-specific licensing with a geography-based system similar to those used in other Commercial Mobile Radio Services (''CMRS''). The Commission designated the upper 200 channels of 800 MHz SMR spectrum for geographic licensing, and created 120-, 60- and 20-channel blocks within the U.S. Department of Commerce Bureau of Economic Analysis Economic Areas (''EAs''). The Commission concluded that mutually exclusive applications for these licenses would be awarded through competitive bidding. Additionally, the Commission granted EA licensees the right to relocate incumbent licensees out of the upper 200 channels to comparable facilities. The Commission reallocated the 150 contiguous 800 MHz General Category channels for exclusive SMR use.

2. The Commission also established competitive bidding rules for the upper 200 channels of 800 MHz SMR spectrum. Specifically, the order provided for the award of 525 EA licenses in the upper 200 channel block through a simultaneous multiple round auction. Incumbents and new entrants may bid for all EA licenses, subject to the CMRS spectrum cap in § 20.6 of the Commission's rules. The Commission also adopted a ''tiered'' approach to installment payments for small businesses in the upper 200 channel block, and allowed partitioning for rural telephone companies.

A. Geographic Licensing in the 800 MHz SMR Band

1. Geographic Licensing in Contiguous Spectrum Blocks

3. In the *CMRS Third Report and Order,* 59 FR 59945 (November 21, 1996), the Commission found that licensing 800 MHz SMR spectrum in contiguous blocks would make SMR systems more competitive with other CMRS systems by maximizing technical flexibility so that, for example, it would be possible for SMR licensees to deploy spread spectrum and other broadband technologies. In the *800 MHz Report and Order* the Commission concluded that the entire upper 200 channel block should be licensed on a contiguous basis throughout a geographic area because the SMR geographic license would then be equivalent in size to the smallest block of spectrum now authorized for broadband PCS.

4. Commenters argue that the Commission has not justified its decision to group the upper 200 channels of 800 MHz SMR spectrum into geographically licensed contiguous blocks or adequately explained how the need for contiguous spectrum justifies disruption of established SMR operators and that the Commission's rules impermissibly fail to mandate that contiguous blocks of spectrum be used to offer innovative or competitive services. They also argue that the Commission's decision should be reversed if it is based on reducing its administrative burden. It argues that scarcity of Commission resources cannot justify any changes in its rules and that geographic licensing will in fact increase the Commission's administrative burden. One commenter asserts that most incumbent licensees span all three EA frequency blocks. Thus, relocating most incumbents will require that at least four applications be filed, placed on public notice and processed by the Commission. It also claims that these burdens will be exacerbated by the burdens of site-specific licensing because the Commission has not eliminated current site-specific licenses.

5. *Discussion:* The Commission rejects the contention that it has failed to justify the need for licensing the upper 200 channels in contiguous blocks. In the *CMRS Third Report and Order,* the Commission determined that, where feasible, assigning contiguous spectrum is likely to enhance the competitive potential of CMRS geographic providers. In the *800 MHz Report and Orde*r the Commission determined that geographic licensing and contiguous spectrum are essential to the competitive viability of SMR service because they will permit use of spread spectrum and other broadband technologies and eliminate delays and transaction costs associated with site-by-site licensing.

6. The Commission disagrees with Commenters claim that geographic licensing will have a negative impact on existing SMR operators. The Commission's rules continue to protect incumbent operators from interference. In the upper 200 channels, the Commission requires EA licensees to comply with existing rules that require minimum separation from incumbents' facilities. Thus, an EA licensee must either locate its station at least 113 km (70 miles) from any incumbent's facility, or if it seeks to operate stations less than 113 km from an incumbent's facility, it must comply with the Commission's short-spacing rule, unless it negotiates a shorter distance with the incumbent. Additionally, incumbent SMRs on the

upper 200 channels also have the operational flexibility to add transmitters in their existing coverage area, without prior notification to the Commission, so long as their 22 dBu interference contours are not exceeded. The Commission cannot agree with the contention that competition and innovation will be increased by allocation of spectrum resources via a blanket regulatory prescription rather than through individual market participants' decisions. In the *800 MHz Report and Order,* the Commission stated that its goal was to provide regulatory symmetry and operational flexibility that will allow SMR providers to use new technologies and compete with other CMRS providers. By giving licensees flexibility to use spectrum on either a contiguous or non-contiguous basis, the Commission gives SMR operators more ways to provide service and more ways to compete with other CMRS providers.

7. The Commission also rejects the claim that geographic licensing will increase its administrative burden. Under the Commission's site-specific licensing rules, it has received and processed approximately 6,000 applications for individual SMR licenses and modifications a year, and in some years, as many as 20,000 applications. By contrast, geographic licensing of the upper 200 channels will be accomplished by issuing 525 EA licenses, and virtually eliminating the need for subsequent modifications of any license unless it is transferred or partitioned. Moreover, licensees will no longer be required to file an application for each base station; geographic licensees will be able to construct base-stations in pre-defined areas without the Commission's prior approval. These changes represent dramatic reductions in administrative burden for both licensees and the Commission. In this connection, the Commission rejects commenter's claim that reducing its administrative costs is an invalid basis for adopting new rules. While the Commission's rule changes are driven by numerous considerations other than administrative cost, *e.g.*, promoting more efficient spectrum use and creating a regulatory framework that will allow 800 MHz SMR operators to compete more effectively with other CMRS providers, the Commission considers improving its efficiency and reducing its cost to be valid public interest considerations.

2. Size of EA Spectrum Blocks

8. *Background.* In the *800 MHz Report and Order,* the Commission concluded that dividing the upper 200 channels into various-sized channel blocks would create opportunities for SMR providers with differing spectrum needs. The Commission rejected proposals to assign the upper 200 channels in five- and/or ten-channel blocks, concluding instead that allocating one 120-channel block, one 60-channel block, and one 20-channel block for licensing on an EA basis would equitably balance the interests of all potential and existing licensees.

9. Commenters argue that the record does not support the Commission's decision to group currently allocated channels into contiguous blocks. They contend that the aggregation of 20, 60, and 120 contiguous channels restricts the number of small business entities that can compete effectively at auction because relocation channels will either be unavailable or impracticably costly and that the cost of relocating 20 or more channels will be prohibitive for small business.

10. Commenters claim that smaller channel blocks would require an EA applicant desiring adjacent channels to bid more aggressively, and thus the public would receive more value for the spectrum. They also argue that 5-channel geographic licenses would facilitate bidding for designated entities such as small businesses.

11. *Discussion.* The Commission rejects commenters' argument that the public interest would be better served by five-channel spectrum blocks. The Commission stated in the *800 MHz Report and Order,* that the use of such small spectrum blocks make it more difficult to obtain sufficient spectrum to establish a viable and competitive wide-area system, and to use broadband technologies such as CDMA and GSM. The Commission also rejects the claim that the aggregation of 20, 60, and 120 channels will reduce opportunities for small businesses. Under Commission rules, small businesses may form coalitions to raise needed capital and finance any desired relocations. The Commission has adopted provisions in its auction rules enabling small businesses to receive bidding credits.

12. The Commission also rejects Commenter's claim that five-channel blocks would increase spectrum valuation. The Commission's geographic licensing system is designed to enhance the competitive potential of the 800 MHz SMR operators. To accomplish this, the Commission has tailored the channel blocks to the needs of various users by creating large, medium and small channel blocks and by placing these blocks to accommodate the spectrum needs of different-sized SMR providers. As the Commission recognized in the *800 MHz Report and Order,* placing the 120-channel block closest to the cellular spectrum allocation will assist operators in providing wide-area service by facilitating dual-mode operation. Placing the 20-channel block in the portion of spectrum nearest to the lower 80 SMR channels will allow small to medium-sized operators to expand capacity while minimizing costs and disruption to existing customers. Similarly, the Commission expects that in many EA's medium-sized SMR operators or consortia of smaller SMR operators may find the 60-channel block suitable to their needs.

13. The Commission similarly is not persuaded by the claim that allocating spectrum in five-channel blocks will reduce the burdens of, and number of entities involved in, relocation negotiations. To the contrary, the Commission's relocation mechanism provided for cost sharing and collective negotiations so that relocation can efficiently occur. Additionally, the Commission notes that in the lower 80 channels, where the current five-channel blocks are non-contiguous and interleaved with blocks of non-SMR channels, it is adopting the proposal to license in five-channel blocks.

3. 800 MHz SMR Spectrum Aggregation Limit

14. *Background.* In the *CMRS Third Report and Order,* the Commission adopted a 45 MHz limit on aggregation of broadband PCS, cellular, and SMR spectrum. It concluded that in light of the broadband CMRS spectrum cap, no separate limitation was necessary on aggregation of spectrum in the upper 200 channel block. In the *800 MHz Report and Order,* the Commission reasoned that the 800 MHz SMR service is one of many competitive services within the CMRS marketplace, and that allowing unrestricted aggregation of SMR spectrum would not impede CMRS competition so long as 800 MHz SMR licensees were subject to the 45 MHz CMRS spectrum aggregation limit.

15. *Petitions.* Commenters argue that the Commission has failed to consider that its actions will increase the current state of concentration in the SMR industry. Accordingly, the Commission must limit EA licensees to something less than the entire 200 channels to ensure a wide variety of applicants. One commenter suggests that the Commission prohibit any EA licensee from acquiring more than one third of the Upper 200 channels in any EA, thus, providing adequate opportunities for designated entities while avoiding excessive concentration of licenses.

Commenters also argue that unlimited spectrum aggregation is critical to regulatory parity because an SMR operator aggregating all 200 channels in a market would still operate on only 10 MHz of spectrum, as compared to the 25 MHz for cellular and 30 MHz for A, B and C block PCS licensees.

16. *Discussion.* The Commission sees no need to adopt a spectrum aggregation limit for the upper 200 channels beyond the CMRS spectrum aggregation limit set forth in 47 CFR 20.6. Market forces—not regulation—should shape the developing CMRS marketplace, and the Commission is unpersuaded that further constraints on SMR providers' ability to acquire spectrum are necessary. In fact, the proposed restriction could handicap all SMR providers—including small businesses, rural telephone companies and women-owned and minority-owned businesses—by limiting their ability to compete with cellular and broadband PCS. The Commission has determined that the relevant market for examining concentration of SMR licenses is the CMRS market as a whole, not SMR only. Thus, even if one licensee were to acquire all 10 MHz of spectrum in an EA, this would not be sufficient to have an anti-competitive effect on the relevant market.

4. Licensing in Mexican and Canadian Border Areas

17. *Background:* In the *800 MHz Report and Order,* the Commission determined that EA licenses would be made available without distinguishing border from non-border areas. Thus, the Commission determined that EA licensees can use available border area channels within their spectrum blocks, subject to international assignment and coordination. Although, reduced channel availability and operating restrictions may reduce values of border area EA licenses, the Commission concluded that EA applicants would consider such factors when bidding on such licenses. The Commission also noted that EA licensees could privately negotiate with other licensees to acquire additional SMR spectrum in border areas.

18. *Petitions.* Petitioners seek clarification of the Commission's border area licensing plan. They note that in border areas some of the upper 200 channels are assigned to non-SMR categories. They seek clarification that these channels are not subject to EA licensing and that incumbent licensees are not subject to mandatory relocation. Petitioners note that in many EAs adjacent to either the Canadian or Mexican borders, no frequencies are available for SMR use in the 120-channel, and 60-channel blocks, and few are available in the 20-channel block and are concerned that bidders will be unaware of this and may overvalue the spectrum.

19. *Discussion.* The Commission clarifies that non-SMR channels in the border area are not subject to EA licensing and thus are unaffected by this rulemaking. The Commission further clarifies that non-SMR channels that have been allocated to SMR eligibles in border areas, but to non-SMR eligibles elsewhere in the country, have been allocated to the upper 200 channel EA licensees on a *pro rata* basis. Prospective bidders should be aware that these channels, which are not available to them anywhere else except in the border regions, will be assigned for their use in the Canadian and Mexican border regions. Most importantly, EA licensees must afford full interference protection to non-SMR licensees operating in adjacent areas on these channels.

20. The Commission notes that its rules already specify which channels are available for EA licensing in the border regions. The Commission believes that license applicants are best situated to decide whether reduced channel availability in border areas affects the value of particular licenses. Nonetheless, to help alleviate ITA's concern about applicant awareness, the Commission will also provide information regarding channel availability border area in the auction bidders package.

B. Rights and Obligations of EA Licensees

1. Spectrum Management Rights

21. *Background.* In the *800 MHz Report and Order,* the Commission determined that if an SMR incumbent fails to construct, discontinues operations, or otherwise has its license terminated by the Commission, the licensed spectrum automatically reverts to the EA licensee. The Commission thus eliminated all waiting lists for SMR category channels within the upper 200 channel block and terminated its finder's preference program for the 800 MHz SMR service. Finally, the Commission created a presumption that permanent transfers and assignments between an EA licensee and incumbents operating within its spectrum block would serve the public interest. The Commission reasoned that this would give EA licensees more flexibility to manage their spectrum, be more consistent with their cellular and PCS rules, and reduce regulatory burdens on both licensees and the Commission.

22. *Petitions.* Petitioner claims that the Commission's approach to spectrum management violates Congressional intent and its goal of regulatory symmetry by disadvantaging non-EA winning SMR licensees vis-a-vis EA licensees. They argue, that incumbents are disadvantaged because they will be restricted from expanding on wide-area blocks and that the Commission's construction requirements favor EA licensees over incumbents. One petitioner claims that the Commission violated section 553(b) of the Administrative Procedure Act by failing to give notice of the elimination of the finder's preference program. It also argues that the Commission should temporarily retain the finder's preference program so that all persons knowing of unconstructed or discontinued facilities can request a finder's preference, take the channels, and provide balance among those applying for the wide-area SMR frequency blocks.

23. *Discussion.* The Commission rejects the claim that it has violated Congressional intent by conferring spectrum management rights on EA licensees, including the right to recover spectrum lost by incumbents who cease operations or violate its rules. The contention that these rules discriminate against incumbent licensees is without merit. Incumbents retain all of the rights to operate that they held under their pre-existing licenses. Thus, incumbents who operate in compliance with the Commission's rules are not affected by the spectrum recovery rule, while incumbents who cease operations or violate the Commission's rules would lose their spectrum rights under either the old rules or the new rules. The only difference in the Commission's new rules is that they have provided for unused spectrum to revert to the EA licensee rather than to be relicensed by the Commission. This procedure does not discriminate against incumbents: any incumbent who seeks the ''superior'' spectrum management rights of an EA license has the same opportunity to obtain it as any other applicant: by bidding for the EA license through the auction process.

24. The Commission also rejects the claim that it gives no notice of the possible elimination of the finder's preference program. Such notice was inherent in the Commission's proposal that rights to unconstructed or non-operational channels would automatically revert to the EA licensee. The elimination of the Commission's finder's preference program was thus both necessarily implicit in and a

logical outgrowth of, the Commission's proposals.

25. Finally, the Commission declines to retain the finders preference program, even on a temporary basis. The Commission's move to geographic licensing makes the finder's preference program unnecessary because EA licensees will have incentive to identify and make use of unused spectrum within their blocks. Additionally, the finder's preference program is inconsistent with the Commission's objective of assigning spectrum through geographic licensing because it would perpetuate site-by-site licensing.

2. Treatment of Incumbent Systems

a. Mandatory Relocation of Incumbents From the Upper 200 Channels

26. *Background.* In the *800 MHz Report and Order,* the Commission adopted a mandatory relocation mechanism for incumbents on the upper 200 channels. In order to minimize the impact on existing licensees, the Commission adopted two key provisions: (1) If an EA licensee is unable or unwilling to provide an incumbent licensee with ''comparable facilities,'' such an incumbent would not be subject to mandatory relocation; and (2) any incumbent that is relocated from the upper 200 channels, either voluntarily or involuntarily, will not be required to relocate again if the Commission adopts its geographic area licensing proposal for the lower 80 and General Category channels.

27. *Petitions.* Several petitioners challenge the Commission's decision to authorize mandatory relocation of incumbent SMR licensees. They argue that the Commission's licensing framework does not require mandatory relocation, and that relocations should occur through private negotiations between EA licensees and incumbents. Other petitioners object that there are no alternative channels on which to relocate incumbents. Still, other commenters are concerned that mandatory relocation will reduce the amount of competitive service offered to the public and thus be harmful to end users and subscribers. These petitioners argue that requiring relocation of an incumbent's entire system effectively excludes most bidders from the auction, including small businesses. Another petitioner adds that the public interest is not served by displacing existing SMRs so other SMRs can provide the same service. And, another argues that the Commission has behaved inconsistently with respect to 800 MHz and paging services, two comparably encumbered frequency bands, because they have concluded that ''alternative'' spectrum for relocation exists in the 800 MHz band but does not exist in the paging bands.

28. *Discussion.* In the *800 MHz Report and Order,* the Commission concluded that while voluntary negotiations are important and to be encouraged, mandatory relocation is necessary to achieve the transition to geographic area licensing and to enhance the flexibility of EA licensees on the upper 200 channels. The Commission rejects petitioners' contention that the Commission could accomplish these goals by relying on voluntary negotiations alone. While the Commission expects most relocation to occur through voluntary negotiations, it is concerned that EA licensees will be unable to realize the potential of their spectrum without some mandatory mechanism in the event voluntary negotiations prove unsuccessful. The Commission reaffirms its conclusion that a narrowly tailored mandatory relocation mechanism is necessary to the achievement of the goals of this proceeding.

29. The Commission also rejects the argument that relocation should not be required because EA licensees will provide the same service as incumbents who are relocated. The Commission expects that EA licensees will use their spectrum to provide a wide variety of services. While some of these services may be of the same type provided by incumbents who are relocated, the ability to clear contiguous spectrum will give EA licensees operational flexibility to provide new and innovative services that were far more difficult to develop under site-by-site, channel-by-channel licensing rules. Thus, relocation will not merely replace one SMR licensee with an identical licensee, but will allow both parties to move towards more efficient use of the spectrum.

30. Many petitioners who challenge the Commission's adoption of mandatory relocation argue it will harm incumbent licensees, particularly small system operators. The Commission disagrees with this view. The Commission's rules do not require any incumbent to relocate unless the EA licensee provides comparable facilities and a seamless transition. Moreover, the rules the Commission is adopting for the lower 80 and General Category channels provide positive incentives for small businesses who relocate, including bidding credits. Bidding credits assist small business in obtaining licenses and thus, provide small business with an incentive to relocate to the lower channels. In addition, because the Commission is allowing incumbents on the lower channels to operate within their 18 dBu contours, incumbents on these channels (including incumbents who relocate from the upper 200 channels) will have greater operational flexibility and protection from interference than incumbents on the upper 200 channels.

31. Some petitioners argue that the Commission's mandatory relocation rules make relocation impractical for all but a few large SMR operators who have spectrum on the lower 80 and General Category channels that can be used for relocation. Even if this is so, the Commission does not agree with petitioners that this is an argument against mandatory relocation: the Commission considers it preferable to allow relocation where it is feasible rather than to prohibit it because it is not feasible in every instance. Moreover, the Commission disagrees with the premise that small businesses will be discouraged from participating in the upper 200 channel auction because of the practical difficulty of relocating incumbents. Many of those small businesses may themselves be incumbents who choose to bid (individually or in combination with other small incumbents) for the upper 200 channel blocks rather than relocate. In addition, small businesses may develop business strategies that do not depend on relocation, e.g., entering into partitioning agreements with incumbents or providing niche services on available channels. The Commission believes that market forces should be relied upon for these types of decisions.

32. Finally, the Commission rejects the claim that its decision conflicts with its decision not to adopt mandatory relocation in the Commission's recently completed paging rulemaking. The Commission's adoption of geographic licensing rules in paging did not require relocation because paging channels are technically identical to one another and paging technology is generally consistent and compatible regardless of the channel used. Thus, there is no advantage in spectrum efficiency to be gained from encouraging paging incumbents in a particular band to migrate to another band. In contrast, the 800 MHz SMR allocation is a mixture of contiguous and non-contiguous channels, which has led to the development of sometimes incompatible technologies. Relocation is therefore beneficial because it creates incentives for SMR providers to operate on the spectrum most suitable for their particular technologies.

b. Mandatory Relocation Implementation Issues

i. Pre-Auction Negotiations

33. *Background:* In the *CMRS Third Report and Order,* the Commission suspended acceptance of new 800 MHz applications pending adoption of new 800 MHz service and auction rules. On October 4, 1995, the Wireless Bureau imposed a similar freeze on new applications for the General Category channels. Under both of these freezes, assignment and transfer of control applications continued to be processed if the location of the licensed facilities remained unchanged.

34. In the *800 MHz Report and Order,* the Commission partially lifted the freeze on new applications for SMR and General Category channel licenses. Specifically, the Commission allowed filing of new applications to permit assignments and transfers of control involving modifications to licensed facilities that were intended to accommodate market-driven, voluntary relocation arrangements between incumbents and potential EA applicants; and (1) would not change the 22 dBu service contour of the facilities relocated, (2) the assignment or transfers would relocate a licensee out of the upper 200 channels block, and (3) the potential EA applicant and relocating incumbent(s) were unaffiliated. The Commission took these actions to begin the relocation process and thus ease the transition to a wide-area licensing scheme for the upper 200 channels.

35. *Petitions.* Petitioner requests two modifications of the Commission's partial lifting of the application freeze. First, it asks that the Commission ''clarify'' that only incumbent 800 MHz SMR licensees be treated as ''potential EA applicants.'' It argues that absent this restriction, anyone could negotiate with an incumbent and avoid the licensing freeze—regardless of eligibility or intent to bid in the auctions. Petitioner believes that the ability to participate in pre-auction settlements should ''travel with the license.'' Second, the petitioner requests that prior to the auction the Commission accept only those applications that facilitate relocation of incumbents off the upper 200 channels, as opposed to moves from one upper 200 channel to another. Petitioner argues that allowing incumbents to move within the upper 200 channels could be used by potential EA applicants for anti-competitive purposes. Such a limitation on pre-auction settlements would prejudice incumbent licensees without lower band channels to trade and may reduce the number of auction participants for certain channels and satisfy Congressional intent that the Commission use negotiations to avoid mutual exclusivity in application and licensing procedures.

36. *Discussion.* The Commission goal in partially lifting the freeze was to facilitate the voluntary relocation of incumbents off of the upper 200 channels. In order to facilitate this goal, the Commission believes that anyone who intends to bid in the upper 200 auction should be able to use this procedure to obtain spectrum that could be used for relocation of incumbents. While the Commission anticipates that most bidders for EA licenses will themselves be incumbents, it is possible that non-incumbents will bid as well. Therefore, the Commission declines to limit the filing of new applications to incumbent 800 MHz SMR licensees as requested. The Commission is concerned that such a restriction could arbitrarily limit the flexibility of participants in pre-auction negotiations.

37. The Commission agrees that new applications should only be accepted if they facilitate relocation of incumbents off of the upper 200 channels. In order for the auction of the upper 200 channels to occur, bidders must have certainty regarding the channels that are currently licensed to incumbents. Continuing to accept applications for new authorizations on the upper 200 channels would deprive bidders of such certainty and delay the auction process. In addition, the Commission sees no relocation benefit to allowing licensees to acquire new spectrum on the upper 200 channels prior to the auction. Therefore, pre-auction applications will be accepted for relocation purposes only on the lower 230 channels, and only if they meet the conditions specified in the *800 MHz Report and Order.* The Commission notes, however, that this policy only applies to initial applications for new spectrum, not to transfers and assignments of *existing* authorizations, which have never been subject to the 800 MHz licensing freeze. Therefore, incumbents may continue to transfer and assign existing authorizations on either the upper 200 channels or the lower 230 channels.

ii. Relocation Negotiations

38. *Background.* To encourage negotiation between EA licensees and incumbents the Commission adopted a multi-phase, post-auction relocation mechanism in the *800 MHz Report and Order.* In the initial one-year voluntary period, the EA licensee and incumbents may negotiate any mutually agreeable relocation agreement. If no agreement is reached, the EA licensee may initiate a two-year mandatory negotiation period, during which the parties are required to negotiate in ''good faith.'' If the parties still fail to reach an agreement, the EA licensee may then initiate involuntary relocation of the incumbent's system. However, such relocation must be to comparable facilities and must be seamless, *i.e.,* without any significant disruption in the incumbent's operations.

39. *Petitions.* Several commenters argue that the Commission's phased negotiation plan does not serve the public interest and object to the one-year voluntary period and two year mandatory period. They argue that the Commission recently recognized the advantages of a two-year voluntary period and have no compelling reason to deviate from this precedent and that a two-year voluntary period gives incumbents the flexibility in timing their relocation and minimizes the adverse impact of relocation on existing SMR service subscribers.

40. Some commenters argue that the Commission should reduce the mandatory negotiation period to one year, because the 800 MHz relocation process will be less complex than that faced by PCS licensees and 2 GHz microwave incumbents. Others support the adopted relocation process of one-year voluntary and two-year mandatory negotiation periods, although they want relocation safeguards to apply to all incumbents, including non-SMR licensees.

41. Commenters complain that the Commission's rules do not require EA licensees to begin negotiations at any particular time and do not require an EA licensee to relocate incumbents during the initial year. It is argued that EA licensees should be required to notify the incumbent that mandatory negotiations have begun, lest an EA licensee wait out the voluntary period and then declare later that mandatory negotiations have begun, leaving incumbents unprepared. Another argues that the EA licensee must show that it has made a bona fide attempt to negotiate during the voluntary period.

42. Commenters also complain that the Commission has not explained how disputes over whether negotiations have been conducted in ''good faith'' are to be adjudicated. They also argue that since the Communications Act authorizes the Commission neither to reject nor delegate its authority to resolve licensing disputes, the Commission must either (1) expeditiously resolve these disputes or (2) reject mandatory frequency relocation and let the market determine whether frequency relocation

will occur. They also ask that the Commission allow incumbents to decide who will retune end-user equipment. They note that hundreds of thousands of mobile units and control stations are included in incumbent SMR systems. Thus, it is concerned that the Commission's requirement that EA licensees build and test the new [relocated] system could be read to permit or require that EA licensees intervene in relations between an incumbent and its customers.

43. *Discussion:* The Commission agrees with commenters that the mandatory negotiations period be limited to one year. The Commission agrees that such a reduction will serve the public interest by facilitating the clearing of incumbents from the EA blocks so that the EA licensees can implement their wide-area systems. Moreover, this reduction will minimize the period during which incumbents will experience uncertainty concerning relocation. Finally, the Commission notes that this approach is consistent with its recent decision in PCS to adopt a one-year voluntary period and a one-year mandatory period for the C, D, E, and F blocks.

44. The Commission rejects the proposal that we extend voluntary negotiations to two years. A one-year voluntary period and a one-year mandatory period balances the desirability of giving parties flexibility to negotiate voluntarily with the need to ensure that relocation, where feasible, occurs expeditiously. The Commission sees no need to extend the voluntary period for an additional year. The Commission finds that petitioners have not supported their claims that another year of voluntary negotiations would ''minimize the adverse impact'' of relocation. In fact, although the voluntary period has not yet commenced, incumbents and potential EA licensees can begin voluntary negotiations at any time, thus affording themselves more than a year to reach a voluntary agreement. The Commission finds that it would not serve the public interest to delay for another year. Finally, the Commission notes that in recent decisions they have reduced voluntary negotiation periods to one year.

45. In response to the argument that the Commission has not explained how disputes over good faith will be resolved, the Commission notes that in this case as in all others, licensees may bring infractions of the Commission's rules to its attention. Nevertheless, the Commission strongly encourage parties to use expedited alternative dispute resolution procedures, such as binding arbitration, mediation or other alternative dispute techniques. Further, since relocation agreements are pursuant to private contracts, the Commission anticipates that parties will pursue common law contract remedies in the court of competent jurisdiction if alternative dispute resolution is not successful.

46. Finally, the Commission clarifies that its relocation rules are not intended to require the mandatory disclosure of incumbents' proprietary information or customer lists. Incumbents must cooperate with the EA licensees and facilitate the testing of their relocated equipment, but incumbents need not disclose competitively sensitive information.

iii. Notice

47. *Background.* In the *800 MHz Report and Order,* the Commission recognized that incumbents need prompt information about the EA licensees' relocation plans. As such, the Commission required EA licensees within 90 days of the release of the Public Notice commencing the voluntary negotiation period to notify incumbents operating in their spectrum block of their intent to relocate such incumbents. Moreover, if an incumbent does not receive timely notice of the EA licensees intent to relocate, the EA licensee can no longer require that incumbent to relocate.

48. Because such notice affects an EA licensee's relocation rights, the Commission decided that the EA licensee must file a copy of the relocation notice and proof of the incumbent's receipt of the notice within ten days of such receipt, or the Commission will presume that the incumbent was not notified of the intended relocation. An incumbent licensee notified of intended relocation will be able to require joint negotiations with all notifying EA licensees. These requirements should ensure that possible relocation will be properly noticed and coordinated.

49. *Petitions.* Commenters ask the Commission to amend its notice rule to recognize proof of an attempt to notify at the address in the Commission's database as proper notice and that the Commission clarify that *any* EA licensees relocation notice informs the incumbent that it could be relocated out of *any* EA license block on which its SMR system is operating—even those not licensed to the EA licensee providing notice. Otherwise *any* EA licensee's failure to provide notice could provide the incumbent a defense to the relocation of part of its system (and, thus, the entire system).

50. *Discussion.* The Commission's rules already require licensees to update its data base with their current address. The Commission thus agrees that proof of an attempt to notify at the address in its database constitutes sufficient evidence of notice. The Commission also agrees that notice by an EA licensee shall constitute notice with respect to the incumbent's entire system, including portions of the system outside the EA licensees' own spectrum block.

c. Incumbent Operational Flexibility

51. *Background.* In the *800 MHz Report and Order* the Commission declined to allow non-EA licensees to expand their systems at will after geographic licensing has occurred because such expansion would devalue geographic licenses by creating continuing uncertainty about the amount of spectrum available under the EA license. The Commission recognized, however, that incumbents should be allowed to make minor alterations to their service areas to preserve the viability of their systems. Thus, in the *800 MHz Report and Order,* the Commission concluded that incumbent licensees on the upper 200 channels should be allowed to make modifications within their current 22 dBu interference contour without prior notice to the Commission. The Commission reasoned that this would increase incumbents' operational flexibility without significantly affecting the EA licensee's wide-area system in the same market. The Commission stated, however, that incumbents must still comply with its short-spacing criteria even if the modifications do not extend their 22 dBu interference contours. Finally, the Commission also decided to allow 800 MHz SMR incumbents who are not relocated to convert their current site-by-site licenses to a single license authorizing operations throughout the contiguous and overlapping service area contours of the incumbent's constructed multiple sites.

52. *Petitions.* Commenters asked that the Commission clarify that the rule allowing incumbents to modify their systems within existing 22 dBu contours does not apply to aggregate 22 dBu contours but must be applied on a channel-specific basis. For example, if an incumbent is operating on more than one station within a geographic area, petitioner contends that the incumbent should not be allowed to use a channel licensed at one station at a site inside the 22 dBu contour of another station if that channel is not licensed at both sites. Thus, an incumbent would be allowed to re-use a channel throughout

the composite 22 dBu contour only of those stations on which that channel is licensed.

53. One commenter supports the Commission's decision to permit incumbent licensees to convert their current site-by-site licenses to a single license, but argues that incumbent licensees might abuse the procedure by filing spurious requests that would enable unaffiliated systems to obtain a single geographic license. Commenter proposed that the Commission allow affected EA licensees to oppose such requests.

54. *Discussion.* The Commission clarifies that the rule allowing incumbents to modify their systems within their existing 22 dBu contours will be applied on a channel-specific basis. The Commission is concerned that by allowing incumbents to unilaterally redeploy channels to sites where they were not previously authorized would create continuous uncertainty for EA licensees as to which channels they could use at particular locations. Thus, an incumbent may use a channel within the 22 dBu contour of all facilities authorized on that channel, but may not redeploy the channel to another facility (or within the 22 dBu contour of such a facility) where that channel is not previously authorized, unless the EA licensee agrees to the change. The Commission emphasizes, however, that incumbents and EA licensees may negotiate alternative arrangements with respect to the deployment of channels for their respective systems.

55. The Commission rejects the request to allow EA licensees to formally oppose incumbent requests to convert multiple site-by site licenses to a single geographic license. The Commission does not believe this process will be susceptible to abuse by incumbents, as Nextel contends. Converting site-by-site licenses to a geographic license will not in any way expand the spectrum rights of incumbents; it is simply an administrative vehicle for simplifying the licensing process. In addition, the Commission is requiring incumbents seeking geographic licenses to show that their facilities are constructed and operational, and that no other licensee would be able to use the channels within the designated geographic area.

3. Co-Channel Interference Protection

a. Incumbent SMR Systems

56. *Background.* In the *CMRS Third Report and Order,* the Commission retained most of its existing co-channel protection rules for CMRS licensees, including its existing station-specific interference criteria for 800 MHz SMR co-channel stations.

57. In the *800 MHz Report and Order,* the Commission concludes that EA licensees on the upper 200 channels must afford interference protection to incumbent SMR systems as provided in § 90.621 of the Commission's rules. As a result, an EA licensee must either (1) locate its stations at least 113 km (70 miles) from any incumbent's facilities; (2) comply with the Commission's short-spacing rule; or (3) negotiate with the incumbent licensee if it wishes to operate closer than these rules allow. The Commission concluded that these requirements will adequately protect incumbents while EA licensees to build stations in their authorized service areas. The Commission believes that the short-spacing rule provides flexibility to EA licensees, allows incumbents to fill in ''dead spots,'' and protects incumbent licensees from actual interference.

58. *Petitions.* Commenters argue that the Commission's decision improperly gives geographic licensees more rights than incumbent licensees. They believe that the Commission's proposal will preclude affected parties from equitably balancing one operator's desire to expand against another operator's desire to obtain full value for an existing investment. Another commenter requests that the Commission require EA licensees to file an application for each proposed station and serve a copy on any incumbent within 70 miles of the proposed station. It claims that some authorized wide-area licensees have violated the Commission's rules when selecting co-channel station locations. Additionally, it argues that the Commission should not proceed until it reviews its database of currently authorized wide-area stations, confirm those authorizations comply with the Commission's interference protection rules, and cancel any wide-area authorizations which were erroneously granted.

59. Consumers also request clarifications of certain aspects of the interference protection rules. Consumers asks the Commission to clarify that the full primary co-channel protection standards of § 90.621(b) must be afforded by non-border area EA auction winners to co-channel I/LT category licensees. They also ask that the Commission clarify that EA licensees operating in California and the Pacific Northwest must comply with the unique co-channel interference protection rules applicable to certain transmitter sites in mountainous areas of California and Washington state.

60. *Discussion.* The Commission disagrees that it must give incumbent and EA licensees identical co-channel protection rights. In other auctions, incumbents obtained the benefits of being geographic area providers by obtaining geographic area licenses. To protect incumbents who do not want to provide service in a predetermined geographic area, the Commission has maintained the technical co-channel interference standards under which such incumbents were originally licensed. These measures give incumbents the flexibility provided in their original license. The Commission also permits them to freely add sites within their existing 22 dBu interference contour.

61. The Commission also declines to adopt the suggestion that it require EA licensees to file applications on a per-site basis. Such a procedure is counterproductive to the Commission's goal of providing EA licensees additional operational flexibility, and would reintroduce some of the administrative burdens associated with site-by-site licensing.

62. Finally, as requested by commenters, the Commission clarifies that (1) full primary co-channel protection pursuant to the standards of § 90.621(b) must be afforded to co-channel I/LT category licensees by non-border area EA licensees and (2) the EA licensees must comply with co-channel separation rules in § 90.621(b) for designated transmitter sites in California and Washington.

b. Adjacent EA Licensees

63. *Background.* In the *CMRS Third Report and Order,* the Commission concluded that the co-channel interference protection between geographic area licensees would be similar to those in the cellular and PCS services, which impose interference protection criteria for border areas in Commission-defined service areas. In the *800 MHz Report and Order,* the Commission determined that 40 dBuV/m is an appropriate measure for the desired signal level at the service border area. Thus, the Commission prohibited EA licensees from exceeding a signal level of 40 dBuV/m at their service area boundaries, unless the bordering EA licensee(s) agree to a higher field strength.

64. *Petitions.* One commenter claims that the Commission should replace the 40 dBuV/m signal level standard with a 22 dBu standard as proposed. It also claims that the Commission should adopt a stricter protection standard because entities operating at a signal level of 40 dBuv/m at the same

geographic boundary will interfere with one another. It further argues that under the proposal, resulting ''dead spots'' at borders could be resolved by negotiations between operators.

65. *Discussion.* The Commission rejects the suggestion that it replace the 40 dBuV/m signal level standard with a 22 dBu standard. The Commission's approach here is consistent with its approach in setting signal strength thresholds in PCS and cellular services. In all three instances, the Commission has used a threshold that allows the geographic area licensee to deliver a reliable signal throughout its licensing area. While the commenter is correct that this could lead to interference between adjacent licensees operating at full power at a common service area border, the Commission's experience has shown that actual interference is uncommon because not all licensees extend coverage to their licensing area borders. Moreover, the Commission has found that in those instances where actual interference does occur, adjacent licensees can and do resolve these situations by mutual agreement. If the Commission were to use the 22 dBu standard, on the other hand, an EA licensee seeking to provide reliable coverage at the border of its licensing area would require the consent of the adjacent EA licensee even if the adjacent licensee was not operating close enough to the border to suffer actual interference. The Commission believes such a requirement would be unnecessarily restrictive.

4. Emission Masks

66. *Background.* In the *CMRS Third Report and Order,* the Commission affirmed its out-of-band emission rules for CMRS services and decided that out-of-band emission rules should apply only if emissions could potentially affect other licensees operations. Moreover, the Commission decided to apply out-of-band emission rules to licensees having exclusive use of a block of contiguous channels only if needed to protect operations outside of the licensee's authorized spectrum. In the *800 MHz Report and Order,* the Commission decided to apply out-of-band emission rules only to the ''outer'' channels included in an EA license and to spectrum adjacent to interior channels used by incumbents. The Commission also adopted and modified a proposed emission mask rule to maintain the existing level of adjacent channel interference protection.

67. *Petitions.* Commenters supports the emission mask rule described in § 90.691, but believes that it should also apply to any non-EA 800 MHz part 90 CMRS system. They propose to amend § 90.210 of the Commission's rules by adding the following sentence to footnote 3: ''Equipment used in this band by non-EA systems shall comply with this section or the emission mask provisions of Section 90.691.''

68. *Discussion.* The Commission agrees with petitioners that its § 90.691 emission mask rules should also apply to non-EA 800 MHz part 90 CMRS systems, and thus it will adopt the proposed change to § 90.210 of the Commission's rules. By making this change, the Commission will provide incumbent licensees who do not submit a winning bid in the auction process the opportunity to use the more flexible emission mask that it has adopted for EA licensees. Moreover, it will aid CMRS operators who are operating on non-SMR pool channels to have the same capabilities as those operating in the SMR category. Thus, the Commission amends § 90.210 by adding the suggested sentence to footnote 3.

C. Construction Requirements

1. EA Licensees

69. *Background.* In the *800 MHz Report and Order,* the Commission adopted a five-year construction requirement for EA-based licensees beginning when the license issues and applying to all of the licensee's stations within the EA spectrum block, including any stations previously subject to an earlier construction deadline. The Commission recognized that it had adopted a ten-year period adopted for PCS systems, but concluded that the already-substantial construction of 800 MHz systems made a five-year period sufficient. Moreover, the Commission recognized that geographic-area licensees that have invested in existing systems or that have incurred bidding costs must construct facilities and provide service promptly, to recover these costs.

70. *Petitions.* A petitioner argues that EA licensees should not be able to obtain an additional five years to construct facilities previously subject to earlier construction deadlines and that the Commission's approach rewards spectrum warehousing and is inconsistent with regulatory symmetry because prior construction deadlines were issued on a site-specific basis. Other petitioners believe that the Commission's construction requirements discriminate between EA licensees and non-EA licensees and that the Commission's rationale for a five-year construction period is flawed because it rested, in part, on an order finding that a two-year construction period was sufficient for existing SMRs.

71. Finally, the petitioner argues that 50 percent minimum channel use should be required at more than a single location within the EA or otherwise, a licensee could meet this requirement by building a multi-channel facility in a rural portion of an EA and avoid serving a metropolitan area. They contend that this would enable EA licensees to avoid constructing true wide-area systems and to warehouse spectrum.

72. *Discussion.* The Commission declines to reconsider its five-year construction deadline. The Commission is unpersuaded by the unsupported assertion that a five-year construction period for EA licensees does not serve the public interest and that its EA construction requirements will allow those who warehouse to be unjustly enriched at auction. To the contrary, the auctions process requires licensees to purchase the rights to, and thereby compensate the American taxpayer for, the spectrum that they use. Thus, the Commission's auction rules discourage speculation and spectrum warehousing. Moreover, the Commission does not agree that its five-year construction requirement will result in or reward spectrum warehousing. The five-year requirement assures that geographic licensees promptly build out and provide service.

73. The Commission also rejects claims that it has acted discriminatorily by adopting a two year construction requirement for site-by-site licenses and a five-year build out for EA licensees. Further, the Commission rejects the claim that its rationale for granting EA licensees a five-year build out period, while limiting existing site licensees to an additional two years, is flawed. The Commission imposes a two-year build out period on site licensees because, by definition, they are seeking authority to build and operate a particular site. EA licensees, in contrast, will be building multiple sites throughout their licenses entire geographical area and thus require a longer build out period. Moreover, the competitive bidding process provides incentives for EA licensees to build out quickly, and thus reduces the likelihood that a longer construction period would lead to spectrum warehousing.

74. Finally, the Commission rejects the proposed expansion of the 50 percent channel use requirement because it finds that its concerns are too speculative, and its suggested approach too rigid. It would be economically irrational for a licensee to construct multiple channels in areas where there is limited demand while leaving areas

where demand is greatest covered by only a single channel. Moreover, licensees should have the flexibility to determine how best to provide services in response to consumer demand. The Commission does not believe that it should micromanage how the EA licensee chooses to provide service.

2. Extended Implementation Authority

a. Dismissal of Pending Extended Implementation Requests

75. *Background.* In the *800 MHz Report and Order,* the Commission stopped accepting requests for extended implementation authority, accelerated the termination date of pending extended implementation periods, and dismissed pending requests for extended implementation authority. The Commission reasoned that retaining extended implementation authority for up to five years would impede EA licensees construction efforts, and that parties still wanting extended implementation could apply for EA licenses under the Commission's new rules.

76. *Petitions.* A Commenter seeks reconsideration of the Commission's dismissal of pending requests for extended implementation and its decision to reduce previously granted construction periods from five to two years. They argue that eliminating existing extended implementation periods unfairly harms incumbent SMR providers. They also argue that eliminating extended implementation authority is an unlawful deprivation of the property interest which it contends it has in its FCC licenses and the continuation of those licenses, and argues that to deny or revoke such a license without cause violates the licensee's due process rights.

77. The commenter also claims that eliminating extended implementation periods will harm the public and the CMRS industry by excluding small and mid-sized SMR providers from the CMRS marketplace. They argue that small SMR providers may lack the resources to acquire spectrum for their current markets at auction. It asserts that eliminating extended implementation compounds this problem by stranding investment in SMR systems whose construction periods will be cut short.

78. Finally, another commenter argues that the Commission has recognized that public safety agencies need extended implementation because complex government funding mechanisms impede rapid deployment of public safety systems. It argues that extended implementation should be available to public safety systems in the General Category. Still, another commenter argues that extended implementation should be available for all private radio licensees in the General Category, because problems such as budgetary constraints affect the I/LT and Business users as much as Public Safety licensees.

79. *Discussion.* The Commission rejects the claim that eliminating extended implementation interferes with legitimate business expectations. First, these licensees have already been given significant time to complete construction. Second, upon adequate rejustification, licensees will have up to two years to complete build out of their systems. Far from being a ''drastic change'' that will strand investment, as contended, this is an equitable transition to a more efficient method of providing service and using spectrum. Finally, one commenter's reliance on the public interest analysis in the *OVS NPRM,* 61 FR 10496 (March 14, 1996), is also misplaced. While, the *OVS* proceeding did acknowledge a strong public interest in establishing a level of certainty in business plans, the Commission did not suggest that a licensees' business expectations were entitled to absolute protection, nor did the Commission imply that these expectations would always dictate the course of future regulation.

80. The claim of a property interest in its license is also without merit. Both section 301 of the Communications Act and relevant case law establish that licensees have no ownership interest in their FCC licenses. Moreover, the Commission does not agree that ending extended implementation will decrease competition. To the contrary, competitive bidding, which allocates resources to those who value them most, is a more efficient and competitive method than the Commission's prior rules for licensing spectrum on an extended basis. The Commission also disagrees that terminating extended implementation will limit small business participation. To the contrary, the Commission has adopted special provisions, such as bidding credits, in order to assist small businesses at auction.

Finally, the Commission notes that it only curtailed extended implementation for SMR licensees. Thus, non-SMR licensees with existing extended implementation grants are not affected by this proceeding. In addition, non-SMR licensees on 800 MHz channels that are not subject to EA licensing (i.e. Business, I/LT and Public Safety channels may still obtain extended implementation authority under § 90.629).

b. Rejustification of Extended Implementation Authority

82. *Background.* In the *800 MHz Report and Order,* the Commission required incumbent 800 MHz licensees with extended implementation grants to submit showings rejustifying the need for extended time to construct their facilities. The Commission provided that if the Bureau approved a licensee's showing, the licensee would receive a construction period of two years or the remainder of its current extended implementation period, whichever was shorter. Licensees making an insufficient or incomplete showing would have six months to construct the remaining facilities covered under their implementation plans.

83. *Petitions:* Several petitioners seek reconsideration or clarification of the extended implementation rejustification procedures adopted in the *800 MHz Report and Order.* One petitioner argues that wide-area systems that received extended implementation via waiver should not be required to submit rejustification showings because their waivers were predicated on the existence of underlying constructed analog facilities. Another asks that the Commission delineate the evidence that a licensee must provide to rejustify its extended implementation grant. Petitioners also ask that the Commission clarify whether licensees who received license grants in the processing of the 800 MHz SMR backlog in October 1995 are eligible for extended implementation.

84. *Discussion.* In the *800 MHz Report and Order,* the Commission specified that all licensees with extended implementation grants would be required to file rejustification showings, regardless of whether they sought extended implementation under § 90.629 to construct new systems or had obtained waivers to reconfigure existing high-power analog systems into low-power digital systems within the existing analog footprint. One petitioner argues that licensees who are converting their systems should be exempt from the rejustification requirement because they are not seeking to occupy previously unlicensed spectrum. The Commission disagrees. The waivers that were granted to licensees to convert existing analog facilities gave them considerable latitude to redeploy channels throughout the aggregate footprint of their systems, in effect allowing them to obtain new spectrum (i.e., spectrum on additional channels) within their existing footprints. In order to provide EA licensees with reasonable certainty regarding what spectrum is available to

them, the Commission believes it is necessary that these licensees be subject to the same timetable for constructing their systems and returning unconstructed channels as licensees who received extended implementation grants to build entirely new systems. Therefore, the Commission denies the request for reconsideration.

85. Since the filing of the petitions for reconsideration, the Wireless Bureau has solicited and received rejustification showings from 37 licensees, and has acted on the showings in a recent order. The Commission also notes that prior to the filing of these showings, the Bureau issued a Public Notice describing the information to be provided in the rejustifications and clarifying that licensees who obtained license grants in the October 31, 1995 Bureau Public Notice, and who had extended implementation requests associated with such applications, could treat such requests as granted for purposes of the rejustification filing requirement. Therefore, the Commission dismisses two petitioners' reconsideration requests as moot.

D. EA License Initial Eligibility

86. *Background.* In the *800 MHz Report and Order,* the Commission concluded that restrictions on EA licensee eligibility were not warranted, except for foreign ownership restrictions required by section 310(b) of the Communications Act.

87. *Petitions.* A petitioner argues that the Commission's relocation requirements have created a *de facto* eligibility limitation. According to the petitioner, if EA licensees must relocate incumbent licensees onto ''comparable facilities,'' then only entities having sufficient ''comparable spectrum'' to offer to incumbents can become EA licensees, and it contends that this relocation requirement will reduce the number and quality of auction participants and the amount of revenue raised. It therefore argues that the Commission should limit eligibility for wide-area licenses on the upper 200 channels to applicants who do not currently hold any wide-area SMR authorizations. It argues that this eligibility restriction will create more competition for EA authorizations and will increase the number of wide-area CMRS service providers.

88. *Discussion.* The Commission rejects the suggested eligibility limitation because it confuses protecting individual competitors with promoting competition. In many instances, the proposal would preclude entities from bidding to obtain geographic area licenses that encompass spectrum they are already using. Such a restriction would be inefficient and contrary to the goals of this proceeding. By contrast, open eligibility for EA licensees is pro-competitive because it enables the market, not regulation, to determine who values the spectrum the most.

E. Redesignation of Other 800 MHz Spectrum—General Category Channels and Inter-Category Sharing

1. General Category Channels

89. *Background.* In the Commission's *800 MHz Report and Order,* the Commission redesignated the General Category channels exclusively for SMR use. The Commission's licensing records showed that there are three times as many SMR licensees in the General Category as any other type of part 90 licensee. The Commission concluded that SMR providers' demand for additional spectrum significantly exceeds the demand of non-SMR services. Moreover, the Commission anticipated that SMR providers' demand for this spectrum would be increased by geographic area licensing of the upper 200 channels and its mandatory relocation policy.

90. *Petitions.* A number of petitioners challenge the Commission's decision to reclassify the General Category based on its finding that SMR licensees outnumber non-SMR licensees on these channels. Some commenters argue that many of these licensees are speculators who have not constructed and are not using the spectrum. Others contend that the SMR licensing freeze and the elimination of intercategory sharing have artificially increased SMR demand for General Category channels and argue that the Commission has arbitrarily reversed its prior treatment of the General Category without adequate explanation. They note that in the *Competitive Bidding Second Report and Order,* 59 FR 26741 (May 24, 1994), the Commission declined to subject the General Category to competitive bidding, whereas it has now determined that the General Category should be reclassified and subject to auction. It contend that the pattern of licensing on the General Category channels has not changed dramatically since the *Competitive Bidding Second Report and Order* was adopted, and that the Commission therefore has no basis for treating it differently now.

91. Some petitioners also argue that reclassifying the General Category will harm non-SMR operations on General Category channels by stranding existing investment in internal communications systems. They contend that it will have to re-engineer its nationwide network if the General Category is redesignated. Another adds that the Commission's decision will make American industry less competitive internationally by limiting its flexibility and that denying public safety operators access to General Category channels will jeopardize police and ambulance communications systems. It adds that redesignating the General Category channels will harm non-SMR licensees whose needs cannot be met by commercial carriers and that redesignation of the General Category channels will not facilitate relocation from the upper 200 channels, because it will make it more difficult to accommodate the relocation of non-SMR incumbents currently operating on those channels. One petitioner argues that a reallocation of the General Category channels is ill-advised unless the Commission identifies additional spectrum to accommodate private systems.

92. *Discussion.* In the *800 MHz Report and Order,* the Commission concluded based on comments in the proceeding and on its licensing records that the primary demand for General Category channels came from SMR operators. Petitioners' arguments do not persuade the Commission that this conclusion was incorrect. Petitioners concede that SMR licensees far outnumber non-SMR licensees on these channels. Moreover, at the time the Commission froze General Category licensing in 1995, it noted that the number of SMR applications for these channels had risen markedly. Even if some of this increased licensing activity was attributable to speculation, as petitioners contend, the Commission believes that such activity is itself an indication that demand for the spectrum exists. The Commission also anticipates that with the advent of geographic area licensing on the upper 200 channels, there will be substantial demand for General Category channels among legitimate small SMR operators, including incumbents who relocate from the upper 200 channels. Based on these factors, and on the fuller record relating to 800 MHz developed in this proceeding, the Commission believes that it was fully justified in reaching a different conclusion with respect to the General Category from that reached in the earlier *Competitive Bidding Second Report and Order.*

93. The Commission believes, however, that petitioners have raised valid concerns with respect to the interests of non-SMR licensees operating on the General Category channels. As several petitioners note, the Commission's decision in the *800 MHz Report and Order,* to reclassify the

General Category as SMR-only would preclude non-SMRs from seeking additional authorizations on these channels to expand their systems. On reconsideration, the Commission sees no reason why non-SMRs should not continue to be eligible for licensing in the General Category. By allowing non-SMRs to obtain spectrum in this band, the Commission gives non-SMRs more options and greater flexibility for continued growth of their systems.

94. While the Commission concludes that non-SMRs should continue to be eligible for General Category licensing, the Commission emphasizes that this in no way affects its decision to license General Category channels geographically, with competing applications resolved through competitive bidding. The Commission has not altered its conclusion in the *800 MHz Report and Order*, that General Category channels are used primarily for subscriber-based services, and thus are subject to competitive bidding under section 309(j). Moreover, competitive bidding will further the public interest by encouraging efficient spectrum use, promoting competition, recovering portions of the value of the spectrum for the public and promote the rapid deployment of service. The Commission rejects petitioners' view that this approach will harm the interests of non-commercial licensees by requiring them to compete for spectrum with commercial systems. To the contrary, there are several ways in which non-SMRs can benefit from the Commission's geographic licensing rules. For example, non-commercial operators may not only apply individually for geographic area licenses, but may also participate in joint ventures (with other non-commercial operators or with commercial service providers) or obtain spectrum through partitioning and disaggregation to meet their spectrum needs. The Commission also expects that geographic area licensing of SMR and General Category spectrum will free up non-SMR spectrum in the 800 MHz band, providing more options for non-commercial operators where availability of General Category spectrum is limited. Finally, the Commission is continuing with its initiatives to provide sufficient spectrum for non-commercial operations through its *Refarming* proceeding and its participation in the Public Safety Wireless Activity Committee.

2. Inter-Category Sharing

95. *Background.* Prior to the *800 MHz Report and Order*, the Wireless Bureau imposed a freeze on applications for intercategory sharing among 800 MHz Industrial/Land Transportation (I/LT), Business, and Public Safety channels (collectively, ''Pool Channels''). This freeze was intended to stem the increase in intercategory applications for Public Safety channels by I/LT and Business licenses whose own channels were subject to increased demand from SMR applicants. In the *800 MHz Report and Order*, the Commission eliminated intercategory sharing by SMR licensees on all of the Pool Channels. The Commission also concluded that non-SMR licensees would no longer be eligible for intercategory sharing on SMR channels.

96. *Petitions.* Petitioners representing I/LT and Business Radio operators oppose the elimination of intercategory sharing to the extent that it prevents them from obtaining spectrum where channels in their own pools are unavailable. They argue that the intercategory sharing freeze has harmed the wireless industry by prohibiting licensees from expanding in areas lacking I/LT or Business channels and that utilities and pipelines need intercategory sharing to expand their radio systems to meet current communications requirements. They add that commercial demand for 800 MHz spectrum has made it virtually impossible for private system operators to obtain channels in their own pools.

97. In contrast, one commenter defends the current freeze on intercategory sharing with respect to Public Safety channels and opposes any effort to reopen these channels to non-Public Safety applicants. It argues that because of the limited availability of Business and I/LT channels and the Commission's proposals for geographic licensing of the General Category, a lifting of the intercategory freeze would cause more Business and I/LT entities to seek Public Safety channels as a ''safe harbor.'' It argues therefore, that a permanent bar on non-public safety applications in the Public Safety pool is needed to ensure that such channels will be available for current and future public safety use.

98. *Discussion.* The Commission will retain the current prohibitions on intercategory sharing between SMR and non-SMR channels. By prohibiting SMRs from applying for Pool Channels, the Commission preserves the availability of those channels for non-commercial and public safety uses. Similarly, eliminating intercategory sharing for SMR-only channels ensures that they will be available exclusively for licensing to SMR operators. In addition, the Commission believes that the concerns of ITA and others regarding the availability of spectrum for I/LT and Business systems are sufficiently addressed by its decision to restore non-SMR eligibility for General Category channels.

F. Auctionability

99. *Background.* In the *800 MHz Report and Order*, the Commission reiterated its conclusion that competitive bidding is an appropriate licensing mechanism for the 800 MHz SMR service. The Commission concluded that the 800 MHz SMR service satisfies the criteria set forth by Congress for determining when competitive bidding should be used. It noted that competitive bidding will further the public interest requirements of the Communications Act by promoting rapid deployment of services, fostering competition, recovering a portion of the value of the spectrum for the public, and encouraging efficient spectrum use. The Commission further noted that where competitive bidding is used, a diverse group of applicants including incumbent licensees and potential new entrants into this service will be able to participate in the auction process because it has decided not to restrict eligibility for EA licenses. Finally, the Commission adopted special provisions for small businesses seeking EA licenses.

100. *Petitions.* Several petitioners once again request that the Commission use procedures other than competitive bidding to license 800 MHz SMR. In essence, petitioners contend that this band does not fit within the congressional criteria for auctions because (i) Congress did not intend for the 800 MHz SMR band to be auctioned; (ii) the competitive bidding design for the upper 10 MHz channels of the 800 MHz SMR band does not promote the objectives contained in section 309(j) of the Communications Act; and (iii) the Commission has failed to consider alternative licensing mechanisms which avoid mutually exclusive applications.

101. *Discussion.* The Commission reaffirms its conclusion that competitive bidding is an appropriate tool to resolve mutually exclusive license applications for the upper 10 MHz channels of the 800 MHz SMR service. Moreover, the criteria for auctionability set forth in section 309(j) of the Communications Act are met. The Commission has fully considered the issues raised here by petitioners both in the *800 MHz Report and Order* and the *Competitive Bidding Second Report and Order.* The Commission continues to believe that competitive bidding is appropriate for the upper 10 MHz of the 800 MHz SMR spectrum and that employing this

procedure strikes a reasonable balance in protecting the public interest in the use of the spectrum while promoting the objectives specified in the Communications Act.

102. The Commission disagrees with petitioners' contention that Congress did not intend that the upper 10 MHz of the 800 MHz SMR spectrum be auctioned. Those petitioners contend that Congress intended auctions to be used for the licensing of new services and not for currently allocated services, such as the upper 10 MHz of the 800 MHz SMR. The Commission disagrees with this position because section 309(j) of the Communications Act does not distinguish between new services and existing services in terms of whether initial licenses in a given service should be subject to competitive bidding. Furthermore, there is nothing in the legislative history to indicate that Congress intended to limit the applicability of auctions to new services. As the Commission noted in the *Competitive Bidding Second Report and Order,* the principal use of 800 MHz SMR is to provide service to eligible subscribers for compensation. The Commission concludes that the use of competitive bidding in the upper 10 MHz block is fully consistent with section 309(j) of the Communications Act and its legislative history.

103. In the *Competitive Bidding Second Report and Order,* the Commission concluded that its auction designs are calculated to meet the policy objective of introducing new technologies to the public. Several petitioners contend that the competitive bidding procedures for the upper 10 MHz of the 800 MHz SMR do not promote the section 309(j) objectives. One petitioner contends that the Commission's auctioning policies do not ensure that winning bidders will employ advanced technologies to serve the public. However, no commenter raises any new arguments that persuade the Commission to change its conclusion that making the 800 MHz SMR spectrum available for public use through auctioning will lead, most efficiently and effectively, to the deployment of new technologies and services to the public. As the Commission noted in the *Competitive Bidding Eight Report and Order,* it believes that competitive bidding furthers the public interest by promoting rapid development of service, fostering competition, recovering a portion of the value of the spectrum for the public and encouraging efficient spectrum use.

104. The Commission does not agree with the contention of some petitioners that the administrative procedures associated with licensing through auctions are not as efficient as site-specific licensing. The Commission previously addressed the advantages to both the Commission and licensees of geographic area licensing. Petitioners do not raise any new arguments that would persuade the Commission to reconsider the adoption of EA licensing for the 800 MHz SMR service. The Commission again emphasizes that geographic area licensing offers a flexible licensing scheme that eliminates the need for many of the complicated and burdensome licensing procedures that hampered SMR development in the past.

105. In response to requests by petitioners, the Commission considers yet again whether auctioning allows for the dissemination of licenses among a wide variety of entities in the 800 MHz SMR spectrum. Several petitioners, for example, believe that auctioning will lead to the concentration of licenses in the hands of a few operators in each market to the detriment of small businesses. The Commission disagrees with the contention that small businesses will not be able to participate in these auctions. The auction rules for the upper 800 MHz SMR include small business provisions such as bidding credits and other measures that are intended to meet the statutory objective of providing opportunities for small businesses in the upper 10 MHz channels of the 800 MHz SMR service. The results of prior auctions demonstrate that these provisions have ensured small businesses participation in other auctionable services. The Commission further notes that because the 800 MHz SMR service falls within the definition of the Commercial Mobile Radio Services (CMRS), it is subject to the 45 MHz aggregate spectrum cap on CMRS. The spectrum cap has been placed on CMRS licensees in order to promote and preserve competition in the CMRS marketplace by limiting the number of licenses any one entity can acquire.

106. The Commission has further considered various alternative licensing procedures for the 800 MHz SMR band as requested by several petitioners. These petitioners contend that section 309(j)(6)(E) of the Communications Act prohibits the Commission from conducting an auction unless it first attempts alternative licensing mechanisms to avoid mutual exclusivity. In the course of this proceeding, the Commission has evaluated the appropriateness of other licensing mechanisms for the upper 800 MHz SMR, but concluded those methods are not in the public interest. The Commission has found that ''first-come, first-served'' licensing in the 800 MHz service leads to processing delays. For the upper channels of the 800 MHz SMR frequency band, the use of competitive bidding is the most appropriate licensing procedure because the Commission anticipates a considerable number of applications for these licenses and competitive bidding will allow the most expeditious access to the spectrum if any of these applications is mutually exclusive. Therefore, the Commission rejects once again other licensing procedures for the upper 800 MHz SMR spectrum. In doing so, the Commission must emphasize that it has made every effort to include the SMR industry in the decision-making process to make certain that the concerns of the industry and, particularly, incumbents are addressed by the Commission.

G. Bidding Issues

1. Bid Increment

107. *Background.* In the *800 MHz Report and Order* for the upper 10 MHz block, the Commission adopted the same procedures for bid increments as those used in auctions for MTA-based PCS licenses. The Commission also indicated that it would retain the discretion to set and, by announcement before or during the auction, vary the minimum bid increments for individual licenses or groups of licenses over the course of the auction.

108. *Petitions.* One petitioner supports a minimum bid increment but believes that tying the minimum bid to the absolute minimum bid establishes an artificial value for each license rather than allowing the marketplace to determine the value of the licenses. Instead, petitioner supports a five percent minimum bid increment because it will ensure active participation by bidders without requiring a disparate increase from one round to the next.

109. *Discussion.* After considering the record, the Commission modified its rules to delegate authority to the Bureau to set appropriate bid increments. The Commission's experience with other auctions indicates that flexibility is necessary to set appropriate bidding levels to account for the pace of the auction, the needs of the bidders, and the value of the spectrum. While the Commission believes that a bid increment of $0.02 MHz-pop is appropriate here, it will delegate authority to the Bureau to vary the minimum bid increment over the course of the auction as it deems necessary.

The Bureau will announce by Public Notice prior to the auction the general guidelines for bid increments.

2. Upfront Payment

110. *Background.* In the *800 MHz Report and Order,* the Commission determined that the upfront payment for the upper 800 MHz SMR service should be $0.02 per MHz-pop, with a minimum payment of $2500. The Commission indicated that in the initial Public Notice, it would announce population information and upfront payments corresponding to each EA license. Further, the Commission notes that population coverage for each channel block in each EA will be based on a formula that takes into account the presence of incumbent licenses.

111. *Petitions.* Petitioners request the Commission to set a lower upfront payment contending that $0.02 per MHz-pop is too high given the value of these licenses and that the Commission reconsider its decision to use upfront payments that take into account the presence of incumbent licenses because of the uncertainty that results from ongoing channel relocation by incumbents. Petitioner believes that prospective bidders would be better served by being advised that the band in heavily encumbered, by being provided with either a list of those incumbents or information as to how that information may be obtained.

112. *Discussion.* The Commission reaffirms its upfront payment formula of $0.02 MHz-pop and uniform discounting for incumbency. The Commission also reaffirms a minimum upfront payment of $2500 and believes that it is necessary to set an adequate upfront payment to ensure participation by qualified bidders. However, as commenters suggest, the Commission recognizes that for purposes of these particular licenses the standard upfront payment formula may yield higher payment as compared to the values of the license. The Commission will modify its rules to delegate authority to the Bureau to vary the minimum upfront payment when it determines that the standard $0.02 per MHz-pop formula would result in an unreasonably high upfront payment. In determining an appropriate upfront payment, the Bureau may take into account such factors as the population and the approximate amount of usable spectrum in each EA. The Bureau will announce any such modification by Public Notice.

3. Activity Rules

113. *Background.* In the *800 MHz Report and Order,* the Commission adopted the three-stage Milgrom-Wilson activity rule in conjunction with the simultaneous stopping rule. The Commission noted that an activity rule ensures that an auction will close within a reasonable period of time by requiring a bidder to remain active throughout the auction. The Commission further noted that under the Milgrom-Wilson approach, bidders are required to declare their maximum eligibility in terms of MHz-pops, and to make an upfront payment equal to $0.02 per MHz-pop. The Commission also notes that the population calculation in each EA will be discounted to take into consideration the presence of incumbent licensees.

114. *Petitions.* Petitioner requests the Commission to reconsider the decision to adjust the bidding unit of an EA based on the occupation of channel blocks by incumbents unless the incumbent has constructed facilities. It contends that the allowance of a downward adjustment irrespective of whether facilities have been constructed unjustly enriches those entities holding unconstructed authorizations.

115. *Discussion.* The Commission affirms its decision to use a three-stage Milgrom-Wilson activity rule for the upper 10 MHz channels of the 800 MHz SMR service. The Commission also reaffirms the use of a uniform discount on the upfront payment to take into consideration the presence of incumbent licenses. The Commission disagrees with the recommendation that a downward adjustment should be made for constructed facilities only. This proposal would require the Commission to make an unsupported assumption that none of the entities holding unconstructed authorizations ever intend to build out their systems.

H. Treatment of Designated Entities

1. Bidding Credits

116. *Background. In the 800 MHz Report and Order,* the Commission does not adopt bidding credits for designated entities participating in the auctions for the upper 10 MHz channels of the 800 SMR service. Bidding credits initially had been proposed for businesses owned by women and minorities. As a result of the Supreme Court's decision in *Adarand,* in the *800 MHz Report and Order* the Commission concluded there was an insufficient record to support the adoption of special provisions solely benefitting minority-and women-owned business (regardless of size) for the upper 10 MHz block auction.

117. *Petitions.* Petitioners request that the Commission provide bidding credits to small businesses in order to provide these entities with a meaningful opportunity to obtain licenses in the 800 MHz SMR service auction.

118. *Discussion.* In this instance, the Commission grants petitioners' request and will provide bidding credits to small businesses. The Commission notes that in the *800 MHz Report and Order,* it concluded that special provisions for small businesses are appropriate for the 800 MHz SMR service. The Commission also recognizes that smaller businesses have more difficulty accessing capital and thus may need a higher bidding credit. Accordingly, the Commission will adopt tiered bidding credits that are narrowly tailored to the varying abilities of businesses to access capital. Tiering also takes into account that different small businesses will pursue different strategies. In determining eligibility for these bidding credits, the Commission will employ the same tiered definitions of small businesses as used in the *800 MHz Report and Order* to determine eligibility for installment payments in the upper 10 MHz, with an adjustment to reflect the unavailability of installment payment plans for the 800 MHz SMR services. Accordingly, a small business with average gross revenues that do not exceed $15 million will be eligible for a bidding credit of 25 percent. A small business having revenues that do not exceed $3 million will be eligible for a bidding credit of 35 percent. Revenues will be defined as average gross revenues for the last three years including affiliates. These are the same levels of bidding credits used in the WCS auction.

2. Installment Payments

119. *Background.* In the *800 MHz Report and Order,* the Commission adopted rules which provided small businesses participating in this auction with tiered installment payment plans. The Commission noted that it adopts the same tiered installment payment approach as in the 900 MHz SMR auction.

120. *Petitions.* Petitioner requests that the Commission eliminate all installment payment plans for the upper 200 channels on the basis of its belief that in prior auctions, the availability of installment payments has encouraged speculation and warehousing. Another petitioner disagrees, stating that installment payments are the only means by which independent, incumbent SMR operators will be able to participate in the auctions. One petitioner believes that the tiered approach to installment payments is insufficient to ensure meaningful participation by small businesses, and

as an alternative asks for 50 percent bidding credits.

121. *Discussion*. As petitioned, the Commission will not adopt installment payments for the upper 200 channels. While the Commission disagrees with the petitioner's contention that installment payments encourage speculation and warehousing of spectrum, its experience with the installment payment program leads the Commission to conclude that installment payments may not always serve the public interest. The Commission has found, for example, that obligating licensees to pay for their licenses as a condition of receipt requires greater financial accountability from applicants. Currently, in several proceedings the Commission is reviewing a number of issues related to administration of installment payment programs. Nonetheless, given that applications for new 800 MHz SMR licenses have not been accepted since 1994, the Commission's priority is to facilitate the licensing of the upper 200 channels without further delay. Therefore, the Commission believes that the public interest is best served by going forward with the auction for the upper 200 channels without extending installment payments to small businesses while it considers installment payment issues generally.

122. The Commission disagrees with petitioner's contention that installment payments are the only means by which small SMR operators will be able to participate in auctions. The Commission notes that in other auctions in which installment payments were not available, small businesses were the high bidders on a significant number of licenses. Further, section 309(j)(4) requires the Commission to consider alternative methods to allow for dissemination of licenses among a wide variety of applicants, including small businesses. To encourage small business participation, the Commission has raised the bidding credits available to small businesses and very small businesses to 25 percent and 35 percent respectively. The Commission believes that higher bidding credits will both fulfill the mandate of section 309(j)(4)(D) to provide small business with the opportunity to participate in auctions and ensure that new services are offered to the public without delay.

123. In view of the Commission's decision here, all winning bidders will be required to supplement their upfront payments with down payments sufficient to bring their total deposits to 20 percent of their winning bid(s). Consistent with the Commission's determination in the *Second Report and Order*, it will allow bidders up to ten days following the close of the auction to make their down payments.

3. Attribution of Gross Revenues of Investors and Affiliates

124. *Background*. In the *800 MHz Report and Order*, the Commission adopts a definition of small business which included attributing the gross revenues of investors owning 20 percent or more in the applicant. In light of the pending petitions for reconsideration, the Commission, on its own motion, retains jurisdiction to reconsider the attribution rule.

125. *Discussion*. In determining eligibility for small business provisions, the Commission will modify its attribution rule to substitute the ''controlling principal'' concept for the attribution model as it recently did for auctions involving other services. Specifically, the Commission will eliminate the rule attributing the revenues of certain investors. The Commission will only attribute the gross revenues of all controlling principals in the small business applicant as well as the gross revenues of the affiliates of the applicant. The Commission will require that in order for an applicant to qualify as a small business, qualifying small business principals must maintain both *de jure* and *de facto* control of the applicant. Typically, *de jure* control is evidenced by ownership of 50.1 percent of an entity's voting stock. *De facto* control is determined on a case-by-case basis. An entity must demonstrate at least the following indicia of control to establish that it retains *de facto* control of the applicant: (1) The entity constitutes or appoints more than 50 percent of the board of directors or partnership management committee; (2) the entity has authority to appoint, promote, demote and fire senior executives that control the day-to-day activities of the licensee; and (3) the entity plays an integral role in all major management decisions. This simplified procedure was adopted for auctions involving other services. The Commission believes this modification of its attribution rule will enhance the opportunity for a wide variety of applicants to obtain licenses. Specifically, the Commission will follow the attribution rules discussed in the Lower 80 and General Category licenses section of the *Second Report and Order* in section 2(a), Small Business Definition.

II. Ordering Clauses

126. *It is ordered* that, pursuant to the authority of sections 4(i), 302, 303(r), and 332(a)(2) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 302, 303(r), and 332(a), the rule changes specified in the related final rule (FCC 97–223) published elsewhere in this issue of the **Federal Register** are adopted.

127. *It is further ordered* that the rule changes set forth in FCC 97–223 will become effective September 29, 1997.

128. *It is further ordered* that the referenced Petitions for Reconsideration are granted to the extent discussed herein, and are otherwise denied.

List of Subjects in 47 CFR Part 90

Radio, Specialized mobile radio services.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

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