

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Revision of Part 22 and Part 90
of the Commission's Rules to Facilitate
Future Development of Paging Systems
Implementation of Section 309(j)
of the Communications Act --
Competitive Bidding
WT Docket No. 96-18
PR Docket No. 93-253

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION
AND THIRD REPORT AND ORDER

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By the Commission:

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## I. INTRODUCTION

1. On February 24, 1997, the Commission released the *Second Report and Order and Further Notice of Proposed Rulemaking* in this proceeding, adopting rules governing geographic area licensing of Common Carrier Paging (CCP) and exclusive 929 MHz Private Carrier Paging (PCP), and procedures for auctioning mutually exclusive applications for these licenses.<sup>1</sup> This *Memorandum Opinion and Order on Reconsideration and Third Report and Order* makes certain modifications to the rules adopted in the *Second Report and Order and Further Notice* and adopts rules that permit partitioning of nationwide licenses and disaggregation of paging spectrum. Consistent with the conclusions reached in the *Part 1 Third Report and Order and Second Further Notice*,<sup>2</sup> it also eliminates installment payment plans for eligible small businesses participating in paging auctions, and increases the level of bidding credits for such entities. Additionally, this *Memorandum Opinion and Order on Reconsideration and Third Report and Order* amends our rules to permit auction winners to make their final payments within ten (10) business days after the applicable deadline, provided that they also pay a late fee of five (5) percent of the amount due. This *Memorandum Opinion and Order on Reconsideration and Third Report and Order* advances the Commission's policy goals of facilitating competition in the wireless market by encouraging a more diverse array of entities, including small businesses and rural telephone companies, to offer paging services to the public. We believe that the actions we take today further our common-sense objectives of streamlining regulations, promoting technical and regulatory parity among commercial mobile radio services (CMRS), and fostering competition in the provision of paging services to the public.

## II. EXECUTIVE SUMMARY

2. In response to our *Second Report and Order*, twenty-nine parties filed petitions for reconsideration, partial reconsideration, or clarification; twenty parties filed oppositions to or comments on the petitions; and thirteen parties filed reply comments. Ten parties filed comments and eight filed reply comments in response to the *Further Notice*.<sup>3</sup> After considering the record in this proceeding, we make certain clarifications and adopt new rules, as follows:

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<sup>1</sup> **Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, *Second Report and Order and Further Notice of Proposed Rulemaking*, 12 FCC Rcd 2732 (1997) (*Second Report and Order and Further Notice*). We use the designation "PCP" for 929 MHz licenses in this Order because we have done so throughout this proceeding. We have historically designated 929 MHz frequencies as PCP because they were originally licensed under Part 90 of our rules, but 929 MHz frequencies are now licensed under Part 22 of our rules.**

<sup>2</sup> **Amendment of Part 1 of the Commission's Rules—Competitive Bidding Procedures, WT Docket No. 97-82, Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, 4660-4685 MHz, ET Docket No. 94-32, *Third Report and Order and Second Further Notice of Proposed Rulemaking*, 13 FCC Rcd 374 (1998) (*Part 1 Third Report and Order and Second Further Notice*) (modified by *Erratum*, DA 98-419 (Mar. 2, 1998)).**

<sup>3</sup> Appendix A provides the full and abbreviated names of the parties filing petitions, oppositions, comments, and reply comments. In addition to these filings, AirTouch filed a Motion for Leave to Respond and Response to Reply to Opposition, and American Paging, Inc. filed an Opposition to AirTouch's Motion for Leave to Respond and Response to Reply Opposition.

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**Order on Reconsideration**

- We affirm our decision in the *Second Report and Order* to dismiss all mutually exclusive paging applications and all paging applications filed after July 31, 1996. We also deny an application for review and a number of petitions for reconsideration of the Wireless Telecommunications Bureau's Order dismissing these applications.
- We will replace the Rand McNally Major Trading Areas (MTAs) with Major Economic Areas (MEAs) for geographic area licensing of the 929 and 931 MHz bands. Because MEAs are composed of Economic Areas (EAs) and EAs will be used to license the lower paging bands (35-36 MHz, 43-44 MHz, 152-159 MHz, and 454-460 MHz), this will enable licensees operating paging systems in both the 929-931 MHz bands and the lower paging bands to operate both systems more efficiently. We affirm our decision to award licenses for EAs, as opposed to Basic Trading Areas (BTAs), for paging systems operating in the lower paging bands. We also add three EA-like service areas for Guam and the Northern Mariana Islands, Puerto Rico and the U.S. Virgin Islands, and American Samoa.
- We decline to limit eligibility for paging auctions to incumbent paging licensees or to exempt incumbents from having to participate in the auction to secure spectrum.
- In the *Second Report and Order*, we decided that spectrum recovered by the Commission from a non-geographic area incumbent licensee would automatically revert to the geographic area licensee to prevent the warehousing of spectrum and to encourage geographic area licensees' systems build-out. In this Order, we clarify that spectrum will automatically revert to the geographic area licensee in all instances where a non-geographic area incumbent licensee permanently discontinues service.
- We clarify our rules to state that when a system-wide licensee allows an area within its system to revert to the geographic area licensee, the system-wide license shall remain intact; however, the parameters of the system-wide license shall be amended to the demarcation of the remaining contiguous interference contours. We will also allow system-wide licensees to maintain separate licenses for any remote, stand-alone transmitters, or to include remote, stand-alone sites within the system-wide license.
- We clarify that non-exclusive incumbent licensees on the thirty-five exclusive 929 MHz channels will continue operating under the same arrangements established with the exclusive incumbent licensees and other non-exclusive incumbent licensees prior to the adoption of the *Second Report and Order and Further Notice*. Additionally, MEA, EA, and nationwide geographic area licensees are afforded the right to share with non-exclusive incumbent licensees on a non-interfering shared basis.
- Providing interference protection from geographic area licensees to fixed stations, including control link operations in the lower bands, is outside the scope of this proceeding, and incumbent mobile telephone service providers will not be permitted to obtain site licenses on a secondary basis.
- We affirm our decision in the *Second Report and Order* to not impose a limit or "cap" on the number of licensees for each of the shared channels.

- We clarify the procedures for authorization on certain frequencies requiring coordination with Canada.
- In the *Second Report and Order*, we eliminated the Part 90 height and power limitations on 929 MHz stations and increased the maximum permitted effective radiated power (ERP) for 929 MHz stations to 3500 watts. We clarify that we will not require incumbent 929 MHz licensees to file a modification application to increase the ERP for their base stations as long as these licensees do not increase their current composite interference contours.
- We provide guidance on the factors we will consider in assessing whether licensees have met the "substantial service" construction option. We also amend Section 22.503(k) of our rules to provide that MEA and EA licensees that fail to meet their coverage requirements will be permitted to retain licenses only for those facilities authorized, constructed, and operating at the time the geographic area license was granted.
- With respect to the competitive bidding rules and policies adopted previously, we decline to:
  - modify our hybrid simultaneous/license-by-license stopping rule;
  - limit the Bureau's discretion to announce precise information, such as bidder identities, that will be provided to bidders during the auction;
  - require that bidders specify each individual license on which they will bid and submit an upfront payment for each license;
  - permit bid withdrawal without monetary liability; or
  - modify our anti-collusion rule to provide safe harbors for certain business discussions during the auction.
- We modify or clarify other aspects of our competitive bidding rules. Specifically, we eliminate installment payment plans for the paging service; increase the levels of bidding credits available to eligible small businesses; and also permit applicants to make their final payments within ten (10) business days after the payment deadline, subject to a late fee of five (5) percent of the amount due. We also clarify the controlling interest standard used to determine eligibility for small business status by providing a definition of "controlling interest."

### **Third Report and Order**

- We conclude that it is best to defer any decision on whether to impose minimum coverage requirements on paging licensees holding nationwide geographic area licenses until we resolve similar issues raised in the *Narrowband PCS Further Notice*. Nationwide geographic area paging licensees will be permitted to partition their service areas to any eligible party along any boundaries the parties choose and disaggregate their spectrum by any method they choose. We will also defer any decision on whether to impose minimum coverage requirements on the parties to a partitioning or disaggregation agreement involving nationwide geographic area licenses until we decide whether to impose such requirements on nationwide licensees generally.

- Partitioners and partitionees of MEA and EA geographic area paging licenses may choose from two options to meet coverage requirements. Under the first option, both the partitioner and partitionee must provide coverage to one-third of the population within their area within three years of the initial license grant, and to two-thirds of the population within their license area within five years of the license grant. In the alternative, either party may provide "substantial service" within five years of the license grant. Failure by either party to meet its coverage requirements will result in the automatic cancellation of its license without further Commission action. Under the second option, the original licensee may certify at the time of the partitioning transaction that it has already met, or will meet, the coverage requirements for the entire geographic area. In the event that the original licensee fails to meet the coverage requirements, its license will be cancelled. Under the second option, the partitionee is not subject to coverage requirements except for those necessary to obtain renewal.
- MEA and EA paging licensees will be permitted to disaggregate their spectrum by any method they choose. Disaggregators and disaggregatees may choose from two options to meet coverage requirements. Under the first option, either the disaggregator or the disaggregatee certifies that it will be responsible for meeting the coverage requirements for the geographic service area. If the certifying party fails to meet the coverage requirements for the entire geographic area, that party's license will be subject to cancellation, but the non-certifying party's license will not be affected. Under the second option, the disaggregator and disaggregatee may certify that they will share the responsibility for meeting the coverage requirements for the entire geographic area. If the parties jointly fail to satisfy the coverage requirements for the entire geographic area, both parties' licenses will be subject to cancellation.
- Partitionees and disaggregatees of nationwide geographic area, MEA, and EA paging licenses will be authorized to hold their licenses for the remainder of the partitioner's or disaggregator's original ten-year term and will receive the same renewal expectancy as the original licensee.
- We will also permit combinations of partitioning and disaggregation of nationwide geographic area, MEA, and EA paging licenses, subject to the Commission's rules on partitioning and disaggregation.
- The unjust enrichment provisions adopted in the *Part 1 Third Report and Order and Second Further Notice* will apply to any MEA or EA paging licensee that receives a bidding credit and later elects to partition or disaggregate its license.
- To deter fraud by application mills on the shared channels, we will add language to the long-form application regarding construction and coverage requirements. In addition, we will disseminate information regarding our licensing rules and the potential for fraud through public notices and the Commission's website.

### III. BACKGROUND

3. In this proceeding, we examine our paging regulations in light of the statutory objective of regulatory symmetry for all CMRS as set forth in the Omnibus Budget Reconciliation Act of 1993

(1993 Budget Act).<sup>4</sup> The 1993 Budget Act mandated that substantially similar mobile service receive comparable regulatory treatment.<sup>5</sup> In the *CMRS Second Report and Order*, we noted that there are no longer any real differences between private carrier and common carrier paging systems and concluded that private carrier paging services offered for a profit should be subject to reclassification as CMRS as of August 10, 1996.<sup>6</sup> We deferred modifying our rules governing service areas and channel assignments in the common carrier and private carrier paging services to a future proceeding until we could determine whether further conforming of our rules would be feasible.<sup>7</sup>

4. In the *Notice of Proposed Rulemaking (Notice)* in this proceeding, we proposed a transition from site-by-site licensing to geographic area licensing for all paging services licensed on an exclusive, non-nationwide basis.<sup>8</sup> Our goals were to establish a comprehensive and consistent regulatory scheme that would simplify and streamline licensing procedures and provide a flexible operating environment for all paging services. We also proposed to adopt competitive bidding rules for mutually exclusive applications, so that available channels could be assigned rapidly to applicants who would expedite service to the public.<sup>9</sup> We sought to ensure that our paging rules would be consistent with the rules for competing services, such as narrowband Personal Communications Services (narrowband PCS), so that competitive success would be dictated by the marketplace, rather than by regulation.<sup>10</sup> Because of the fundamental changes we were proposing, the *Notice* suspended acceptance of new applications for paging channels as of February 8, 1996.<sup>11</sup> The *First Report and Order* adopted interim rules governing the licensing of paging systems during

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<sup>4</sup> Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI § 6002(b)(2)(a), (b), 107 Stat. 312 (largely codified at 47 U.S.C. § 332 *et seq.*) (1993 Budget Act).

<sup>5</sup> See 47 U.S.C. § 337(c); see also Implementation of Sections 3(n) and 332 of the Communications Act, *Second Report and Order and Further Notice*, 9 FCC Red 1411 (1994) (*CMRS Second Report and Order*). In the *CMRS Second Report and Order*, the Commission began implementing its congressional mandate to establish regulatory symmetry among similar mobile services as provided in the 1993 Budget Act.

<sup>6</sup> *CMRS Second Report and Order*, 9 FCC Red at 1452-53, ¶ 97. The Commission noted that the CMRS classification would not be extended to not-for-profit, non-interconnected paging systems, which would be presumptively classified as private mobile radio services (PMRS). *Id.* We are not revising the rules governing the non-reclassified PMRS systems in this proceeding.

<sup>7</sup> *Id.* at 8053, ¶ 122.

<sup>8</sup> Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, *Notice of Proposed Rulemaking*, 11 FCC Red 3108, 3113, ¶ 21 (1996) (*Notice*).

<sup>9</sup> *Id.* at 3109, ¶ 1.

<sup>10</sup> *Id.* at 3109, ¶ 2.

<sup>11</sup> *Id.* at 3136, ¶ 139. We did, however, allow applications for additional sites without restrictions for CCP and PCP licensees who had obtained nationwide exclusivity on a paging channel. Further, we allowed incumbent licensees to add sites to existing systems or modify existing sites, provided that such additions or modifications would not expand the interference contour of the incumbent's existing system. *Id.* at 3136-37, ¶¶ 140-142; see also Wireless Telecommunications

the pendency of the rulemaking proceeding. The interim rules allowed incumbent licensees to file applications for additional sites within 65 kilometers (40 miles) of operating sites.<sup>12</sup> We also stated that we would process all paging applications for additional sites received through July 31, 1996, under the interim rules.<sup>13</sup>

5. In our *Second Report and Order and Further Notice*, we adopted rules governing geographic area licensing for exclusive channels in the 35-36 MHz, 43-44 MHz, 152-159 MHz, 454-460 MHz, 929-930 MHz, and 931-932 MHz bands allocated for paging, and competitive bidding procedures for granting mutually exclusive applications for non-nationwide geographic area licenses.<sup>14</sup> We concluded that geographic area licensing would provide flexibility for licensees and ease of administration for the Commission, facilitate further build-out of wide-area systems, and enable paging operators to act quickly to meet the needs of their customers. We found that geographic area licensing would further our goal of providing carriers that offer substantially similar services more flexibility to compete, and would enhance regulatory symmetry between paging and narrowband PCS.<sup>15</sup> We stated in the *Second Report and Order* that all pending mutually exclusive paging applications would be dismissed; all non-mutually exclusive paging applications filed on or before July 31, 1996, would be processed; all applications filed after July 31, 1996, would be dismissed (other than applications for nationwide or shared channels); and, other than for shared channels, no additional site-by-site applications would be accepted (with the exception of applications filed pursuant to sections 22.369 and 90.177, applications filed for coordination with Mexico and Canada, and applications required under section 1.1301 *et seq.*)<sup>16</sup>

6. With respect to shared channels, we retained our interim licensing rules that allowed only incumbents to file applications to add new sites to their systems, but eliminated the requirement that these applications be for sites located within 40 miles of an existing site operated by the licensee on the same channel.<sup>17</sup> Thus, following the adoption of the *Second Report and Order*, incumbent licensees were

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**Bureau Announces 929-930 MHz Paging Licensees That Have Met Construction Requirements for Nationwide Exclusivity, *Public Notice*, 11 FCC Rcd 12124 (1996).**

<sup>12</sup> **Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, *First Report and Order*, 11 FCC Rcd 16570, ¶ 25 (*First Report and Order*), affirmed on reconsideration, 11 FCC Rcd 7409 (1996). Additionally, Basic Exchange Telecommunications Radio Service, Rural Radiotelephone Service, and Special Emergency Radio Service were exempted from the interim paging application freeze. *First Report and Order*, 11 FCC Rcd at 16587-88, ¶ 38.**

<sup>13</sup> **FCC Clarifies Processing of Licensing Applications Under Interim Paging Rules, *Public Notice*, 11 FCC Rcd 7032 (1996) (*Interim Paging Rules Public Notice*).**

<sup>14</sup> ***Second Report and Order and Further Notice*, 12 FCC Rcd at 2739, ¶ 6.**

<sup>15</sup> ***Id.* at 2744, ¶ 15, 2745, ¶ 17, & 2748, ¶ 23.**

<sup>16</sup> ***Id.* at 2739, ¶ 6.**

<sup>17</sup> ***Id.* at 2757, ¶ 43.**



permitted to file for new sites at any location.<sup>18</sup> We also allowed new applicants to file applications for private, internal-use systems because such systems cannot be operated on a commercial basis, and thus would not be subject to speculative applications.<sup>19</sup> Additionally, in our *Further Notice*, we sought comment on coverage requirements for nationwide licenses, partitioning of paging licenses, the feasibility of disaggregating paging spectrum, and modifying the application process for shared channels to reduce paging license application fraud.<sup>20</sup>

#### IV. ORDER ON RECONSIDERATION

##### A. Dismissal of Pending Applications

7. **Background.** In the *Notice*, we suspended acceptance of new applications for both exclusive and non-exclusive paging channels as of February 8, 1996, in connection with the fundamental rule changes we proposed. In the *Second Report and Order and Further Notice*, we stated that, in light of our decision to adopt geographic area licensing, we would dismiss all pending mutually exclusive paging applications, including those filed under the interim rules adopted in the *First Report and Order*, and all applications filed after July 31, 1996.<sup>21</sup> On December 14, 1998, the Commercial Wireless Division dismissed these applications pursuant to the *Second Report and Order and Further Notice*.<sup>22</sup>

8. **Discussion.** Metrocall argues that the Commission should process the pending mutually exclusive applications and those filed after July 31, 1996, because the Commission did not notify the public prior to release of the *Second Report and Order* of its intent to dismiss those applications.<sup>23</sup> Blooston, Metrocall, Morris, Nationwide, PCIA, and Robert Kester also contend that by dismissing the pending applications, the Commission is unlawfully applying new rules retroactively.<sup>24</sup> We disagree. Courts have consistently recognized that the filing of an application creates no vested right to continued application of

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 2820-26, ¶¶ 202-20.

<sup>21</sup> *Id.* at 2739, ¶ 6; *see also supra* note 17 and accompanying text.

<sup>22</sup> ***See Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, Order, WT Docket No. 96-18, DA 98-2543 (Dec. 14, 1998) (CWD Order).***

<sup>23</sup> Metrocall, Inc. Motion to Stay Pending Reconsideration and Clarification (Metrocall Motion) at 3.

<sup>24</sup> Blooston, Mordkofsky, Jackson & Dickens Petition for Reconsideration (Blooston Petition) at 11-14; Metrocall Inc. Petition for Partial Reconsideration and Clarification (Metrocall Petition) at 11-16; Morris Communications, Inc. Petition for Partial Reconsideration and Clarification (Morris Petition) at 6-10; Nationwide Paging, Inc. Petition for Partial Reconsideration and Clarification (Nationwide Petition) at 6-10; Personal Communications Industry Association Petition for Reconsideration (PCIA Petition) at 17-18; Robert Kester Consolidated Petition for Reconsideration (Robert Kester Petition) at 7-9.

licensing rules that were in effect when the application was filed, and an application may be dismissed if substantive standards subsequently change.<sup>25</sup> In this proceeding, we dismissed pending applications based on our substantive rule changes establishing geographic area licensing for paging. In proposing these rule changes, we stated our intention to process pending applications filed prior to the adoption of the *Notice* provided that the applications were not mutually exclusive with other applications, and provided that the relevant period for filing competing applications had expired as of the adoption date of the *Notice*.<sup>26</sup> We stated that following adoption of final rules, we would process or dismiss all remaining pending applications in accordance with the new rules.<sup>27</sup> Following the adoption of interim licensing rules in the *First Report and Order*, we gave notice that we would process paging applications received through July 31, 1996, under our interim rules.<sup>28</sup>

9. Metrocall, PCIA, and Western Maryland Wireless further contend that carriers with pending applications that the Commission decided to dismiss will be harmed because these applicants reasonably relied on the Commission's prior procedures for processing applications.<sup>29</sup> Additionally, Metrocall argues that the Commission has failed to explain why the processing of pending mutually exclusive applications would in any way undermine geographic area licensing, and that the order is silent as to why dismissal of these applications is necessary to serve either the public interest or some other policy objective.<sup>30</sup> Blooston also argues that because the Commission continued to accept expansion applications after July 31, 1996, dismissal would be grossly unfair.<sup>31</sup> Priority and Robert Kester argue that the only discernible reason for licensing paging spectrum through competitive bidding is to raise money for the Federal government.<sup>32</sup> In light of the notice we gave of our interest in instituting geographic area licensing, and of our intent not to

<sup>25</sup> See *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 202-03 (1956) (upholding the dismissal without a comparative hearing of an application based on a rule adopted after the application was filed); *Chadmoore Communications Inc. v. FCC*, 113 F.3d 235, 240-41 (D.C.Cir. 1997) (permittee had no vested right in a particular outcome of its extension request that was abridged when the Commission dismissed that request pursuant to a subsequent, more restrictive rule); *Hispanic Information & Telecommunications Network v. FCC*, 865 F.2d 1289, 1294-95 (D.C. Cir. 1989); see also Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, 13 FCC Rcd 15920, 15937, ¶ 44 (1998); Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services, *Report and Order*, 9 FCC Rcd 6513, 6534, ¶ 100 (1994).

<sup>26</sup> *Notice*, 11 FCC Rcd at 3137, ¶ 144.

<sup>27</sup> *Id.*

<sup>28</sup> *Interim Paging Rules Public Notice*, 11 FCC Rcd at 7032.

<sup>29</sup> Metrocall Petition at 13; PCIA Petition at 18; Western Maryland Wireless Company Petition for Reconsideration (Western Maryland Petition) at 2-5.

<sup>30</sup> Metrocall Motion at 4.

<sup>31</sup> **Blooston Petition at 15-16.**

<sup>32</sup> **Priority Communications, Inc. Petition for Reconsideration (Priority Petition) at 7-10; Robert Kester Petition at 9-10.**

process applications filed after July 31, 1996, we do not believe that any applicants could have reasonably relied on our processing applications filed after that date.<sup>33</sup> In addition, once we had decided that it was in the public interest to employ geographic area licensing and competitive bidding in the paging services, it would not have served the industry or the public well to have continued the process of site-by-site licensing. Such licensing has the potential to create significant uncertainty regarding the spectrum available to bidders in the auctions and thus to delay the implementation of geographic area licensing. Moreover, we do not think that carriers that had previously pending applications will be irreparably harmed by a decision to proceed to the auction of paging licenses without any further processing of site-specific applications because such applications were dismissed without prejudice and these applicants may therefore file applications to participate in the auctions. Our reasons for adopting competitive bidding procedures for paging licenses are set forth at length in the *Notice* and *Second Report and Order and Further Notice*, and these reasons do not include revenue-raising considerations.<sup>34</sup> Finally, we note that we concluded in the *Competitive Bidding Second Report and Order* that mutually exclusive initial paging applications were auctionable under the auction authority provided the Commission by the 1993 Budget Act.<sup>35</sup> This conclusion is unchanged by the Balanced Budget Act of 1997, which amended Section 309(j) to expand the Commission's auction authority.<sup>36</sup> The Commission is now required to assign initial licenses by competitive bidding whenever mutually exclusive applications are accepted for filing, with certain limited exceptions.<sup>37</sup> We have concluded in other proceedings that the revised statute does not require us to re-examine our determinations that specific services or frequency bands were auctionable under the more restrictive definition of the 1993 Budget Act.<sup>38</sup>

10. Metrocall asserts that although the Commission has promoted auctions as a means of expediting the licensing of paging spectrum, the dismissal of pending applications undermines that policy

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<sup>33</sup> ***Interim Paging Rules Public Notice*, 11 FCC Rcd at 7032 (stating that the extent to which post-July 31 applications are processable may be affected by the timing of a final order in the proceeding and the transition to new licensing rules).**

<sup>34</sup> ***See infra* at ¶ 32 (setting forth the reasons for adopting competitive bidding, none of which include revenue-enhancing considerations).**

<sup>35</sup> *See* Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Second Report and Order*, 9 FCC Rcd 2348, 2359 (¶¶ 61, 63, on reconsideration, *Second Memorandum Opinion and Order*, 9 FCC Rcd 7245 (1994) (*Competitive Bidding Second Report and Order*)).

<sup>36</sup> Balanced Budget Act of 1997, Pub. L. No. 105-33, § 3002, 111 Stat. 251 (1997) (amending 47 U.S.C. § 309(j)); *see also Fresno Mobile Radio, Inc. v. FCC*, No. 978-1459 (D.C. Cir. Feb. 5, 1999).

<sup>37</sup> *See* 47 U.S.C. § 309(j); *see also* Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended, *Notice of Proposed Rule Making*, WT Docket No. 99-87, FCC 99-52 (Mar. 25, 1999) (*BBA NPRM*).

<sup>38</sup> *See BBA NPRM*, WT Docket No. 99-87, FCC 99-52, at ¶ 24 (stating that consistent with previous proceedings, the *NPRM* will not re-examine the Commission's previous determinations that specific services or frequency bands were auctionable under the 1993 Budget Act); Amendment of the Commission's Rules Concerning Maritime Communications, *Third Report and Order and Memorandum Opinion and Order*, 13 FCC Rcd 19853, 19882-83 at ¶¶ 60-61 (1998) (earlier finding that public coast service is subject to competitive bidding is unchanged by Balanced Budget Act); Amendment of the Commission's Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems, *Second Report and Order*, 13 FCC Rcd 15182, 15187-88 ¶ 9 (1998), on reconsideration, PR Docket No. 93-61, FCC 99-3 at ¶¶ 3-4 (Jan. 21, 1999).

goal because dismissal will undoubtedly delay the initiation of paging service in many market areas.<sup>39</sup> Metrocall further argues that delay will cause irreparable injury to them because it will prevent the expansion of its networks, encourage customers to seek other services, and cause uncertainty in its business planning (e.g., purchasing equipment or making financial commitments for new transmitter sites).<sup>40</sup> Metrocall suggests that mutually exclusive applications could be granted more quickly if, prior to the auction of geographic area licenses, an auction were scheduled for the pending mutually exclusive site-by-site applications, and bidding were limited to those applicants that filed within the cut-off period.<sup>41</sup> Blooston and Robert Kester argue that only applicants with existing mutually exclusive applications should be permitted to participate in competitive bidding for these licenses.<sup>42</sup> We find, however, that it was the formidable administrative burden of processing site-by-site applications, and the substantial number of mutually exclusive applications that were filed, which created a backlog of pending applications and caused their processing to be delayed. We further find that holding an additional auction for the purpose of resolving mutually exclusive site-by-site licenses, prior to conducting an auction for geographic areas containing these same sites, would be grossly inefficient. Limiting bidding for each site to the mutually exclusive applicants for that site would require the Commission to undertake an onerous engineering analysis of each site and examine relationships among many applications to determine eligible bidders. It is this type of inefficient processing that the Commission seeks to eliminate.<sup>43</sup> Moreover, as noted above, applicants whose mutually exclusive applications were dismissed without prejudice have the opportunity to participate in the geographic area auction.

11. Citing section 309(j)(6)(E) of the Communications Act of 1934, Blooston, Priority, ProNet, Schuykill, and Western Paging<sup>44</sup> contend that the Commission may not proceed to geographic area licensing without first attempting to avoid mutual exclusivity through "engineering solutions, negotiation, threshold qualifications, service regulations, and other means."<sup>45</sup> Metrocall, Morris, and Nationwide argue

<sup>39</sup> **Metrocall Motion at 4.**

<sup>40</sup> *Id.* at 5-6; Metrocall Petition at 14-15.

<sup>41</sup> Metrocall Motion at 4-5; Metrocall Petition at 15.

<sup>42</sup> Blooston Petition at 11-12; Robert Kester Petition at 12-14.

<sup>43</sup> *See Notice*, 11 FCC Rcd at 3113, ¶ 21. Inefficiencies in our former rules created a vast web of relationships between applications for individual transmitter sites at various locations. For example, Applicant A seeks a license for proposed operations that overlap the service area created by Applicant B's proposed operations, which in turn overlap the service area created by Applicant C's proposed operations, with overlapping service areas continuing indefinitely. *Id.* at 3113, ¶ 21 & n.53.

<sup>44</sup> **Blooston Petition at 13; Priority Petition at 5-7; ProNet Inc. Comments on Petitions for Reconsideration (ProNet Comments on Petitions for Reconsideration) at 4-5; Schuykill Petition for Reconsideration and Clarification (Schuykill Petition) at 1-3; Western Paging I Corporation and Western Paging II Corporation Petition for Reconsideration and Clarification (Western Paging Petition) at 1-3.**

<sup>45</sup> 47 U.S.C. § 309(j)(6)(E) provides: "Nothing in this subsection, or in the use of competitive bidding, shall... be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings."

that by dismissing pending applications and accepting new applications for an auction, the Commission is creating mutual exclusivity in violation of section 309(j)(6)(E).<sup>46</sup> The Commission has previously construed Section 309(j)(6)(E) to mean that it has an obligation to attempt to avoid mutual exclusivity by the methods prescribed therein only when it would further the public interest goals of Section 309(j)(3).<sup>47</sup> In the *Second Report and Order*, the Commission adopted geographic area licensing for the paging services, concluding that the public interest would be better served by licensing all remaining paging spectrum through a geographic licensing scheme than by processing additional site-specific licenses.<sup>48</sup> The Commission reasoned that geographic area licensing provides flexibility for licensees and ease of administration for the Commission, facilitates build-out of wide-area systems, and enables paging operators to act quickly to meet the needs of their customers.<sup>49</sup> The Commission thereby effectively determined that it would not be in the public interest to implement other licensing schemes or other processes that avoid mutual exclusivity, thus fulfilling the Commission's obligation under Section 309(j)(6)(E). As noted above, we have concluded in other proceedings that the Balanced Budget Act's revision of our auction authority does not require us to re-examine determinations regarding the use of geographic licensing and competitive bidding that were made under the auction authority provided by the 1993 Budget Act.<sup>50</sup> Accordingly, we affirm our previous decision to dismiss all pending applications.

12. Several petitions for reconsideration and an application for review were filed in response to the *CWD Order*.<sup>51</sup> Contending that their pending applications should not have been dismissed, the parties

<sup>46</sup> **Metrocall Petition at 15; Morris Petition at 9-10; Nationwide Petition at 9-10.**

<sup>47</sup> **See *DIRECTV, Inc. v. FCC*, 110 F.3d 816, 828 (D.C. Cir. 1997) ("Nothing in § 309(j)(6)(E) requires the FCC to adhere to a policy that it deems outmoded 'to avoid mutual exclusivity in ... licensing proceedings'"); Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR systems in the 800 MHz Frequency Band, *Second Report and Order*, 12 FCC Rcd 19079, 19104, 19154 ¶¶ 62, 230 (1997) (*800 MHz Second Report and Order*); Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR systems in the 800 MHz Frequency Band, *Memorandum Opinion and Order on Reconsideration*, 12 FCC Rcd 9972, 10009-10 ¶ 115 (1997) (*800 MHz Memorandum Opinion & Order*) (Section 309(j)(6)(E) does not prohibit Commission from conducting an auction without first attempting alternative licensing mechanisms to avoid mutual exclusivity); see also Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, *Report and Order and Second Notice of Further Rule Making*, 12 FCC Rcd 18600, 18647 ¶ 101 (1997) (previous rules that arguably avoided mutual exclusivity were no longer adequate for other reasons).**

<sup>48</sup> ***Second Report and Order and Further Notice*, 12 FCC Rcd at 2744, ¶ 15 & 2748, ¶ 23.**

<sup>49</sup> ***Id.* at 2744, ¶ 15.**

<sup>50</sup> **See *supra* at note 39 and accompanying text.**

<sup>51</sup> Robert J. and Laurie F. Keller d/b/a Western Maryland Wireless Company filed an application for review on December 28, 1998. Petitions for reconsideration were filed on January 13, 1999, by the following parties: AirTouch Paging, AirTouch Paging of California, AirTouch Paging of Kentucky, AirTouch Paging of Texas, AirTouch Paging of Virginia, Allcom Communications, Inc., Arch Capitol District, Inc., Arch Connecticut Valley, Inc., Arch Southeast Communications, Inc., Becker Beeper, Inc., Blasiar, Inc., Electronic Engineering Company, Hello Pager Company, Paging Systems Management, Inc., PowerPage Inc., Robert Kester *et al.*, Satellite Paging, Inc., South Texas Paging, Inc. (Arthur Flemmer), USA Mobile Communications, Inc. II, Westlink Licensee Corporation, and Westlink of New Mexico Licensee.

generally reiterate the same arguments against dismissing their applications that were set forth in the petitions for reconsideration filed in response to the *Second Report and Order*. Having already considered these arguments, we deny the petitions for reconsideration and application for review of the *CWD Order* that are listed in footnote 52.<sup>52</sup>

13. Metrocall argues that non-mutually exclusive applications filed after July 31, 1996, and prior to adoption of the *Second Report and Order and Further Notice* could be granted immediately, resulting in immediate benefits to consumers who cannot currently receive service.<sup>53</sup> We believe, however, for the reasons stated above, that a grant of paging applications filed after July 31, 1996, would be inconsistent with the goals of this proceeding. The Commission has given consideration to applicants who filed applications prior to the Commission's proposed licensing changes, after which parties were on notice of the possibility that their applications might be dismissed because of the decision to conduct auctions.<sup>54</sup>

## B. Geographic Area Licensing

### 1. 929-931 MHz Bands

14. **Background.** In adopting geographic area licensing for the 929 MHz and 931 MHz paging channels, we concluded that Major Trading Areas (MTAs) are an appropriate geographic area for paging systems on these channels because they are economically defined regions that best reflect the size and development of existing paging systems.<sup>55</sup> In the *Second Report and Order and Further Notice*, we also eliminated section 90.496 of our rules, which provided for extended implementation of construction and operations deadlines for proposed systems on the 929-930 MHz band that qualified for regional or nationwide channel exclusivity.<sup>56</sup> As explained in the *Notice*, we found that extended implementation would be unnecessary under our geographic area licensing scheme and, in fact, would hinder geographic area licensing because construction extensions for incumbents could effectively allow them to occupy an entire geographic area.<sup>57</sup>

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<sup>52</sup> Petitions for reconsideration of the *CWD Order* were also filed on January 13, 1999, by Ameritech Mobile Services, Inc., Capitol Radiotelephone Company Inc. dba Capitol Paging, Clear Paging, Inc., and Express Message Corporation. Because these petitioners raise arguments specific to whether their applications were actually mutually exclusive with other applications, we will resolve their petitions in a separate order.

<sup>53</sup> Metrocall Petition at 15-16.

<sup>54</sup> We note that the Commission has granted over 3,500 applications that were filed between May 10, 1996, and July 31, 1996.

<sup>55</sup> *Second Report and Order and Further Notice*, 12 FCC Red at 2744-45, ¶ 16.

<sup>56</sup> *Id.* at 2856.

<sup>57</sup> *Notice*, 11 FCC Red at 3118, ¶ 42.

15. **Discussion.** Metrocall and PCIA request that the Commission replace MTAs with Major Economic Areas (MEAs) for geographic licensing for the 929 and 931 MHz bands.<sup>58</sup> AirTouch also supports this proposal.<sup>59</sup> Metrocall states that MEAs are similar to MTAs but are less extensive and unwieldy.<sup>60</sup> PCIA contends that MEAs correspond to the service areas that have developed in the marketplace. PCIA further contends that MEAs will be more advantageous than MTAs to geographic area licensees on the 929 and 931 MHz bands because MEAs are made up of the Economic Areas (EAs) that will be used for the lower bands.<sup>61</sup> PCIA and AirTouch contend that 929 and 931 MHz licensees that also have systems on the lower bands would be able to operate more efficiently if they were licensed based on MEAs because EAs are entirely encompassed within MEAs.<sup>62</sup> Metrocall, PCIA, and AirTouch also observe that the use of MEAs would not subject geographic area licensees to royalty payments to Rand McNally as would the use of MTAs.<sup>63</sup> Finally, no parties to this proceeding opposed the petitioners' proposal.

16. We agree with Metrocall, PCIA, and AirTouch that MEAs should be used instead of MTAs. In the *Second Report and Order and Further Notice*, we determined that MTAs are economically defined regions that best reflect the size and development of existing paging systems. However, at the time of our initial determination, the Commission had not established MEAs, which were first developed by the Commission to define geographic license areas for the Wireless Communications Service (WCS).<sup>64</sup> In the *WCS Report and Order*, the Commission determined that MEAs would enable a large number of entities to participate in the provision of services and result in increased competition, encourage a more diverse group of service providers to participate in competitive bidding, and result in broader flexibility in service offerings by licensees.<sup>65</sup>

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**Metrocall Petition at 24; PCIA Petition at 19-21.**

**Comments of AirTouch Paging on Petitions for Reconsideration (AirTouch Comments on Petitions for Reconsideration) at 13-14.**

**Metrocall Petition at 24.**

**PCIA Petition at 20.**

**AirTouch Comments on Petitions for Reconsideration at 14; PCIA Petition at 20.**

**AirTouch Comments on Petitions for Reconsideration at 14; Metrocall Petition at 24; PCIA Petition at 20-21.**

<sup>64</sup> See Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service ("WCS"), *Report and Order*, 12 FCC Rcd 10785, 10814, ¶ 54 (1997) (*WCS Report and Order*). In the *WCS Report and Order*, we aggregated EAs into 52 MEAs, including 46 in the continental United States and an additional six areas covering Alaska (MEA #47), Hawaii (MEA #48), Guam and the Northern Mariana Islands (MEA # 49), Puerto Rico and the U.S. Virgin Islands (MEA #50), American Samoa (MEA #51), and the Gulf of Mexico (MEA #52). The Commission has sought comment on licensing commercial mobile radio services generally in the Gulf of Mexico in a separate proceeding. See Cellular Service and Other Commercial Mobile Radio Services in the Gulf of Mexico, *Second Further Notice of Proposed Rulemaking*, 12 FCC Rcd 4576 (1997). We therefore adopt only 51 MEAs at this time for paging services.

<sup>65</sup> *WCS Report and Order*, 12 FCC Rcd at 10815, ¶ 57.

17. Although MTAs and MEAs are substantially similar, we find that geographic area licensing based on MEAs will provide geographic area licensees with additional benefits that could not be obtained if we maintained MTAs as the geographic area for the 929-931 MHz band. We recognize that licensees with paging systems in both the 929-931 MHz band and the lower bands will benefit from our using MEAs for the 929-931 MHz band because MEAs are composed of EAs. The fact that the geographic borders of MEAs coincide with those of the EAs contained within the MEAs will enable licensees with both upper and lower band systems to operate more efficiently. We also agree with AirTouch that adopting MEAs on the 929 and 931 MHz channels will enhance competition between the paging systems on the lower channels and the paging systems on the 929 and 931 MHz channels because the paging systems on the lower channels will be able to combine their EAs to form MEAs. We also acknowledge that licensees will benefit economically from licensing based on a geographic designation that is in the public domain. Therefore, based on the foregoing, we adopt MEAs as the geographic licensing area for the 929-931 MHz band.<sup>66</sup>

18. Finally, we reject PSWF's contention that the decision to eliminate section 90.496 was arbitrary and capricious and an unlawful retroactive rulemaking without the opportunity for notice and comment.<sup>67</sup> We sought comment in the *Notice* on our proposal to eliminate extended implementation and to dismiss all "slow growth" applications pending at the time an order pursuant to the *Notice* was adopted without prejudice to refile under our geographic area licensing scheme.<sup>68</sup> Neither PSWF nor its predecessor-in-interest American Mobilphone, Inc. submitted comments on these proposals. We clarify, however, that removal of section 90.496 of our rules does not affect the rights associated with extended implementation authority granted under that rule as of May 12, 1997, the effective date of the *Second Report and Order and Further Notice*. In addition, any requests pending as of May 12, 1997, are dismissed without prejudice to obtain licenses under our geographic area licensing rules.<sup>69</sup>

## 2. 35-36 MHz, 43-44 MHz, 152-159 MHz, and 454-460 MHz Bands

19. **Background.** In the *Second Report and Order and Further Notice*, we concluded that Basic Trading Areas (BTAs) would be too small as a service area for the majority of existing paging systems

<sup>66</sup> A list of the MEAs is set forth in Appendix B, revised rule section 22.503(b).

<sup>67</sup> PSWF Corporation Petition for Partial Reconsideration at 5-8.

<sup>68</sup> *Notice*, 11 FCC Rcd at 3118, ¶ 42.

<sup>69</sup> PSWF also argued in its petition that elimination of section 90.496 was a violation of its due process rights. PSWF Petition at 1-5. PSWF's petition requests that the Commission process its pending extended implementation request filed in January 1997, for paging authorizations granted on 929.8125 MHz between May and July of 1996. *Id.* However, on November 5, 1998, the Commercial Wireless Division, Wireless Telecommunications Bureau, clarified that PSWF was entitled to regional exclusivity with regard to authorizations granted on 929.8125 MHz between August 1993, and February 1994. PSWF Corporation and Communications Innovations Corporation, *Order*, 13 FCC Rcd 22451 (1998) (*PSWF Order*). In the *PSWF Order*, PSWF's extended implementation request was dismissed as moot because the transmitter sites that were the subject of its extended implementation request were identical to those for which it was granted regional exclusivity. *Id.* at 22457, ¶ 12. For the same reasons, PSWF's due process argument in its petition for reconsideration is also moot.



on the lower channels.<sup>70</sup> We indicated that EAs, which consist of a metropolitan area or similar center of economic activity and the surrounding economically related counties, would provide geographic area licensees with the flexibility to construct transmitters at any location within their EA, as well as provide more opportunities for the entry of new applicants into the paging market, such as small businesses and rural telephone companies.<sup>71</sup> Thus, we determined that EAs, which are smaller than MTAs but larger than BTAs, would be appropriate for geographic area licensing on the 35-36 MHz, 43-44 MHz, 152-159 MHz, and 454-460 MHz bands.<sup>72</sup>

20. **Discussion.** Consolidated recommends using BTAs for geographic area licensing.<sup>73</sup> Consolidated contends that the size of EAs will prevent small and rural paging companies from participating in the geographic area licensing auction.<sup>74</sup> Consolidated states that EAs contain major urban areas as well as rural and suburban areas, and that small and rural companies, such as Consolidated, are only interested in the rural and suburban areas of the EA.<sup>75</sup> Consolidated also argues that partitioning does not address the concerns of small and rural companies, which will "be at the mercy" of larger geographic area licensees for expansion.<sup>76</sup> Contrary to Consolidated's argument, we believe that the size of EA geographic areas will not prevent paging operators of smaller systems from participating in geographic area licensing auctions. In the 220 MHz auction, we adopted EAs and 39 small entities successfully acquired 358 EA licenses.<sup>77</sup> We also believe bidding credits will allow small businesses to compete against larger bidders. Further, small and rural paging companies will not be prevented from expanding their systems even if they choose not to participate in the geographic area licensing auction, because we will allow geographic area licensees to partition their service areas and we have no reason to believe that geographic area licensees will be unwilling to enter into partitioning agreements. Conversely, small companies may choose to acquire a geographic area license and partition any areas they do not wish to serve themselves. We continue to conclude that EAs, which the majority of commenters supported, best reflect the geographic area that the paging licensees on the lower channels seek to serve. We therefore reject Consolidated's proposal to use a BTA licensing scheme, and affirm our decision to employ EAs as the geographic area for the lower paging bands.

<sup>70</sup> **There are 487 BTAs in the United States, some of which are smaller than counties.**

<sup>71</sup> ***Second Report and Order and Further Notice*, 12 FCC Rcd at 2748-49, ¶¶ 23-24.**

<sup>72</sup> ***Id.* at 2746, ¶ 20.**

<sup>73</sup> **Petition for Partial Reconsideration and Request for Clarification of Consolidated Communications Telecom Services, Inc. (Consolidated Petition) at 8-9.**

<sup>74</sup> ***Id.* at 5.**

<sup>75</sup> ***Id.* at 7-8.**

<sup>76</sup> ***Id.* at 6.**

<sup>77</sup> ***See* Phase II 220 MHz Service Auction Closes, Winning Bidders in the Auction of 908 Phase II 220 MHz Service Licenses, DA 98-2143, *Public Notice* (Oct. 23, 1998).**

21. PRTC states that we did not adopt EA-like areas for Guam and the Northern Mariana Islands, Puerto Rico and the U.S. Virgin Islands, and American Samoa.<sup>78</sup> Consequently, PRTC requests that section 22.503(b)(3) of the Commission's rules be revised to include three additional EA-like areas for the U.S. territories.<sup>79</sup> We inadvertently omitted these three EA-like service areas from the *Second Report and Order and Further Notice*. We therefore adopt PRTC's recommendation and add the following three EA-like service areas: Guam and the Northern Mariana Islands (EA 173); Puerto Rico and the United States Virgin Islands (EA 174); and American Samoa (EA 175).<sup>80</sup>

### 3. Highly Encumbered Areas

22. **Background.** In the *Second Report and Order and Further Notice*, we concluded that we would grant mutually exclusive applications for geographic area licenses through competitive bidding even in areas extensively built out by an incumbent licensee.<sup>81</sup> We also rejected a proposal by commenters to restrict competitive bidding to incumbent licensees. We determined that all qualified paging applicants should be eligible to bid for any geographic area license.<sup>82</sup> We noted that if an incumbent already has a significant presence in a geographic area, other potential applicants may choose not to bid for that geographic area. Thus, market forces, not regulation, would determine participation in competitive bidding for geographic area licenses.<sup>83</sup>

23. **Discussion.** Petitioners argue that those incumbent licensees that have previously satisfied certain coverage requirements should receive a geographic area license without competitive bidding.<sup>84</sup> PCIA advocates granting a market area license to an incumbent providing coverage to at least 70 percent of its

<sup>78</sup> Puerto Rico Telephone Company Petition for Reconsideration and Clarification (PRTC Petition) at 1-2.

<sup>79</sup> *Id.* at 2.

<sup>80</sup> The revised Section 22.503(b) is in Appendix B.

<sup>81</sup> *Second Report and Order and Further Notice*, 12 FCC Rcd at 2758-59, ¶ 45.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> Advanced Paging, Inc. Petition for Reconsideration (Advanced Petition) at 4-13; AirTouch Comments on Petitions for Reconsideration at 6-7; Arch Communications Group, Inc. Petition for Partial Reconsideration and Request for Clarification (Arch Petition) at 7; Opposition and Comments of Arch Communications Group, Inc. (Arch Opposition) at 3; Reply of Arch Communications Group, Inc. (Arch Reply) at 2-3; MetroCall Petition at 6-11; Metrocall, Inc. Response to Petitions for Reconsideration (Metrocall Response to Petitions for Reconsideration) at 11-12; Paging Network Petition for Partial Reconsideration and Clarification (PageNet Petition) at 4-6; PageNet October 27, 1998 *Ex Parte* at 1-2; Priority Petition at 7; Puerto Rico Telephone Company Reply (PRTC Reply) at 1-4; PCIA Petition at 4-7; PCIA October 26, 1998 *Ex Parte*; PCIA October 13, 1998 *Ex Parte*; PCIA September 21, 1998 *Ex Parte*; PCIA September 18, 1998 *Ex Parte*; PCIA September 3, 1998 *Ex Parte*.

market.<sup>85</sup> Advanced, Arch, and Metrocall similarly argue for granting market area licenses to incumbents providing coverage to two-thirds or a similar percentage of the market.<sup>86</sup> PageNet suggests different possible thresholds.<sup>87</sup> PageNet and PCIA propose a two-step process for granting market area licenses.<sup>88</sup> First, where an incumbent operator certifies that it covers 70 percent of a market area's population or geographic area, the Commission should grant a market area license to that incumbent.<sup>89</sup> PCIA further suggests that if multiple incumbents serving a market on a single frequency together cover 70 percent of the population or geographic area, those licensees should be permitted jointly to file an application that demonstrates their joint coverage, and receive a market area license on that basis.<sup>90</sup> In the second step, interested parties could file applications for all remaining available frequencies in each market.<sup>91</sup> According to PCIA, mutually exclusive applications would then be subject to the Commission's auction rules.<sup>92</sup> Arch and PageNet alternatively propose to limit eligible bidders to the same-channel incumbents operating within the geographic area or in an area adjacent to the geographic area license.<sup>93</sup>

24. Petitioners present a number of arguments in support of their proposals. They argue, for example, that, under the Commission's rules adopted in the *Second Report and Order and Further Notice*, new opportunities for greenmail and speculative applications will result in inflated auction prices,<sup>94</sup> and

<sup>85</sup> PCIA Petition at 5-7; PCIA October 26, 1998 *Ex Parte*; PCIA October 13, 1998 *Ex Parte*; PCIA September 21, 1998 *Ex Parte*; PCIA September 18, 1998 *Ex Parte*; PCIA September 3, 1998 *Ex Parte*.

<sup>86</sup> Advanced Petition at 8; Arch Petition at 7; Metrocall Petition at 8. Both proposals are based on the Commission's five-year construction benchmark requiring a geographic licensee to provide coverage to two-thirds of the population within five years of the license grant; *see* Arch Petition at 7; PCIA October 26, 1998 *Ex Parte* at 7.

<sup>87</sup> In its petition, PageNet advocated awarding geographic area licenses to any incumbent that demonstrated it covers two-thirds or more of the market's population, PageNet Petition at 4-6, while in its October 27, 1998 *ex parte*, PageNet cited a threshold amount of 70 percent, PageNet October 27, 1998 *Ex Parte* at 1-2.

<sup>88</sup> PageNet October 27, 1998 *Ex Parte* at 1; PCIA October 26, 1998 *Ex Parte* at 4-8; PCIA September 21, 1998 *Ex Parte*; PCIA September 18, 1998 *Ex Parte*; PCIA September 3, 1998 *Ex Parte*.

<sup>89</sup> PageNet October 27, 1998 *Ex Parte* at 1; PCIA October 26, 1998 *Ex Parte* at 6.

<sup>90</sup> PCIA October 26, 1998 *Ex Parte* at 7.

<sup>91</sup> PageNet October 27, 1998 *Ex Parte* at 1; PCIA October 26, 1998 *Ex Parte* at 6.

<sup>92</sup> PCIA October 26, 1998 *Ex Parte* at 7.

<sup>93</sup> Arch Petition at 7; PageNet Petition at 6.

<sup>94</sup> *See* Advanced Petition at 6-9; Arch Petition at 7; Blooston Petition at 10-11; Metrocall Petition at 8; PageNet Petition at 2 & 5; PCIA Petition at 4-7; PCIA October 26, 1998 *Ex Parte* at 7-8; PRTC Reply at 3-4. In its Petition, PageNet argues that "greenmailers" might "do no more than place a single transmitter in the

reliable service will decline because auctions introduce additional parties for coordination and negotiation and customers will be unable to receive or obtain services if multiple providers are using the same channel within a market area.<sup>95</sup> Petitioners further argue that new entrants will increase the potential for co-channel interference;<sup>96</sup> "dead zones" will occur between the incumbent and geographic area licensee's service areas;<sup>97</sup> the incumbent's ability to expand to provide the "widest area coverage" will be blocked if a new entrant wins at auction;<sup>98</sup> new entrants will be encouraged to enter markets where it would not be economically viable to do so;<sup>99</sup> and customers will not reap the benefits of competition.<sup>100</sup> In addition, Advanced, Metrocall, and PageNet state that an applicant is not qualified if it cannot meet the construction benchmark of covering two-thirds of the population of an MTA where operating incumbents already meet the coverage requirements.<sup>101</sup> Metrocall and PageNet further assert that the Commission's current rules do not meet its statutory obligation to avoid mutual exclusivity, while mutual exclusivity could be avoided through "threshold qualifications," identified in their percent-of-coverage proposals.<sup>102</sup> Finally, Metrocall asserts that despite the

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remaining white space for five years," forcing paging carriers "to bid, not at the legitimate value of the few remaining transmitter locations, but to keep those locations from falling into the hands of someone else who seeks only to extract exorbitant rates from them for the future right to expand." PageNet Petition at 2. In its Petition, PCIA argues that the Commission's auction rules "create an environment that is highly conducive to the filing of fraudulently induced and speculative applications." PCIA Petition at 4. Specifically, PCIA is concerned that "insincere applicants" participating in the auction will drive up the price of geographic area licenses, and the history of the paging market and IVDS suggests that adoption of a competitive bidding process is not a complete solution to the filing of speculative applications. *Id.* at 6-7. In addition, Advanced argues that bidders that "park" their bids in low-priced markets, for which they have little or no genuine interest, to comply with the activity rules will artificially inflate the bidding for markets in which an incumbent has already met the coverage requirements. Advanced Petition at 8-9.

<sup>95</sup> PCIA October 26, 1998 *Ex Parte* at 4-5; *see* PageNet October 27, 1998 *Ex Parte* at 2.

<sup>96</sup> *See* Advanced Petition at 5-6 & 9-10; Metrocall Petition at 9-10; PageNet October 27, 1998 *Ex Parte* at 2; PCIA October 26, 1998 *Ex Parte* at 4-5.

<sup>97</sup> *See* PageNet October 27, 1998 *Ex Parte* at 2; PCIA October 26, 1998 *Ex Parte* at 4-5.

<sup>98</sup> *See* Advanced Petition at 5; Blooston Petition at 11; Metrocall Petition at 7; PageNet Petition at 4-5; PageNet October 27, 1998 *Ex Parte* at 1; PCIA Petition at 6-7.

<sup>99</sup> *See* Metrocall Petition at 7-8; PCIA October 26, 1998 *Ex Parte* at 4.

<sup>100</sup> *See* Advanced Petition at 7-8; Metrocall Petition at 7; PageNet October 27, 1998 *Ex Parte* at 2. Metrocall asserts that the Commission's decision not to adopt automatic licensing for incumbents "guarantees inefficient use of the spectrum" and the public will bear the ultimate burden "in the form of less competitive rates and less efficient service options." Metrocall Petition at 7. PageNet argues that customers can only reap the benefits of competition if carriers operate on different frequencies in the same or overlapping territory. PageNet October 27, 1998 *Ex Parte* at 2.

<sup>101</sup> Advanced Petition at 10-11; Metrocall Petition at 8; PageNet Petition at 5; PRTC Reply at 4.

<sup>102</sup> Metrocall Petition at 7; PageNet October 27, 1998 *Ex Parte* at 1; PRTC Reply at 3.

"overwhelming support for granting geographic [area] licenses to incumbents," and because the Commission has "failed to provide any factual basis" for its decision not to adopt automatic licensing for incumbents, that decision is contrary to the record in this proceeding and, therefore, arbitrary and capricious.<sup>103</sup>

25. While we recognize that some geographic areas are significantly served by incumbent licensees, we believe that the market should decide whether an economically viable paging system can be established in the unserved area of a geographic market. For instance, an incumbent licensee might consider the unserved area within its "home" geographic market to be beyond the scope of its business plans. In contrast, a paging provider that primarily serves an adjacent geographic market may have a strong desire to serve the unserved area in its neighbor's "home" market. In addition, even where only 30 percent of a geographic area is available to a potential new entrant, we do not believe that it has been shown that the new entrant cannot establish a viable system that serves the public as well as the incumbent. Thus, we cannot conclude that an incumbent licensee is entitled to a geographic area license without competitive bidding simply because its paging system may cover a substantial portion of the geographic area. We therefore continue to believe that all otherwise qualified paging applicants should be eligible to bid for any geographic area license. Open eligibility promotes prompt service to the public by allocating spectrum to the entity that values it most.

26. We also believe the benefits of open eligibility outweigh the risks that speculators and misguided applicants pose to the competitive bidding process. Although under our prior rules, which did not allow for competitive bidding, fraudulent application preparers duped a number of consumers into submitting unwarranted site-specific applications for Specialized Mobile Radio (SMR) service licenses with promises of a quick re-sale profit,<sup>104</sup> we do not believe that this problem has arisen in connection with any of our auctions of communications licenses. Nor do we have any evidence that this is likely to become a significant problem as we auction paging licenses. Indeed, while speculation can be a problem when licenses are awarded through such systems as lotteries, we believe that auctions deter speculation. Parties must make an upfront payment on each desired market and make minimum opening bids, and they are subject to bid withdrawal payments. They must also make full payment at the close of the auction for any licenses on which they are the high bidder, or pay default payments. Thus, the opportunity cost of speculating can be high, and engaging in speculative bidding is highly risky. We have auctioned other highly encumbered services, such as 800 MHz and 900 MHz SMR and 220 MHz, and have not seen any evidence that speculative applications have raised bidding prices. Petitioners also have not provided any evidence that speculative applications have raised bidding prices in prior auctions.

27. Issues related to coverage requirements and co-channel interference are addressed in other sections of this Order. A new entrant will be able to meet its coverage requirements by providing substantial service within the geographic area<sup>105</sup> and geographic area licensees must provide co-channel protection to all

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<sup>103</sup> **Metrocall Petition at 10-11; *see* Advanced Petition at 4.**

<sup>104</sup> ***See, e.g., Daniel R. Goodman, Receiver, Dr. Robert Chan, Petition for Waiver of Sections 90.633(c) and 1.1102 of the Commission's Rules, Memorandum Opinion and Order and Order on Reconsideration, 13 FCC Rcd 21944 (1998).***

<sup>105</sup> ***See infra* ¶¶ 66-70.**

incumbents.<sup>106</sup> Moreover, petitioners have not provided any evidence that the "border" issues raised here, including problems related to "dead zones," are any different from issues that arise under other circumstances where one licensee is adjacent to another. Finally, turning to our obligation to attempt to avoid mutual exclusivity when it is in the public interest, we do not believe that Congress intended us to interpret the term "threshold qualifications" in Section 309(j)(6)(E) to mean that carriers should receive licenses for unserved areas without competitive bidding simply because they already hold certain licenses for other areas in the vicinity, particularly because the result of such an approach would be to preclude the dissemination of licenses to new entrants.

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<sup>106</sup>

*See infra* ¶ 50.

#### 4. Basic Exchange Telecommunications Radio Systems (BETRS) Licensees

28. **Background.** Basic Exchange Telecommunications Radio Systems (BETRS) are licensed under the Rural Radiotelephone Service. BETRS use two-way paired channels to provide basic exchange telephone service to remote rural areas of the country.<sup>107</sup> Only local exchange carriers (LECs) that are state certified to provide basic exchange telephone service, or others having state approval to provide such service, are eligible to hold authorizations for BETRS.<sup>108</sup> The *Second Report and Order and Further Notice* directs that BETRS and Rural Radiotelephone Service licensees be subject to geographic area licensing, and also allows providers in these services to obtain site licenses on a secondary basis.<sup>109</sup> It further provides that all existing BETRS operating on a co-primary basis remain in place and receive full protection from interference by geographic area licensees.<sup>110</sup> BETRS licensees may also enter into partitioning agreements with auction participants and auction winners both before and after the paging auction.<sup>111</sup> In the *Second Report and Order*, the Commission stated that "[i]f a geographic area licensee is concerned that a BETRS facility operating on secondary sites may cause interference to the geographic area licensee's existing or planned facilities, the BETRS provider must discontinue use of the interfering channel no later than six months after the geographic area licensee notifies the BETRS provider of the actual or potential interference."<sup>112</sup> This policy is codified at section 22.723 of our rules.<sup>113</sup>

29. **Discussion.** Several petitioners argue that BETRS is essential to the Commission's universal service goal of delivering local exchange service to remote, rural areas and should be licensed on a site-by-site, co-primary basis with geographic area licensees, and exempt from competitive bidding

<sup>107</sup> Basic Exchange Telecommunications Radio Service, *Report and Order*, 3 FCC Rcd 214, 217, ¶ 27 (1988). We note that under section 22.757 of the Commission's rules, 47 C.F.R. § 22.757, certain channels in the 800 MHz band are available on a co-primary basis to BETRS.

<sup>108</sup> 47 C.F.R. § 22.702.

<sup>109</sup> *Second Report and Order and Further Notice*, 12 FCC Rcd at 2752-54, ¶¶ 32-36. We initially decided against using auctions to resolve mutual exclusivity between initial BETRS or Rural Radiotelephone applications and common carrier mobile service applications because it would not serve the public interest to establish BETRS as a potentially low-cost alternative to wireline service, and then require BETRS applicants to bid against a radio common carrier applicant for the same channels. *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2356, ¶ 46. Following the release of the *Competitive Bidding Second Report and Order*, however, we expanded our rules to permit CMRS licensees the flexibility to provide fixed or mobile services, or a combination, over CMRS spectrum. Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services, *First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 8965, 8977, ¶ 24 (1996). In light of this new flexibility, we noted that the local exchange service offered by BETRS would one day be offered by wireless and wireline providers, and that "it may not be logical to continue to exempt BETRS from geographic area licensing and auctions." *Second Report and Order and Further Notice*, 12 FCC Rcd at 2752, ¶ 32.

<sup>110</sup> *Id.* at 2753, ¶ 34.

<sup>111</sup> *Id.* at 2753, ¶ 35.

<sup>112</sup> *Id.* at 2753-54, ¶ 35.

<sup>113</sup> **47 C.F.R. § 22.723.**

procedures.<sup>114</sup> These petitioners contend that participation in auctions will impair the financial ability of rural telephone companies to respond to their customers' needs for local exchange service in remote rural areas and that it is impracticable for a rural telephone company or a consortium of rural telephone companies to bid on BETRS spectrum in a market the size of an EA.<sup>115</sup> Petitioners also cast doubt on the ability of potential competitors like broadband PCS and cellular to provide viable and cost-effective alternatives to BETRS for the provision of telephone service to rural areas.<sup>116</sup>

30. After a thorough review of the record in this proceeding, we decline to adopt rules that permit site-by-site licensing of BETRS on a co-primary basis with geographic area paging licensees. We agree that BETRS provide an important service, and none of the actions we take today have the effect of abolishing BETRS. In the *Second Report and Order*, we directed that all existing BETRS remain in place and receive full interference protection from geographic area licensees.<sup>117</sup> However, we also find that BETRS licensees should be allowed to compete at auction with other BETRS licensees and wireless providers. The Commission has determined that BETRS do not require exemption from competition to ensure continued BETRS service and lower costs to subscribers. In fact, the rules that we adopted in the *Second Report and Order* provide competitive bidding benefits to small businesses that will enable them to compete more effectively with larger auction participants.<sup>118</sup> We also believe that BETRS operators will be able to obtain interests in paging licenses or actual paging licenses through entering into partitioning arrangements both before and after the paging auction.<sup>119</sup> We emphasize that we are committed to

<sup>114</sup> Big Bend Telephone Company, Inc. Petition for Reconsideration (Big Bend Petition) at 2, 5-7; Century Telephone Enterprises, Inc. Petition for Reconsideration (Century Petition) at 2, 5-7; Lincoln County Telephone System, Inc. Petition for Reconsideration (Lincoln Petition) at 2, 5-7; Mid-Rivers Telephone Cooperative, Inc. Petition for Reconsideration (Mid-Rivers Petition) at 2, 5-7; Petition for Reconsideration of the National Telephone Cooperative Association (NTCA Petition) at 5-6; Reply to Oppositions to Petition for Reconsideration of the National Telephone Cooperative Association (NTCA Reply) at 2; Nucla-Naturita Telephone Company Petition for Reconsiderations (Nucla-Naturita Petition) at 2 & 5-7.

<sup>115</sup> **Big Bend Petition at 2, 4 & 7 n.8; Big Bend Telephone Company, Inc. Reply to Opposition and Comments on Petitions for Reconsideration (Big Bend Reply) at 2; Century Petition at 2, 4 & 7 n.8; Century Telephone Enterprises, Inc. Reply to Opposition and Comments on Petitions for Reconsideration (Century Reply) at 2; Lincoln Petition at 2, 4 & 7 n.8; Mid-Rivers Petition at 2, 4 & 7 n.8; Mid-Rivers Telephone Cooperative, Inc. Reply to Opposition and Comments on Petitions for Reconsideration (Mid-Rivers Reply) at 2; NTCA Petition at 3, 6; Nucla-Naturita Petition at 2, 4 & 7 n.8; Nucla-Naturita Reply to Opposition and Comments on Petitions for Reconsideration (Nucla-Naturita Reply) at 2. Big Bend states that “[u]nlike paging carriers, who will generally be interested in only a single channel at the auction, BETRS licensees would be required to bid on many frequencies in a particular market to acquire sufficient spectrum to meet present and future demands for local exchange telephone service, even though at least some of these frequencies may not be put to use immediately, if at all.” Big Bend Reply at 3-4. Big Bend further explains that EAs are impracticable service areas because they “include both urbanized and rural areas, and thus, large areas which would not require construction of BETRS facilities.” *Id.* at 4.**

<sup>116</sup> Big Bend Petition at 2-4; Century Petition at 2-4; Lincoln Petition at 2-4; Mid-Rivers Petition at 2-4; NTCA Petition at 3; Nucla-Naturita Petition at 2-4.

<sup>117</sup> ***Second Report and Order and Further Notice*, 12 FCC Rcd at 2753, ¶ 34.**

<sup>118</sup> ***Id.* at 2804-20, ¶¶ 163-201; see *infra* at ¶ 114 (explaining that BETRS licensees also may qualify for financial benefits from the Rural Electrification Administration and universal service support).**

<sup>119</sup> ***See Second Report and Order and Further Notice*, 12 FCC Rcd at 2753, ¶ 35 (the Commission’s partitioning rules are tailored to accommodate future**



promoting service in rural areas and we believe that the rules adopted for BETRS in the *Second Report and Order* will further that goal. If a BETRS operator demonstrates that it cannot serve a particular need in a rural area under these rules, we will consider appropriate action to address specific concerns.<sup>120</sup>

31. Petitioners further contend that, contrary to the Commission's universal service goals, section 22.723 of our rules will allow geographic area licensees to terminate BETRS upon any allegation of harmful co-channel interference, resulting in a loss of communications services essential to the public in rural areas. Petitioners argue that the Commission must either retain existing rules or establish safeguards against allowing geographic area licensees to "shut down BETRS operations."<sup>121</sup> ProNet, however, seeks clarification that section 22.723 confers no right on rural radio service licensees to continue operations that cause actual interference to geographic area licenses for six months after receiving notice of the interference.<sup>122</sup> We have no reason to believe that geographic area licensees will make unsupported allegations of potential or actual interference by BETRS, as petitioners suggest. We therefore affirm our earlier decision to allow BETRS licensees to obtain site licenses and operate facilities on a secondary basis. We clarify, however, that under section 22.723 of our rules, the geographic area licensee must provide notification to the BETRS provider that the relevant BETRS facility causes or will cause interference with the geographic area licensee's service contour in violation of our interference rules.<sup>123</sup>

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**expansion of BETRS by "allow[ing] BETRS licensees to enter into partitioning agreements with geographic area licensees both before and after geographic licensing occurs". Paging providers may obtain partitioned licenses by: (1) forming bidding consortia to participate in auctions, and then partitioning licenses won among consortium members; or (2) acquiring partitioned licenses from other licensees through private negotiation and agreement either before or after the auction. // at 2817, ¶ 194.**

<sup>120</sup> **We note that there has not been much recent activity in licensing Rural Radiotelephone Services, which includes BETRS. We have received only 16 new or major modification applications for Rural Radiotelephone licenses between January 1, 1998, and May 1, 1999.**

<sup>121</sup> Big Bend Petition at 5; Big Bend Reply at 6-8; Century Petition at 5; Century Reply at 6-8; Lincoln Petition at 5; Mid-Rivers Petition at 5; Mid-Rivers Reply at 6-8; NTCA Petition at 5-7; Nucla-Naturita Petition at 5; Nucla-Naturita Reply at 6-8.

<sup>122</sup> **ProNet Inc. Petition for Reconsideration and Clarification (ProNet Petition) at 20; ProNet Comments on Petitions for Reconsideration at 15.**

<sup>123</sup> **Where the BETRS facility would create interference with a facility the geographic area licensee is proposing to build, the geographic area licensee may not provide notification of impermissible interference to the BETRS provider earlier than six months prior to the date it intends to initiate operation of the proposed facility. Thus, the geographic area licensee may not force the BETRS provider to discontinue service before the geographic area licensee initiates service. Where the BETRS facility is constructed after the geographic area licensee's facility is already constructed and the BETRS facility causes interference with that existing facility, the BETRS operator must discontinue use of the interfering channel in accordance with our interference rules. Where a geographic area licensee plans construction and initially determines that the BETRS facility would not cause interference, but after construction determines the BETRS facility is causing interference, the BETRS operator must discontinue use of its facility within six months of receiving notification. If a dispute arises, either party may submit the interference information to the Commission to resolve the dispute. If the geographic area licensee provides proper notification to the BETRS provider, no adjustments will be made to the initial six month period. If the Commission determines that the notification was improper or inaccurate, the geographic area licensee, where appropriate, must submit a new, corrected notification to the BETRS provider. In the latter case, the six month period would restart.**

32. Petitioners argue that the Commission has exceeded its statutory authority by using competitive bidding procedures to issue geographic area paging licenses because the use of auctions to assign paging spectrum is motivated purely by the Commission's desire to raise federal revenues.<sup>124</sup> We have not exceeded our statutory authority by employing competitive bidding procedures to issue geographic area paging licenses. Section 309(j) of the Communications Act, as amended, gives the Commission authority to issue geographic area paging licenses through competitive bidding.<sup>125</sup> Petitioners have offered no evidence to support their assertion that revenue for the federal treasury "appears to be the real reason for the Commission's proposal."<sup>126</sup> Our reasons for adopting competitive bidding procedures for paging licenses are set forth at length in the *Notice* and *Second Report and Order and Further Notice*, and these reasons do not include revenue-enhancing considerations. We stated that geographic area licensing would enhance regulatory symmetry between one-way paging and narrowband PCS, streamline the regulatory procedures and application processing rules, and result in a broader array of entities providing paging services to the public.<sup>127</sup> Moreover, Congress has charged us to promote: (1) development and rapid deployment of new technologies, products, and services; (2) economic opportunity and competition; (3) recovery of a portion of the value of the public spectrum; and (4) efficient and intensive use of the electromagnetic spectrum.<sup>128</sup> The recovery of a portion of the value of the public spectrum made available through competitive bidding does not amount to maximizing revenue, nor is it our sole objective. Petitioners have not articulated any persuasive reason for us to reconsider our findings on this point.

33. Petitioners also argue that the Commission did not adequately consider adopting "mandatory partitioning" of rural areas of the geographic area license, at no cost to the rural telephone company, to offset the unwillingness of geographic area licensees to enter into agreements for the provision of BETRS service.<sup>129</sup> PCIA and ProNet maintain, however, that mandatory partitioning is unnecessary because BETRS providers are permitted to enter into voluntary arrangements with winning geographic area licensees.<sup>130</sup> AirTouch and PCIA contend that no cost, mandatory partitioning is contrary to the public

<sup>124</sup> Big Bend Petition at 4-5; Century Petition at 4-5; Lincoln Petition at 4-5; Mid-Rivers Petition at 4-5; Nucla-Naturita Petition at 4-5.

<sup>125</sup> **See 47 U.S.C. § 309(j)(2)(A), (B) & (C).** As previously noted, the Commission's mandate to employ competitive bidding was broadened by the Balanced Budget Act of 1997. *See supra* at ¶ 9 (citing the Balanced Budget Act of 1997, Pub. L. No. 105-33, § 3002, 111 Stat. 251 (1997) (amending 47 U.S.C. § 309(j)); *see also Fresno Mobile Radio, Inc. v. FCC*, No. 978-1459 (D.C. Cir. Feb. 5, 1999); and *BBA NPRM*

<sup>126</sup> **Big Bend Petition at 4; Century Petition at 4; Lincoln Petition at 4; Mid-Rivers Petition at 4; Nucla-Naturita Petition at 4.**

<sup>127</sup> ***Second Report and Order and Further Notice*, 12 FCC Red at 2776, ¶ 85; *Notice*, 11 FCC Red at 3113, ¶ 21.**

<sup>128</sup> **See 47 U.S.C. § 309 (j)(3)(A), (B), (C) & (D) (1998).**

<sup>129</sup> Big Bend Petition at 7-9; Big Bend Reply at 4-5; Century Petition at 7-9; Century Reply at 4-5; Lincoln Petition at 7-9; Mid-Rivers Petition at 7-9; Mid-Rivers Reply at 4-5; Nucla-Naturita Petition at 7-9; Nucla-Naturita Reply at 4-5.

<sup>130</sup> Reply Comments of the Personal Communications Industry Association (PCIA Reply Comments) at 7-8; ProNet, Inc. Reply Comments on Further Notice of Proposed Rulemaking (ProNet Reply Comments) at 9-10.

interest and would come at the expense of geographic area licensees.<sup>131</sup> We affirm our conclusion in the *Second Report and Order and Further Notice* that BETRS licensees may acquire partitioned licenses from other licensees by: (1) participating in bidding consortia; or (2) acquiring partitioned licenses from other licensees through private negotiation and agreement either before or after the auction.<sup>132</sup> We have no reason to believe that auction winners will not be willing to enter into partitioning arrangements. Petitioners themselves argue that winning geographic area licensees may have no desire or intention to build in rural areas.<sup>133</sup> If this is true, there appears to be little incentive for these licensees to demand unreasonable amounts of money for the rural portion of a license prior to or subsequent to the auction, especially if the choice is between selling to a willing buyer or leaving the rural area unserved.<sup>134</sup> Where possible, the Commission encourages market forces and the business judgment of companies to dictate the formation of business relationships. For example, we have expressed our preference for allowing market forces to encourage voluntary agreements between broadband PCS licensees and rural telephone companies to accomplish partitioning.<sup>135</sup> We believe such voluntary agreements will be an adequate means of accommodating BETRS licensees seeking modifications to existing BETRS or wishing to establish new systems, and that mandatory partitioning is unnecessary.

## 5. Spectrum Reversion

34. **Background.** In the *Second Report and Order and Further Notice*, we concluded that spectrum within a geographic area recovered by the Commission from a non-geographic area licensee should automatically revert to the geographic area licensee.<sup>136</sup> We found that granting this right to geographic area licensees would give them greater flexibility in managing their spectrum, establish greater consistency with our cellular and PCS rules, and reduce the regulatory burdens on both licensees and the Commission with respect to future management of the spectrum.<sup>137</sup>

<sup>131</sup> AirTouch Comments on Petitions for Reconsideration at 21-22; The Personal Communications Industry Association Opposition to and Comments on Petitions for Reconsideration (PCIA Opposition) at 4; *see* PCIA Reply Comments at 7.

<sup>132</sup> *Second Report and Order and Further Notice*, 12 FCC Rcd at 2817-18, ¶ 194.

<sup>133</sup> **Big Bend Petition at 3, 9; Century Petition at 3, 9; Lincoln Petition at 3, 9; Mid-Rivers Petition at 3, 9; Nucla-Naturita Petition at 3, 9.**

<sup>134</sup> **Big Bend, for example, asserts that in the absence of mandatory partitioning rules, geographic area licensees will likely demand excessive amounts of money for partitioned licenses in rural areas. Big Bend Petition at 9 n.11.**

<sup>135</sup> ***See, e.g., Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees, Report and Order and Further Notice on Proposed Rulemaking*, 11 FCC Rcd 21831, 21844, ¶ 16 (1996) (*Partitioning and Disaggregation Report and Order and Further Notice*) (rejecting rural telephone companies' argument that they will not be able to compete for partitioned PCS licenses unless the Commission restricts partitioning solely to rural telephone companies as contrary to Commission policy of encouraging competition).**

<sup>136</sup> *Second Report and Order and Further Notice*, 12 FCC Rcd at 2745, ¶ 18.

<sup>137</sup> *Id.*

35. **Discussion.** ProNet suggests that the Commission should clarify that under the spectrum reversion rule adopted in the *Second Report and Order and Further Notice*, recovered spectrum automatically reverts to the geographic area licensee in all instances except where an incumbent licensee discontinues operations in a location wholly encompassed by the incumbent licensee's valid composite interference contours.<sup>138</sup> ProNet argues that the geographic area licensee would not be able to serve such an area, and that reversion would be contrary to the Commission's policy of allowing fill-in transmitters anywhere within the incumbent's outer perimeter interference contour.<sup>139</sup> We disagree. As an initial matter, we note that an incumbent's valid composite interference contour does not include areas surrounded by the composite interior contour that is not part of the interference contours of the incumbent's individual sites. ProNet has not demonstrated that a geographic area licensee would be unable to serve areas wholly surrounded by an incumbent; such service by the geographic area licensee would be subject to our interference rules. Moreover, where an incumbent discontinues service to an area, we do not believe it serves the public interest to withhold that area from the geographic area licensee in the hope that the incumbent may wish to resume service sometime in the future. Should an incumbent desire to serve the reverted area in the future, it is free to reach an agreement with the geographic area licensee for the partitioning of this area. This approach is consistent with our treatment of reverted spectrum in the 800 MHz SMR service,<sup>140</sup> and it is in the public interest, as it promotes use of the spectrum. Therefore, we reaffirm that where an incumbent permanently discontinues operations at a given site, as defined by our rules,<sup>141</sup> the spectrum automatically reverts to the geographic area licensee.

## 6. System-wide Licensing

36. **Background.** In the *Second Report and Order and Further Notice*, we allowed all incumbent paging licensees to either continue operating under existing authorizations or trade in their site-specific licenses for a single system-wide license. We stated that such a system-wide license would be demarcated by the aggregate of the interference contours around each of the incumbent licensee's contiguous sites operating on the same channel.<sup>142</sup> We also concluded that incumbent licensees may add or modify sites within their existing interference contours without filing site-specific applications, but may not expand their existing interference contours without the consent of the geographic area licensee.<sup>143</sup>

<sup>138</sup> ProNet Petition at 8; ProNet Comments on Petitions for Reconsideration at 8; *see* AirTouch Comments on Petitions for Reconsideration at 16-17 (supporting ProNet's arguments).

<sup>139</sup> *Id.*

<sup>140</sup> *See* 800 MHz Memorandum Opinion and Order on Reconsideration, 12 FCC Rcd at 9982-83, ¶¶ 27-29.

<sup>141</sup> *See* 47 C.F.R. § 22.317.

<sup>142</sup> *Second Report and Order and Further Notice*, 12 FCC Rcd at 2764, ¶ 58.

<sup>143</sup> *Id.*; *see* Wireless Telecommunications Bureau clarifies Interim Licensing Rules Applicable to Addition of Internal Sites by 929 MHz Nationwide Licensees, Public Notice, 11 FCC Rcd 11632 (1996).

37. **Discussion.** Although system-wide licenses and site-specific licenses are identical in terms of operational and technical flexibility, some licensees may realize administrative benefits from consolidating site-specific licenses. Petitioners seek clarification of the procedures for converting site-specific licenses to a system-wide license.<sup>144</sup> In the *ULS Order*, the Commission stated that conversions from site-specific to system-wide licenses are minor modifications subject to the Commission's prior approval.<sup>145</sup> Applicants requesting a system-wide license will be notified by public notice of the action taken on their request and public notices granting such requests will indicate the new call sign associated with the system-wide license. The expiration date of the system-wide license will be determined by the earliest expiration date of the site-specific licenses that are consolidated into the system-wide license. Once a system-wide license is approved, the licensee must submit a timely renewal application for the system-wide license based on that expiration date. We emphasize, however, that the licensee is solely responsible for filing timely renewal applications for site-specific licenses included in a system-wide license request until the request is approved. If the situation arises where a site-specific renewal application for a site included in a system-wide license request and the system-wide license request itself are pending at the same time before the Bureau, the Bureau may elect to complete the site-specific license renewal proceeding prior to making a determination on the system-wide license request. Renewal applications will be placed on public notice as accepted for filing pursuant to our rules. To minimize administrative burdens on licensees and conserve government resources, the Bureau intends to use electronic filing to the greatest extent possible in accepting and processing these applications.<sup>146</sup>

38. Several petitioners seek clarification of the definition of "contiguous sites" for the purpose of determining an incumbent's "aggregate interference contour."<sup>147</sup> Blooston asks whether service contours or interference contours must overlap to meet the definition of "contiguous sites."<sup>148</sup> PageNet asserts that contiguous sites are defined by overlapping service area contours.<sup>149</sup> Petitioners also urge the Commission to modify section 503(i) to define non-geographic area incumbent systems according to the composite

<sup>144</sup> Metrocall Petition at 22-23; Morris Petition at 11; Nationwide Petition at 11.

<sup>145</sup> Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97 and 101 of the Commission's Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Service, *Report and Order*, 13 FCC Rcd 21027, 21060, ¶ 72 (1998) (*ULS Report and Order*); see also 47 C.F.R. § 1.929 (k)(7). We note that we inadvertently omitted codifying the requirement that conversions to system-wide licenses are subject to Commission approval. We will amend section 1.947 of our rules accordingly upon reconsideration of the *ULS Report and Order*.

<sup>146</sup> See, e.g., Wireless Telecommunications Bureau Announces New Procedures for Filing Part 22 Paging Applications in Universal Licensing System (ULS) Starting July 1, 1998, *Public Notice*, DA 98-989 (May 22, 1998).

<sup>147</sup> Blooston Petition at 8-9; Metrocall Petition at 22-23; Morris Petition at 11; Nationwide Petition at 11; ProNet Petition at 3 & 18; AirTouch Comments on Petitions for Reconsideration at 15-16; Arch Reply at 8-9.

<sup>148</sup> Blooston Petition at 9.

<sup>149</sup> Paging Network, Inc. Reply to Oppositions and Comments Regarding Certain Petitions for Reconsideration and Clarification (PageNet Reply) at 6-7.

interference contours of all authorized transmitters, including valid construction permits, regardless of the grant date.<sup>150</sup> PageNet and Arch oppose the inclusion of expired construction permits in determining composite interference contours.<sup>151</sup> We have consistently stated that system-wide licenses are defined by interference contours<sup>152</sup> and we now clarify that contiguous sites are defined by overlapping interference contours, not service contours. We further clarify that all authorized site-specific paging licenses and construction permits are included in a composite interference contour. We are continuing to process site-specific applications that were not mutually exclusive and were filed prior to July 31, 1996, and we will not revoke authorized construction permits before the construction deadline. In addition, we are continuing to resolve pending petitions that might result in grants of applications.<sup>153</sup> We also note that for purposes of due diligence we intend to release, prior to auction, a list of site-specific applications and petitions pending at that time. Accordingly, we amend section 503(i) to clarify that geographic area licensees must provide co-channel interference protection in accordance with sections 22.537 or 22.567, as appropriate for the channel involved, to all authorized co-channel facilities of exclusive licensees within the paging geographic area.<sup>154</sup>

39. Petitioners also contend that system-wide licenses should include areas where an incumbent's interference contours do not overlap, but where no other licensee could place a transmitter because of interference rules.<sup>155</sup> We conclude that a system-wide license is merely a consolidation of a system's call signs such that one call sign will be associated with the system-wide license. The contours of the system-wide license remain as the aggregate of the contours of the individual sites. We find that inclusion of areas that are outside of an incumbent's interference contours within a system-wide license would be contrary to our objective of prohibiting encroachment on the geographic area licensee's operations.

<sup>150</sup> **AirTouch Comments on Petitions for Reconsideration at 16; ProNet Petition at 3-6; ProNet Comments on Petitions for Reconsideration at 7-8; ProNet Reply at 4; Schuylkill Petition at 3-4; Western Paging Petition at 3-4.**

<sup>151</sup> **Arch Reply at 7; Paging Network, Inc. Comments in Opposition of Certain Petitions for Reconsideration and Clarification (PageNet Opposition) at 8; PageNet Reply at 9.**

<sup>152</sup> **Second Report and Order and Further Notice, 12 FCC Rcd at 2764, ¶ 58; Notice, 11 FCC Rcd at 3116, ¶ 37; 800 MHz Second Report and Order, 12 FCC Rcd at 19106, ¶ 72; 800 MHz Memorandum Opinion and Order, 12 FCC Rcd at 9992, ¶ 63; Wireless Telecommunications Bureau Clarifies Definition of Interference Contour for Interim Paging Rules, Public Notice, 11 FCC Rcd 11509 (1996); Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rulemaking, 11 FCC Rcd 1463, 1514, ¶ 88 (1995) (800 MHz Report and Order).**

<sup>153</sup> **For example, the resolution of pending petitions for reconsideration of grants of site-by-site paging applications might result in new grants of site-specific licenses. In addition, as previously stated, we will resolve in separate orders a number of petitions for reconsideration of the CWD Order dismissing pending mutually exclusive applications that have raised arguments as to whether the subject applications were in fact mutually exclusive with other applications. Again, these petitions could result in grants of site-specific licenses. See supra at note 53 and accompanying text.**

<sup>154</sup> **See infra at ¶ 48 (further clarification of section 22.503(i)).**

<sup>155</sup> **Blooston Petition at 8-9; Metrocall Petition at 22-23; Morris Petition at 11; Nationwide Petition at 11; ProNet Petition at 3 & 18; AirTouch Comments on Petitions for Reconsideration at 15-16; Arch Reply at 8-9.**

As we explained for our 900 MHz SMR service<sup>156</sup> and reiterated in the *Second Report and Order and Further Notice*,<sup>157</sup> our objective is to allow incumbents to continue existing operations without harmful interference and to give them the flexibility to modify or augment their systems so long as they do not encroach upon the geographic area licensee's operations. At the same time, a system-wide license is not intended to expand an incumbent's system beyond the contours of its individual sites. Incumbent licensees seeking to expand their contours may participate in the auction of geographic area licenses, or may seek partitioning agreements with the geographic area licensee.

40. Blooston seeks clarification as to whether the discontinuance of operation of an interior site would jeopardize a system-wide license.<sup>158</sup> Where a system-wide licensee allows an area within its system to revert to the geographic area licensee, the system-wide license shall remain intact; however, the parameters of the system-wide license shall be amended to the demarcation of the remaining contiguous interference contours.

41. ProNet asserts that incumbents should be permitted to include remote transmitters linked to contiguous systems via control/repeater facilities or by satellites within their system-wide licenses, or in the alternative should be allowed to maintain separate licenses for any remote, stand-alone transmitters.<sup>159</sup> We agree. We will allow licensees to include in system-wide licenses remote, stand-alone transmitters that are linked to contiguous systems via control/repeater facilities or by satellites. Including these remote, stand-alone sites in the system-wide license, however, in no way expands the licensee's composite interference contours. We will also permit licensees to maintain separate site-specific licenses for remote, stand-alone transmitters. We believe that this will reduce unnecessary regulatory burdens on licensees, reduce administrative costs on the industry, and thereby benefit consumers. We further find that an incumbent licensee should be permitted to obtain multiple system-wide licenses where applicable.

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<sup>156</sup> **Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, *Second Report and Order and Second Further Notice of Proposed Rulemaking*, 10 FCC Rcd 6884, 6901, ¶ 47 (1995).**

<sup>157</sup> ***Second Report and Order and Further Notice*, 12 FCC Rcd at 2764, ¶ 57.**

<sup>158</sup> **Blooston Petition at 9.**

<sup>159</sup> **ProNet Petition at 8-9; ProNet Comments on Petitions for Reconsideration at 9.**

## C. Interference

### 1. Co-Channel Interference Protection for Incumbent Licensees

42. **Background.** Co-channel interference rules are designed to protect licensees from interference caused by other licensees operating facilities on the same channel. Exclusive paging systems are protected from co-channel interference by a variety of rules that govern transmitter height and power, distance between transmission stations, the licensee's protected service area, and the field strength of the licensee's service and interfering signals.<sup>160</sup> For the CCP channels below 931 MHz, we use mathematical formulas to determine the distance from each transmitting site to its service and interference contours along the eight cardinal radials from the transmitter site.<sup>161</sup> To determine service and interference contours for the 931 MHz channels, we use two tables of fixed radii, Tables E-1 and E-2.<sup>162</sup> Prior to adoption of the *Second Report and Order and Further Notice*, for the 929 MHz exclusive channels, we used geographic separation rules that agreed with the separations that result from the application of the fixed radii tables for 931 MHz.<sup>163</sup> Unlike our CCP rules, at that time, our PCP rules did not formally define a protected service or interference contour for each station.<sup>164</sup>

43. In the *Notice*, we proposed to adopt the eight-radial contour method and new mathematical formulas, rather than fixed tables, to determine the service and interference contours for the exclusive 929 MHz and 931 MHz channels.<sup>165</sup> We found that using these formulas would more reasonably predict potential interference to incumbents and provide geographic area licensees with greater flexibility in placing their facilities.<sup>166</sup> The commenters addressing this issue strenuously objected to our proposal, stating that our proposed method could require incumbents to reduce coverage or be required to accept interference from geographic area licensees.<sup>167</sup> Consequently, we decided not to adopt the proposed formulas.<sup>168</sup> We did,

<sup>160</sup> *Second Report and Order and Further Notice*, 12 FCC Rcd at 2768, ¶ 66 (citing *Notice*, 11 FCC Rcd at 3119, ¶ 46).

<sup>161</sup> *Second Report and Order and Further Notice*, 12 FCC Rcd at 2768, ¶ 67; 47 C.F.R. §§ 22.537 & 22.567. The lower band CCP channels are located at 35-36 MHz, 43-44 MHz, 152-159 MHz, and 454-460 MHz.

<sup>162</sup> *Second Report and Order and Further Notice*, 12 FCC Rcd at 2768, ¶ 67 (citing 47 C.F.R. § 22.537(e) & (f)).

<sup>163</sup> *Id.* (citing 47 C.F.R. § 90.495(b)(2)(1996)).

<sup>164</sup> *See Notice*, 11 FCC Rcd at 3120, ¶ 54.

<sup>165</sup> *Id.* at 3119-20, ¶¶ 49-55.

<sup>166</sup> *Id.* at 3119, ¶ 50.

<sup>167</sup> *Second Report and Order and Further Notice*, 12 FCC Rcd at 2768-69, ¶ 68.

<sup>168</sup> *Id.* at 2769, ¶ 69.



however, adopt Tables E-1 and E-2 for the exclusive 929 MHz and 931 MHz channels, thus maintaining the *status quo* for 931 MHz channels and conforming 929 MHz channels to the current procedures for 931 MHz channels.<sup>169</sup>

44. **Discussion.** Several petitioners now request that instead of using Tables E-1 and E-2, we permit incumbents to employ alternative formulas to determine the interference contours of "fill-in" transmitters.<sup>170</sup> PageNet suggests using signal strength criteria, rather than alternative formulas, for determining the interference contours of "fill-in" transmitters.<sup>171</sup> We do not find that permitting incumbents to use different formulas for "fill-in" transmitters will serve the public interest. The record in this proceeding supports our decision to use Tables E-1 and E-2 to determine interference and service contours for all 929 MHz and 931 MHz transmitters.<sup>172</sup> We find that to permit incumbents to add sites under alternative formulas depending on the location and power of each of their transmitters significantly raises the risk of encroachment on a geographic area licensee's territory.<sup>173</sup> In addition, the incumbent will have the opportunity to cover any existing gaps in coverage by either competing for the geographic area license or by partitioning from the geographic area licensee. Thus, we affirm our earlier decision to use Tables E-1 and E-2 to determine interference contours for both perimeter and "fill-in" transmitters.

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<sup>169</sup> *Id.*

<sup>170</sup> **AirTouch Comments on Petitions for Reconsideration at 17; Arch Petition at 2-5; Arch Opposition at 1-3; Blooston Petition at 9-10; Blooston, Mordkofsky, Jackson & Dickens Reply to Oppositions and Comments on Petitions for Reconsideration (Blooston Reply) at 7-8; ProNet Petition at 9-18; ProNet Comments on Petitions for Reconsideration at 10-12; Reply of ProNet Inc. (ProNet Reply) at 7-8. Fill-in transmitters are "[t]ransmitters added to a station, in the same area and transmitting on the same channel or channel block as previously authorized transmitters, that do not expand the existing service area, but are established for the purpose of improving reception in dead spots." 47 C.F.R. § 22.99.**

<sup>171</sup> **PageNet Reply at 3-6. PageNet initially opposed petitioners' proposals of alternative formula, arguing that they would only lead to litigation between incumbents and geographic area licensees. PageNet Opposition at 11-12.**

<sup>172</sup> ***Second Report and Order and Further Notice*, 12 FCC Rcd at 2769, ¶ 69.**

<sup>173</sup> **Tables E-1 and E-2 provide both the geographic area licensee and incumbent licensee with an objective standard for determining where they can place their transmitters without causing interference. As we stated in the *Second Report and Order*, formulas would, in most cases, reduce the service area and composite interference contour that incumbent licensees have relied on in developing their systems to date. *Second Report and Order and Further Notice*, 12 FCC Rcd at 2769, ¶ 69. Further, formulas may underestimate the actual reliable coverage of paging systems. *Id.***

## 2. Adjacent Geographic Area Licensees

45. **Background.** In the *Notice*, we sought comment on a geographic area licensee's obligations to resolve possible interference concerns of adjacent geographic area licensees by: (1) reducing the signal level at the service area boundary; or (2) negotiating a mutually acceptable agreement with the neighboring geographic area licensee.<sup>174</sup> In the *Second Report and Order and Further Notice*, we concluded that geographic area licensees should be able to negotiate mutually acceptable agreements with all adjacent geographic area licensees if their interfering contours extend into other geographic areas.<sup>175</sup> We also indicated that adjacent licensees have a duty to negotiate in good faith with one another regarding co-channel interference protection. We noted that lack of adequate service to the public because of failure to negotiate reasonable solutions with adjacent geographic area licensees could reflect negatively on licensees seeking renewal.<sup>176</sup>

46. **Discussion.** Certain parties now seek clarification of the good faith negotiation requirement, arguing the standard is vague and invites litigation.<sup>177</sup> Blooston further notes that while the cellular industry has negotiated agreements, paging coordination will be more difficult because paging carriers operate on only one frequency, while cellular carriers have many channels with which to negotiate.<sup>178</sup> The *Second Report and Order and Further Notice* adopted the good faith standard to provide flexibility for licensees to negotiate mutually acceptable agreements. Thus, adjacent geographic area licensees have a duty to negotiate with each other in good faith regarding co-channel interference protection when an interfering contour extends into an adjacent geographic area or areas. Providing for adjacent geographic area licensees to negotiate mutually acceptable agreements should reduce the amount of unserved area that could result from specifying a minimum distance a geographic area licensee's transmitter must be from a geographic border.<sup>179</sup> In other services, such as the Multipoint Distribution Service (MDS), we have expected licensees to cooperate among themselves to resolve interference issues before bringing them to the attention of the Commission.<sup>180</sup> Based on the limited number of interference complaints that the Commission has been called upon to resolve, we believe this policy has worked well in the MDS service. Moreover, none of the parties have proposed a better way to achieve flexibility and the reduction of unserved areas. We therefore affirm our previous conclusion.

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<sup>174</sup> *Notice*, 11 FCC Red at 3121, ¶ 62.

<sup>175</sup> *Second Report and Order and Further Notice*, 12 FCC Red at 2771, ¶ 73.

<sup>176</sup> *Id.*

<sup>177</sup> *Airtouch Comments on Petitions for Reconsideration at 18; Blooston Petition at 17; ProNet Petition at 23.*

<sup>178</sup> *Blooston Petition at 17.*

<sup>179</sup> *Second Report and Order and Further Notice*, 12 FCC Red at 2771, ¶ 73.

<sup>180</sup> *See* 47 C.F.R. § 21.902(a) & (b).

### 3. Channel Exclusivity

47. **Background.** Prior to 1993, all PCP channels were assigned on a non-exclusive basis. In 1993, the Commission established rules allowing PCP carriers in the 929-930 MHz band to obtain channel exclusivity as local, regional, and nationwide paging systems on thirty-five of the forty 929 MHz PCP channels.<sup>181</sup> Those licensees that qualified for exclusivity as a local, regional, or nationwide system at that time were grandfathered as exclusive licensees, and required to maintain their existing sharing arrangements with other licensees, but were protected from the addition of other licensees on these channels.<sup>182</sup> Thus, no application for a new paging site would be granted on a channel assigned to an incumbent who qualified for exclusivity if the applicant proposed a paging facility that did not comply with the separation standards based on antenna height and transmitter power of the respective systems.<sup>183</sup> All other incumbent licensees were grandfathered with respect to their existing systems as shared licensees, and required to continue to share channels with each other.<sup>184</sup> We note that grandfathered licensees could not add stations to their existing systems in areas where a co-channel licensee had qualified for exclusivity.<sup>185</sup> Therefore, on these thirty-five 929 MHz channels, we have: (1) exclusive incumbents: grandfathered exclusive systems that are exclusive with respect to new licensees, but share with other grandfathered licensees; (2) non-exclusive incumbents: grandfathered shared licensees; (3) licensees who failed to construct enough sites to qualify for exclusivity under the *PCP Exclusivity Order* (considered "secondary" with respect to licensees with earned exclusivity); and (4) licensees with earned exclusivity. In the *Second Report and Order and Further Notice*, we concluded that geographic area licensees must provide co-channel protection to all incumbent licensees.<sup>186</sup>

48. **Discussion.** PCIA, PageNet, and ProNet seek clarification as to whether non-exclusive 929 MHz licensees operating on the thirty-five exclusive channels (*i.e.*, categories 2 and 3 in the above paragraph) will receive the same interference protection as an exclusive licensee.<sup>187</sup> AirTouch and Arch seek clarification that the Commission did not elevate incumbent licensees operating on shared channels to

<sup>181</sup> **Amendment of the Commission's Rules to Provide Channel Exclusivity to Qualified Private Paging Systems at 929-930 MHz, Report and Order, 8 FCC Rcd 8318 (1993) (PCP Exclusivity Order).** The five remaining channels continued to be licensed on a shared basis. *Id.*

<sup>182</sup> *Id.* at 8329, ¶ 31.

<sup>183</sup> *Id.* at 8330, ¶ 32; *see* 47 C.F.R. § 22.537. We note that no application would be granted on a channel where a licensee qualified for nationwide exclusivity.

<sup>184</sup> *PCP Exclusivity Order*, 8 FCC Rcd at 8329, ¶ 31.

<sup>185</sup> *Id.* at 8330, n.66. Even where expansion was not allowed, however, we allowed grandfathered licensees to make minor modifications needed to maintain an existing system (*e.g.*, relocation of a transmitter upon expiration of site lease). *Id.*

<sup>186</sup> *Second Report and Order and Further Notice*, 12 FCC Rcd at 2769, ¶ 69.

<sup>187</sup> PageNet Petition at 18; PageNet Opposition at 14; PageNet Reply at 1-3; PCIA Petition at 16; ProNet Petition at 24.

exclusive status.<sup>188</sup> PageNet specifically argues that section 22.503(i) will require that nationwide geographic area licensees terminate sharing arrangements they have with non-exclusive licensees and provide interference protection to them.<sup>189</sup> API, however, contends that section 22.503(i) does not require the termination of existing channel sharing arrangements involving exclusive incumbent licensees and non-exclusive incumbent licensees.<sup>190</sup> Non-exclusive incumbent licensees on the thirty-five exclusive 929 MHz channels will continue to operate under the same arrangements established with the exclusive incumbent licensees and other non-exclusive incumbent licensees prior to the adoption of the *Second Report and Order and Further Notice*. We further clarify that MEA, EA, and nationwide geographic area licensees will be able to share with non-exclusive incumbent licensees on a non-interfering shared basis. The non-exclusive incumbent licensees must cooperate with the nationwide and geographic area licensees' right to share on a non-interfering shared basis. Accordingly, we amend section 22.503(i) to clarify that nationwide and geographic area licensees are afforded the right to share with non-exclusive incumbent licensees on a non-interfering shared basis. As for shared PCP channels, we concluded in the *Second Report and Order and Further Notice* that licensees on these channels will not be converted to exclusive status and that these channels will not be subject to competitive bidding.<sup>191</sup> Therefore, licensees on these shared channels will continue to share with any future licensees.

#### 4. Mobile Telephone Providers and Control Links

49. **Background.** Blooston requests that we grant full interference protection to existing control link<sup>192</sup> operations on the UHF and VHF paired channels originally allocated for mobile telephone service once the "auction for the UHF and VHF common carrier channels" is completed.<sup>193</sup> Blooston contends that in reliance on the Commission's proceeding in CC Docket 87-120, which permitted paging carriers to use these two-way channels as control links, "numerous carriers have configured their paging systems on [the] basis of their protected use of a VHF or UHF frequency to link their base stations."<sup>194</sup> Consolidated requests clarification as to whether incumbent mobile telephone service providers operating on

<sup>188</sup> Arch Petition at 8-9; Arch Reply at 5-7; AirTouch Comments on Petitions for Reconsideration at 20-21.

<sup>189</sup> PageNet Petition at 17-18.

<sup>190</sup> Comments of American Paging, Inc. (API Comments on Petitions for Reconsideration) at 4.

<sup>191</sup> *Second Report and Order and Further Notice*, 12 FCC Rcd at 2756-58, ¶¶ 40.

<sup>192</sup> A control link or "control transmitter" is a fixed transmitter in the Public Mobile Services that transmits control signals to one or more base or fixed stations for the purpose of controlling the operation of the base or fixed stations, and/or transmits subscriber communications to one or more base or fixed stations that retransmit them to subscribers. 47 C.F.R. § 22.99.

<sup>193</sup> Blooston Petition at 22.

<sup>194</sup> *Id.*

the lower paging frequencies will be protected from interference from geographic area licensees.<sup>195</sup> Furthermore, Consolidated requests that incumbent mobile telephone service providers be permitted to obtain additional site licenses on a secondary basis.<sup>196</sup>

50. **Discussion.** We conclude that Blooston's request to protect control link operations is unclear and outside the scope of this proceeding. Our rules do not generally provide protection from interference to fixed stations<sup>197</sup> and Blooston's request would require a rulemaking to develop interference criteria, which is beyond the scope of this proceeding. In addition, Blooston's request is unclear. For example, Blooston does not specify whether any protection provided should apply to the mobile channel used as a control link or the base channel used as a control link. We therefore deny Blooston's request. With respect to Consolidated's request for clarification, we reiterate that geographic area licensees must provide co-channel protection to all incumbent licensees, including incumbent mobile telephone service providers operating on the 150 MHz and 450 MHz bands.<sup>198</sup>

51. We will not, however, grant Consolidated's request that incumbent mobile telephone service providers be permitted to obtain additional site licenses on a secondary basis. In the *Second Report and Order*, we permitted BETRS operators to obtain site licenses on a secondary basis.<sup>199</sup> We noted that BETRS primarily serves rural, mountainous, and sparsely populated areas where it would be impractical to provide wireline telephone service.<sup>200</sup> We also stated that if any geographic area licensee subsequently notifies the BETRS licensee that a secondary facility must be shut down because it may cause interference to the paging licensee's existing or planned facilities, the BETRS licensee must discontinue use of the particular channel at that site no later than six months after such notice.<sup>201</sup> While we are generally aware that two-way incumbent mobile telephone service providers serve rural areas in the western part of the country,<sup>202</sup> Consolidated provides no information at all for determining whether to permit incumbent mobile telephone service providers to operate facilities on a secondary basis. We therefore deny Consolidated's request.

<sup>195</sup> Consolidated Petition at 10.

<sup>196</sup> *Id.*

<sup>197</sup> See 47 C.F.R. § 22.351(c)(4) (providing that "[e]xcept as provided elsewhere in this part, no protection from interference is afforded in the following situations: . . . (4) *Interference to fixed stations.* Licensees should attempt to resolve such interference by technical means or operating arrangements").

<sup>198</sup> See *Second Report and Order and Further Notice*, 12 FCC Rcd at 2769, ¶ 69.

<sup>199</sup> *Id.* at 2753, ¶ 34.

<sup>200</sup> *Id.* at 2749 & 2753, ¶¶ 26 & 34.

<sup>201</sup> *Id.* at 2753-54, ¶ 35.

<sup>202</sup> *Id.* at 2754, ¶ 36.

#### D. Shared Channels

52. **Background.** In the *Notice*, we sought comment on whether to use geographic area licensing for the shared PCP channels in the 152-158 MHz, 462 MHz, and 465 MHz bands.<sup>203</sup> Specifically, we sought comment on whether we should: (1) convert lower band shared PCP channels to exclusive use and implement geographic area licensing; (2) issue only a certain number of licenses per shared channel and use competitive bidding to choose among mutually exclusive applications once the limit is reached; or (3) retain the *status quo*.<sup>204</sup>

53. Most commenters who responded to this issue in the *Notice* were opposed to geographic area licensing for the shared channels and sought to retain the *status quo*.<sup>205</sup> In the *Second Report and Order and Further Notice*, we found that the cost and disruption caused by converting shared channels to exclusive channels and subjecting them to competitive bidding would outweigh the benefits.<sup>206</sup> We did not impose a limit or "cap" on the number of licensees for each of the shared channels, as we found that capacity limits of paging channels are based primarily on use and not the number of licensees. Thus, "capping" the number of licensees would not necessarily ensure efficient spectrum use.<sup>207</sup> We also determined in the *Second Report and Order* that pending the resolution of issues related to consumer fraud addressed in the *Further Notice*, we would retain our interim licensing rules, which limited applications to incumbents seeking to expand their systems. We did, however, eliminate the 40-mile requirement for new sites, allowing incumbents to file for new sites at any location.<sup>208</sup> Finally, noting that we would not grant applications proposing operations on a commercial basis, we allowed new applicants to file applications for private, internal-use systems,<sup>209</sup> and we reiterated that Special Emergency Radio Service providers would remain exempt from the licensing freeze and could continue to file applications on shared channels.<sup>210</sup>

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<sup>203</sup> *Notice*, 11 FCC Rcd at 3115, ¶ 31.

<sup>204</sup> *Id.* at 3115, ¶ 32.

<sup>205</sup> *Second Report and Order and Further Notice*, 12 FCC Rcd at 2754-55, ¶ 38.

<sup>206</sup> *Id.* at 2756, ¶ 40.

<sup>207</sup> *Id.* at 2757, ¶ 42.

<sup>208</sup> *Id.* at 2757, ¶ 43.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 2757-58, ¶ 43.

54. **Discussion.** Preferred Networks and Teletouch oppose granting new applicants licenses for private, internal-use systems.<sup>211</sup> Preferred Networks alleges that allowing new applications would encourage speculative applications.<sup>212</sup> Teletouch argues that allowing new applications would result in harmful congestion on the shared PCP channels.<sup>213</sup> As a remedy, Preferred Networks and Teletouch urge us to retain our interim rules, which limit the filing of new applications primarily to incumbents.<sup>214</sup> In the alternative, Preferred Networks and Teletouch suggest that we: (1) require new applicants to perform channel loading analyses; (2) restrict their emission to digital pages; and (3) adopt and enforce channel sharing arrangements requiring new applicants to accept reasonable sharing arrangements with incumbents.<sup>215</sup> TSR Paging also requests that the Commission limit applications filed on the 929 MHz shared channels to incumbent licensees.<sup>216</sup> Preferred Networks and Teletouch further urge the Commission to limit incumbents' expansion applications to sites that are within 75 miles of an existing facility, in lieu of the 40-mile requirement that we have eliminated, to deter incumbents from filing speculative applications.<sup>217</sup> Finally, Preferred Networks and Teletouch ask that the Commission permit applications from public safety and medical services providers for shared channels only upon certification that no public safety channels are available to meet those providers' needs.<sup>218</sup>

55. We do not believe that eliminating the opportunity for new licensees to establish service on shared channels serves the public interest because it does not promote efficient use of spectrum. As we stated in the *Second Report and Order and Further Notice*, the capacity limits on paging channels are based primarily on use and not the number of licensees.<sup>219</sup> We do not believe that concerns about speculation or congestion on shared channels are sufficient at this time to warrant additional burdens on new applicants. We have no evidence, and Preferred Network has provided no evidence, that speculative applications have

<sup>211</sup> Preferred Networks, Inc. Petition for Reconsideration (Preferred Networks Petition) at 3-5; Teletouch Licenses, Inc. Petition for Reconsideration (Teletouch Petition) at 7-10; *see* AirTouch Comments on Petitions for Reconsideration at 20-21; and Metrocall Response to Petitions for Reconsideration at 17-18.

<sup>212</sup> Preferred Networks Petition at 3, 5.

<sup>213</sup> Teletouch Petition at 8-9.

<sup>214</sup> Preferred Networks Petition at 3; Teletouch Petition at 7; *see* AirTouch Petition at 20 (generally supporting the request of Preferred Network and Teletouch "to limit the further sharing of *all* shared frequencies").

<sup>215</sup> Preferred Networks Petition at 4; *see* Teletouch Petition at 9, n.6.

<sup>216</sup> TSR Paging at 2-5.

<sup>217</sup> Preferred Networks Petition at 5-6; Teletouch Petition at 3-7.

<sup>218</sup> Preferred Network Petition at 4; Teletouch Petition at 9-10; *see* Metrocall Response to Petitions for Reconsideration at 18.

<sup>219</sup> *Second Report and Order and Further Notice*, 12 FCC Rcd at 2757, ¶ 42.

created problems in connection with private, internal-use systems. Moreover, Teletouch bases its arguments about congestion on hypothetical situations.<sup>220</sup> Our goal is to increase the use of these shared channels, not to unduly restrict access to them. After reviewing the record, therefore, we affirm our previous decision and decline to impose limits on the number of licensees for each channel in a particular area. We will take further action if we find that the transition of the exclusive channels to geographic area licensing results in congestion and interference problems on the shared channels, causing overall service to the public to be reduced. We also decline to adopt a certification requirement for public safety providers. Because petitioners once again base their arguments on hypothetical situations, we find it inappropriate to impose additional requirements on public safety providers at this time. Finally, we will be removing our interim licensing rules on all the shared paging channels.<sup>221</sup> Accordingly, we decline to impose any mileage limitations on expansion applications to provide service on shared paging channels.

56. AirStar contends that the Commission should reconsider its decision not to subject the five 929 MHz non-exclusive channels to competitive bidding.<sup>222</sup> AirStar argues that a geographic area license on a shared 929 MHz channel would be more valuable than a geographic area license for an exclusive channel because the geographic area licensee on a shared channel would receive the right to serve the entire geographic area, whereas geographic area licensees on exclusive channels only receive the right to build out in unserved area.<sup>223</sup> AirStar further explains that the geographic area licensee would have a greater incentive to make the investment in equipment necessary to support efficient time sharing if it does not have to plan against the possibility of an unlimited number of additional entrants in the market.<sup>224</sup> We decline to reconsider our decision not to subject shared channels to competitive bidding. AirStar's arguments to include shared channels in competitive bidding are effectively a request to limit the number of licensees authorized to operate on shared channels. As previously stated, we decline to impose limits on the number of licensees for each channel in a particular area.<sup>225</sup>

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<sup>220</sup> **Teletouch Petition at 8-9.**

<sup>221</sup> ***See infra* at ¶ 167.**

<sup>222</sup> **AirStar Paging Inc. Petition for Clarification and Reconsideration (AirStar Petition) at 8.**

<sup>223</sup> ***Id.* at 9. AirStar states that a geographic area licensee of a non-exclusive channel would receive the last right to time-share throughout the entire region covered by the license. *Id.***

<sup>224</sup> ***Id.* at 10.**

<sup>225</sup> **In addition, in the *Second Report and Order and Further Notice*, we eliminated finders' preferences immediately for paging services, dismissed all pending finder's preference requests, and stated that we would no longer accept finders' preference requests upon adoption of the *Second Report and Order*. *Second Report and Order and Further Notice*, 12 FCC Red at 2745, ¶ 18. AirStar's petition requests that the Commission process its finder's preference request pending at the time the *Second Report and Order* was adopted. AirStar Petition at 4-8. However, AirStar and Nationwide Paging Inc. subsequently sought withdrawal of AirStar's finder's preference request pursuant to a settlement agreement. Letter from Frederick M. Joyce, Attorney for Nationwide Paging, Inc. to Steve Weingarten, Acting Chief, Commercial Wireless Division of 3/20/98. The withdrawal request and issues raised in AirStar's petition regarding its finder's preference request will be disposed of in a separate order.**



57. Metrocall requests that we adopt specific interference rules for shared frequencies, and provide shared frequency licensees with some form of exclusivity protection.<sup>226</sup> In the *Second Report and Order and Further Notice*, we found that shared channels are heavily used by incumbent systems, many of whom have entered into time-sharing or interconnection agreements to avoid interference with one another.<sup>227</sup> We believe the imposition of specific interference requirements at this time could jeopardize the viability of some of these existing relationships. Each licensee who chooses to operate on these shared channels is aware that these channels are, by definition, not for exclusive use and should expect that such private agreements may be necessary. In fact, we noted in the *Second Report and Order and Further Notice* that several commenters had pointed out in response to the *Notice* that incumbents would not benefit from receiving interference protection for their existing service areas, because systems on shared channels have not developed based on a protected service area model.<sup>228</sup> Metrocall has not provided any information that indicates otherwise. We therefore decline to adopt interference rules, as Metrocall requests.

#### E. Coordination with Canada

58. **Background.** In the *Second Report and Order and Further Notice*, we indicated that geographic area licensees will have to file site-specific applications with the Commission, if such filing is necessary for coordination with Canada.<sup>229</sup> Currently, certain paging facilities north of line A or east of Line C on certain channels are coordinated on a site-by-site basis with Industry Canada.<sup>230</sup> The licensee files an application with the Commission and the Commission obtains clearance from Industry Canada.<sup>231</sup>

59. **Discussion.** Blooston requests clarification regarding whether a geographic area licensee must submit a Form 600 to install a transmitter north of Line A on those channels that require Canadian coordination.<sup>232</sup> Blooston also requests clarification regarding whether an incumbent licensee must file a Form 600 before it can implement fill-in transmitters and permissive relocations north of Line A on those

<sup>226</sup> Metrocall Petition at 19-22.

<sup>227</sup> *Second Report and Order and Further Notice*, 12 FCC Rcd at 2756, ¶ 40.

<sup>228</sup> *Id.* at 2756, ¶ 41.

<sup>229</sup> *Id.* at 2745 n.52, 2748 n.70 & 2749 n.73. As we also indicated, licensees must file applications with the Commission when coordination with Mexico is required. No comments were submitted seeking clarification of the filing procedures for sites in the U.S./Mexico border area.

<sup>230</sup> *See* 47 C.F.R. §§ 1.923, 22.531(e). Industry Canada is the Canadian agency that regulates telecommunications services and their providers in Canada. The Commission uses Line A and Line C as a coordination point with Canadian authorities in the assignment of paging channels. Line A and Line C are defined in section 2.1 of our rules, 47 C.F.R. § 2.1.

<sup>231</sup> *See* 47 U.S.C. § 90.175(c).

<sup>232</sup> Blooston Petition at 18.

channels that require Canadian coordination. Blooston requests that the Commission establish an expedited procedure for coordination with Canada.<sup>233</sup>

60. The Commission is bound by international agreement to coordinate with the Canadian government (Industry Canada) stations using certain frequencies north of Line A or east of Line C. Incumbent and geographic area licensees on the lower paging channels must submit a Form 600 (or Form 601) to obtain authorization to operate stations north of Line A or east of Line C because the lower paging channels are subject to the *Above 30 Megacycles per Second Agreement* with Industry Canada.<sup>234</sup> The *U.S.-Canada Interim Coordination Considerations for the Band 929-932 MHz, as amended*, assigns specific 929 and 931 MHz frequencies to the United States for licensing along certain longitudes above Line A, and assigns other specific 929 and 931 MHz frequencies to Canada for licensing along certain longitudes along the U.S.-Canada border. As a result, frequency coordination with Canada is not required for the 929 and 931 MHz frequencies that U.S. licensees are permitted to use north of Line A pursuant to that agreement.<sup>235</sup> In addition, the 929 and 931 MHz frequencies assigned to Canada are unavailable for use by U.S. licensees above Line A as set out in the agreement.<sup>236</sup> Finally, we agree with Blooston's suggestion that the Commission take steps to expedite the coordination of applications with Industry Canada. To this end, we are implementing electronic filing and automated coordination procedures to the extent practical and allowable under our agreements with Canada.<sup>237</sup>

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<sup>233</sup> *Id.*

<sup>234</sup> **Canada Telecommunication: Coordination and Use of Radio Frequencies Above 30 Megacycles per Second, October 24, 1962, as amended, June 24, 1965, U.S.-Canada.**

<sup>235</sup> **Interim Coordination Considerations for the Band 929-931 MHz, Sept. 14, 1983, as amended, Further Interim Coordination for the Shared 931-931 MHz, Feb. 10, 1987, as amended, Letter from Robert W. McCaughern, Deputy Director General, Engineering Programs Branch, DOC, to Bruce Franca, Deputy Chief Engineer, Office of Engineering and Technology, FCC of July 22, 1992; *see* 47 C.F.R. § 22.531(e).**

<sup>236</sup> *Id.*

<sup>237</sup> ***See ULS Report and Order*; 13 FCC Rcd 21027 (1998).**

## F. Power Requirements

61. **Background.** To establish technical parity between 929 MHz and 931 MHz licensees, in the *Second Report and Order and Further Notice* the Commission eliminated the Part 90 height and power limitations on 929 MHz stations and increased the maximum permitted effective radiated power (ERP) for 929 MHz stations to 3500 watts.<sup>238</sup> The Commission determined that paging systems operating on the 929 MHz band are virtually identical to the paging systems operating on the 931 MHz band and should be subject to the same height and power rules.<sup>239</sup> In addition, the Commission noted that conforming these rules allows paging licensees to design their systems in the most efficient manner, especially when integrating two systems where one operates in the 931 MHz band and the other operates in the 929 MHz band.<sup>240</sup>

62. **Discussion.** Petitioners request clarification as to whether incumbent 929 MHz licensees must file a modification application to increase the current ERP for their base stations up to the maximum permissible, 3500 watts.<sup>241</sup> In the *First Report and Order*, we allowed 929 MHz and 931 MHz licensees to make internal system changes without filing an application with the Commission so long as they did not expand the composite interference contour of their existing stations as determined by Table E-2.<sup>242</sup> Similarly, we will not require 929 MHz licensees to file a modification application to increase the ERP for base stations at any location, including exterior base stations, as long as they do not expand their current composite interference contour. Thus, licensees may modify power levels without filing a modification application only to the extent that their composite interference contour, as determined by Table E-2, remains constant or decreases.<sup>243</sup> Again, we restate that, pursuant to the *First Report and Order*, an incumbent licensee is not permitted to increase its composite interference contour.<sup>244</sup>

## G. Coverage Requirements

<sup>238</sup> *Second Report and Order and Further Notice*, 12 FCC Rcd at 2773-74, ¶ 78.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> Metrocall Petition at 23; Morris Petition at 11-12; Nationwide Petition at 11-12.

<sup>242</sup> *First Report and Order*, 11 FCC Rcd at 16587, ¶ 35.

<sup>243</sup> The *Second Report and Order and Further Notice* adopted the fixed distances in Tables E-1 and E-2 in section 22.537 for the exclusive 929 MHz and 931 MHz channels. *Second Report and Order and Further Notice*, 12 FCC Rcd at 2769-70, ¶ 69. Therefore, a base station that is less than 177 meters can increase its ERP to 3500 watts without increasing its interference contour as defined by Table E-2. However, a base station above 177 meters that increases its ERP may increase its interfering contour, as well, as defined by Table E-2; *see* 47 U.S.C. § 22.537.

<sup>244</sup> *First Report and Order*, 11 FCC Rcd at 16587, ¶ 35.

63. **Background.** In the *Second Report and Order and Further Notice*, we stated that coverage requirements are needed as performance requirements to deter speculation, promote prompt service to the public, prevent warehousing, promote rapid deployment of new technologies and services, and promote service to rural areas.<sup>245</sup> We concluded that for each MTA or EA the geographic area licensee must provide coverage to one-third of the population of the entire area within three years of the license grant, and to two-thirds of the population of the entire area within five years of the license grant; or in the alternative, the MTA or EA licensee may provide substantial service to the geographic license area within five years of license grant.<sup>246</sup> In addition, we concluded that failure to meet our coverage requirements would result in automatic termination of the geographic area license.<sup>247</sup> We stated that we would reinstate any licenses that were authorized, constructed, and operating at the time of termination of the geographic area license.<sup>248</sup>

64. **Discussion.** PageNet advocates requiring the geographic area licensee to provide coverage to one-third of the market area within one year, and two-thirds within three years.<sup>249</sup> PageNet states that paging carriers have been able to construct substantial systems in under twelve months.<sup>250</sup> Com-Nav, Ventures in Paging, and OTC argue, however, that small companies will have difficulty meeting PageNet's suggested coverage requirements, especially if they must construct in rugged areas with low population density to cover two-thirds of the population.<sup>251</sup> Ventures in Paging suggests that if the Commission chooses to follow PageNet's suggestion, it should permit an exemption for small businesses or create an exception for EAs that contain a significant number of rural communities.<sup>252</sup>

65. We decline to adopt PageNet's proposal. We believe that our previously adopted coverage requirements adequately promote prompt service to the public without being unduly burdensome on licensees that require a reasonable amount of time to complete construction. We find that areas which are

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<sup>245</sup> *Second Report and Order and Further Notice*, 12 FCC Rcd at 2766-67, ¶ 63.

<sup>246</sup> *Id.* "Substantial service" is defined as service that is sound, favorable, and substantially above a level of mediocre service, which would barely warrant renewal. *Id.* at 2766-67, ¶ 63.

<sup>247</sup> *Id.* at 2767, ¶ 64.

<sup>248</sup> *Id.*

<sup>249</sup> PageNet Petition at 10.

<sup>250</sup> *Id.*

<sup>251</sup> Letter from Com-Nav, Inc. d/b/a Radio Telephone of Maine to William F. Caton, Acting Secretary, Federal Communications Commission of 5/8/97; Letter from Ventures in Paging, L.C., to William F. Caton, Acting Secretary, Federal Communications Commission of 5/8/97; Letter from Oregon Telephone Corporation to William F. Caton, Acting Secretary, Federal Communications Commission of 5/9/97, at 2.

<sup>252</sup> Letter from Ventures in Paging, L.C. to William F. Caton, Acting Secretary, Federal Communications Commission of 5/8/97.

currently unserved have remained so in spite of the fact that paging service has existed for many years and is extremely competitive in some markets. This finding suggests that providers of service in these areas may face unusual difficulties. Moreover, we find that overly stringent coverage requirements would unfairly favor incumbents by erecting a formidable barrier to entry.

66. Petitioners argue that the "substantial service" alternative should be eliminated because it will encourage speculation, greenmail and anti-competitive conduct.<sup>253</sup> However, in some MEAs or EAs, an incumbent licensee may already serve more than one-third of the population. The elimination of the substantial service alternative would prevent a potential co-channel licensee other than the incumbent (*e.g.*, a licensee in an adjacent market) from bidding in these markets because the five-year coverage requirement could only be satisfied by the incumbent. The option of providing a showing of substantial service allows those MEA and EA licensees who cannot meet the three-year and five-year coverage requirements because of the existence of incumbent co-channel licensees to satisfy a construction requirement. Moreover, we recognize that the unserved areas of many MEAs and EAs are rural areas that may be more difficult to serve than urban areas. We think it is in the public interest to encourage build-out in rural areas by allowing licensees to make a substantial service showing. Further, the substantial service option enables licensees to use spectrum flexibly to provide new services without being concerned that they must meet a specific percentage of coverage benchmark or lose their license. Elimination of the substantial service alternative would be inconsistent with promoting competition and opportunities for new entrants.<sup>254</sup> We also note that our approach here is consistent with the coverage requirements imposed on geographic area licensees in the 220 MHz service.<sup>255</sup> Finally, any party relying on "substantial service" in lieu of the three-year and five-year coverage requirements must demonstrate that level of service or will automatically lose the geographic area license.

67. Blooston and AirTouch argue that the substantial service option is used in other market area licensing situations to facilitate the provision of "niche" services in areas where an incumbent does not operate, but that this option should not be employed in the paging context.<sup>256</sup> Blooston contends that unlike

<sup>253</sup> See AirTouch Comments on Petitions for Reconsideration at 9-11; Blooston Petition at 6-8; Metrocall Petition at 16; Metrocall Response to Petitions for Reconsideration at 16; PageNet Petition at 7-9; PCIA Petition at 7-10; ProNet Petition at 21-22.

<sup>254</sup> Section 309(j) of the Communications Act requires the Commission to promote economic opportunity and competition and ensure that new and innovative technologies are readily accessible to the public by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants. 47 U.S.C. § 309(j)(3)(B).

<sup>255</sup> See Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-22 MHz Band by the Private Land Mobile Service, *Third Report and Order and Fifth Notice of Proposed Rulemaking*, 12 FCC Rcd 10943, 11019-21, ¶¶ 160-163 (1997) (*220 MHz Third Report and Order*); 47 C.F.R. § 90.767. We note that in the 220 MHz service, the "substantial service" option may only be satisfied by geographic area licensees who offer either fixed services as part of their system or have one or more incumbent co-channel licensees authorized in their geographic area. 47 C.F.R. § 90.767(2)(b). This is not the case for the paging service. See also 47 C.F.R. § 90.685 (800 MHz EA licensees must provide service to one-third of the population of the geographic area within three years, and two-thirds of the population of the geographic area within five years of initial license grant; or, alternatively, demonstrate substantial service within five years); *id.* § 90.665 (MTA 900 MHz SMR licensees must provide service to one-third of the population of the geographic area within three years, and two-thirds of the population of the geographic area within five years of initial license grant; or, alternatively, demonstrate substantial service within five years).

<sup>256</sup> Blooston Petition at 7; AirTouch Comments on Petitions for Reconsideration at 9-10.

new services on relatively unlicensed spectrum (e.g., PCS), paging has little room for "niche" services.<sup>257</sup> Blooston also contends that with only 25 kHz of spectrum, paging carriers have relatively little flexibility in what services they can offer, and that wide-area coverage is preferable to coverage of isolated niche markets.<sup>258</sup> AirTouch adds that niche services "have not emerged or been proposed by any commenter and would not promote continued development of wide-area systems."<sup>259</sup> We believe, however, that market forces, not regulation, should dictate whether serving a niche market would be viable for a paging provider.

68. Advanced, AirTouch, Blooston, Metrocall, and ProNet argue that the vagueness of the definition of "substantial service" will result in an abundance of litigation.<sup>260</sup> ProNet suggests that substantial service could be defined as coverage of fifty percent at three years, and seventy-five percent at five years, of the geographic area that is not served by co-channel incumbent licensees.<sup>261</sup> ProNet also suggests that the Commission could require licensees to show a specified level of infrastructure investment by the three- and five-year deadlines.<sup>262</sup> AirTouch suggests that the Commission provide specific examples of what construction levels would satisfy the substantial service test, as provided in the *WCS Report and Order*.<sup>263</sup>

69. We decline to adopt specific coverage requirements as the sole means of defining "substantial service," as suggested by ProNet. As already noted, the unserved area of an MEA or EA license (i.e., the area not served by co-channel incumbent licensees at the time the MEA or EA license is granted) may consist largely of spectrum in rural areas. We believe that imposing strict coverage requirements to define "substantial service" in the unserved area would discourage new entrants from attempting to acquire licenses to serve rural areas. Nonetheless, we find that an objective criterion, similar to ProNet's suggestions, would be beneficial in determining substantial service in the unserved areas of an MEA or EA. Therefore, we will presume that the substantial service coverage requirement is satisfied if an MEA or EA licensee provides coverage to two-thirds of the population in the unserved area of the MEA or EA within five years of license grant.

<sup>257</sup> **Blooston Petition at 7.**

<sup>258</sup> *Id.*

<sup>259</sup> **AirTouch Comments on Petitions for Reconsideration at 10.**

<sup>260</sup> **Advanced Petition at 11; AirTouch Petition at 9; Blooston Petition at 6; Metrocall Petition at 17-18; Metrocall Response to Petitions for Reconsideration at 17; ProNet Petition at 21; *see, e.g.*, AirTouch Comments on Petitions for Reconsideration at 9 ("This vague concept will spawn volumes of litigation at the five-year mark when parties attempt to determine whether a geographic area licensee has satisfied its construction obligation and should retain its license.").**

<sup>261</sup> **ProNet Petition at 22.**

<sup>262</sup> *Id.*

<sup>263</sup> **AirTouch Comments on Petitions for Reconsideration at 10 n.14 (citing *WCS Report and Order*, 12 FCC Red at 10843-44, ¶1 113). The rules adopted in the *WCS Report and Order* are found at 47 C.F.R. §§ 27.1-27.325 (1997).**

70. At the same time, we recognize the need for flexibility in areas where stringent coverage requirements would discourage provision of any service. Therefore, we clarify that an MEA or EA licensee may be able to satisfy the substantial service requirement even if it does not provide coverage to two-thirds of the population in the unserved area within five years of license grant. AirTouch correctly points out that we offered guidance to WCS licensees with regard to factors that we would consider in evaluating whether the substantial service requirement has been met, and we now apply this additional guidance to our paging licensees.<sup>264</sup> Thus, the Commission may consider such factors as whether the licensee is offering a specialized or technologically sophisticated service that does not require a high level of coverage to be of benefit to customers, and whether the licensee's operations serve niche markets. A licensee may also demonstrate that it is providing service to unserved or underserved areas without meeting a specific percentage, as we permitted SMR providers in the 800 MHz band to do.<sup>265</sup> Because the substantial service requirement can be met in a variety of ways, the Wireless Telecommunications Bureau will review licensees' showings on a case-by-case basis.

71. PCIA and AirTouch request clarification as to whether licensees who fail to meet coverage requirements will be permitted to retain licenses for those facilities authorized, constructed, and operating at the time the geographic area license is cancelled, or only those authorized, constructed, and operating at the time of grant of the geographic area license.<sup>266</sup> PCIA states that adopting the latter approach would discourage "cherry picking," or providing service to only the most lucrative markets, in geographic service areas. Moreover, PCIA believes that if the Commission were to allow a geographic area licensee to retain the facilities it constructed, despite failure to comply with the requirements associated with a grant of the geographic area license, speculators would be encouraged to participate in the market knowing that they could partially comply with applicable obligations without placing their investment at risk.<sup>267</sup> However, OTC states that geographic area licensees should not have to face the possibility of a stranded investment because of PCIA's "all or nothing" approach.<sup>268</sup>

72. We agree with petitioners' argument that licenses reinstated after termination of the geographic area license should be limited to the sites authorized, constructed, and operating at the time the geographic area license was granted. In other words, the right to use channels any place in the geographic area will be forfeited, but any licenses for which individual sites were constructed and operating prior to the grant of the geographic area license will be reinstated. This is consistent with our rules for other services such as 900 MHz SMR service,<sup>269</sup> and most recently for the 220 MHz service.<sup>270</sup> Further, we believe that

<sup>264</sup> ***WCS Report and Order*, 12 FCC Rcd at 10843-44, ¶ 113 n.279 (citing the use of the substantial service test in SMR and PCS services, as well as WCS).**

<sup>265</sup> ***See 800 MHz Second Report and Order*, 12 FCC Rcd at 19094-95, ¶ 34.**

<sup>266</sup> **PCIA Petition at 24-25; AirTouch Comments on Petitions for Reconsideration at 19.**

<sup>267</sup> **PCIA Petition at 24-25.**

<sup>268</sup> **Letter from Oregon Telephone Corporation to William F. Caton, Acting Secretary, Federal Communications Commission of 5/9/97, at 2.**

<sup>269</sup> ***See Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz***

this approach properly balances our overarching goal of ensuring, to the extent possible, continuous service to the public and our policy of discouraging speculation and spectrum warehousing. Moreover, we are not convinced that this approach would result in a stranded investment, as OTC argues, since the licensee may choose to meet the substantial service coverage requirement. A licensee unable to demonstrate "service that is sound, favorable, and substantially above a level of mediocre service, which would barely warrant renewal" after five years could not have made a significant investment in paging facilities. Accordingly, we amend section 22.503(k) to provide that licensees who fail to meet their coverage requirements will be permitted to retain licenses only for those facilities authorized, constructed, and operating at the time the geographic area license was granted.<sup>271</sup> In such instances, incumbent licensees will have the burden of showing when their facilities were authorized, constructed, and operating, and they should retain necessary records of these sites until they have fulfilled their construction requirements.

## H. Geographic Licensing for Nationwide Channels

### 1. In General

73. **Background.** In the *Notice*, we proposed to exclude from competitive bidding the three 931 MHz channels already designated under our rules for nationwide network paging use, and all 929 MHz channels for which the licensees had met the construction requirements for nationwide exclusivity as of February 8, 1996, the adoption date of the *Notice*.<sup>272</sup> The Commission specifically sought comment on whether a licensee who had obtained nationwide exclusivity on a paging channel should be given a single nationwide license for use of the channel instead of continuing under site-specific authorizations.<sup>273</sup>

74. The *Second Report and Order and Further Notice* awarded nationwide geographic area licenses on the 931 MHz channels and to the eighteen licensees who had constructed sufficient stations to

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and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, *Second Order on Reconsideration and Seventh Report and Order*, 11 FCC Rcd 2639, 2649-53, ¶¶ 27-34 (1995).

<sup>270</sup> See *220 MHz Third Report and Order*, 12 FCC Rcd at 11019-21, ¶¶ 160-165.

<sup>271</sup> See 47 C.F.R. § 22.503(k).

<sup>272</sup> *Notice*, 11 FCC Rcd at 3114, ¶ 26. The three 931 MHz channels, 931.8875 MHz, 931.9125 MHz, and 931.9375 MHz, were designated as nationwide channels in 1982. Amendments of Parts 2 and 22 of the Commission's Rules to Allocate Spectrum in the 928-941 MHz Band and to Establish Other Rules, Policies, and Procedures for One-Way Paging Stations in the Domestic Public Land Mobile Radio Service, *First Report and Order*, 89 F.C.C.2d 1337 (1982), *on reconsideration*, 93 F.C.C.2d 908 (1983); see 47 C.F.R. §§ 22.531(b), 22.551 (1995). Licensees on the 929 MHz channels could earn nationwide exclusivity under former section 90.495 of our rules by constructing networks that consisted of 300 transmitters or more in the continental U.S., Alaska, Hawaii, and Puerto Rico, provided service to at least 50 urban markets listed in our rules, including 25 of the top 50 markets, and provided service to two markets in each of the seven regions modeled on Regional Bell Operating Company regions. *PCP Exclusivity Order*, 8 FCC Rcd at 8322-23, ¶ 13; and 47 C.F.R. § 90.495(a)(3) (1996).

<sup>273</sup> *Notice*, 11 FCC Rcd at 3114, ¶ 26.



obtain nationwide exclusivity on 929 MHz channels under our rules as of February 8, 1996.<sup>274</sup> In addition, we granted nationwide geographic area licenses to four licensees on the 929 MHz band that had sufficient authorizations, as of February 8, 1996, to qualify for nationwide exclusivity on a conditional basis, but had not completed build-out at that time. As stated in the *Second Report and Order and Further Notice*, these four licensees had constructed the required number of transmitters to earn nationwide exclusivity on these channels.<sup>275</sup> We also granted nationwide exclusivity to Nationwide 929.8875 LLC (Nationwide) on 929.8875 MHz based on showings that it had met the criteria for nationwide exclusivity as of February 8, 1996, under section 90.495(a)(3) of our rules.<sup>276</sup> In excluding these channels from competitive bidding, we stated that it would not serve the public interest or be fair to take away exclusivity rights that licensees earned before the commencement of this proceeding. We also indicated that the licensees on these channels had developed successful and efficient nationwide networks under our pre-existing rules, and that we did not believe that competitive bidding was necessary to further the goal of developing competitive nationwide paging networks on these channels.<sup>277</sup>

75. **Discussion.** Advanced and Blooston argue that the exemption for nationwide licensees is arbitrary and capricious because it results in similarly situated licensees being treated in a disparate manner.<sup>278</sup> According to Advanced, incumbents that have met their five-year coverage requirement are

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<sup>274</sup> *Second Report and Order and Further Notice*, 12 FCC Rcd at 2761, ¶ 50.

<sup>275</sup> *Id.* The four licensees that conditionally qualified as of February 8, 1996 were Tri-State Radio Co, Inc. (929.2125 MHz), AirTouch (929.4875 MHz), PageMart Inc. (929.7625 MHz), and Communications Innovations Corp. (CIC) (929.8125 MHz). On March 26, 1997, American Paging Inc. (API) filed a petition for partial reconsideration, contending that AirTouch was not entitled to a nationwide geographic area license on 929.4875 MHz. On April 20, 1998, TSR Wireless LLC (TSR Wireless) notified the Commission and other parties in this proceeding that TSR Paging Inc. had merged with API and its subsidiaries to form a new entity, TSR Wireless; thus, API and TSR Paging were replaced in this proceeding by TSR Wireless. On October 22, 1998, TSR Wireless filed a petition of withdrawal of the petition for partial reconsideration filed by API. Withdrawal of Petition for Partial Reconsideration, filed by TSR Wireless LLC, October 22, 1998.

On March 26, 1997, PSWF Corporation filed a petition for partial reconsideration contending that CIC had not in fact constructed sufficient base stations to qualify for nationwide exclusivity. PSWF Petition for Partial Reconsideration, filed March 26, 1997. This matter was pending before the Enforcement Division. However, on November 5, 1998, the Commercial Wireless Division, Wireless Telecommunications Bureau, released an order, which in part, dismissed PSWF's petition for partial reconsideration, as requested by both PSWF and CIC. See PSWF Corporation and Communications Innovations Corporation, *Order*, DA 98-2254, (Nov. 5, 1998).

<sup>276</sup> In the *Second Report and Order and Further Notice*, we noted that Nationwide was jointly owned and controlled by AirTouch and Arch, who were in the process of securing Commission consent to assign their respective regional exclusive system licenses to Nationwide. *Second Report and Order and Further Notice*, 12 FCC Rcd at 2761-62, ¶ 52. We also noted that AirTouch and Arch had regional exclusivity on 929.8875 MHz for four regional systems, and were parties to an agreement to operate their 929.8875 MHz facilities on an integrated basis to provide nationwide service. We further noted that prior to the *Notice*, AirTouch and Arch filed a nationwide exclusivity request on 929.8875 MHz for their combined systems, and certified that they had more than 300 transmitters in over 40 states as of February 8, 1996, to meet the criteria for nationwide exclusivity under section 90.495(a)(3). *Id.*

<sup>277</sup> *Id.* at 2761, ¶ 50.

<sup>278</sup> Advanced Petition at 4-5; Blooston Petition at 5-6; Blooston Reply at 2-7.

similar to nationwide licensees that met our previous build-out requirements to qualify for exclusivity.<sup>279</sup> Blooston contends that most nationwide licensees compete directly with other paging licensees, including wide-area 931 MHz and regional 929 MHz licensees, for regional and local customers and that it is "grossly unfair to allow 26 competitors in each market to forgo the costs and delays associated with auctions."<sup>280</sup> Blooston further contends that other paging licensees had the same expectation that the nationwide licensees had of a reasonable opportunity to expand their systems incrementally in response to consumer demand.<sup>281</sup>

76. Several petitioners support the exclusion of nationwide licenses from competitive bidding. AirTouch supports this exclusion because nationwide licensees had a reasonable expectation that the channels on which they had been granted exclusivity would be excluded from the auction.<sup>282</sup> Arch argues that the Commission's auction authority is limited to only those situations where mutually exclusive applications are accepted for filing, and no competing applications can be filed for nationwide channels, precluding mutual exclusivity.<sup>283</sup> Metrocall, PageMart, and PageNet argue that the exemption of nationwide licenses does no more than recognize the validity of licenses granted prior to this rulemaking proceeding.<sup>284</sup> PageMart further argues that the regulatory framework, and therefore the expectations, for nationwide exclusive licensees and site-specific incumbents were radically different. PageMart explains that in contrast to nationwide licensees, the incumbent non-nationwide licensees "were never *entitled* to additional coverage."<sup>285</sup> PageNet asserts its argument that including nationwide licenses in competitive bidding would constitute retroactive rulemaking and a taking in violation of the Fifth Amendment of the United States.<sup>286</sup> Blooston responds that "white space" on nationwide frequencies will not be used in many parts of the country for the foreseeable future and should be auctioned; there is no mutual exclusivity on many of the non-nationwide channels in much of the country; nationwide licensees did not pay for their spectrum and thus have no greater reliance interest in the right to expand than non-nationwide licensees; and the use of

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<sup>279</sup> **Advanced Petition at 4-5.**

<sup>280</sup> **Blooston Petition at 5-6.**

<sup>281</sup> **// at 5.**

<sup>282</sup> **AirTouch Comments on Petitions for Reconsideration at 7-9.**

<sup>283</sup> **Arch Opposition at 5; Arch Reply at 3-4.**

<sup>284</sup> **Metrocall Response to Petitions for Reconsideration at 6-10; PageMart, Inc. Partial Opposition to Petition for Reconsideration (PageMart Opposition) at 3; PageNet Opposition at 1-2.**

<sup>285</sup> **PageMart Opposition at 3-4.**

<sup>286</sup> **PageNet Opposition at 3-8.**

auctions for nationwide frequencies would be no more of a denial of due process than the use of auctions for other paging channels.<sup>287</sup>

77. Contrary to Advanced's and Blooston's contention, we do not believe that our decision to exempt nationwide licensees from competitive bidding discriminates against other paging systems. We agree with PageMart, PageNet, and MetroCall that this decision merely recognizes licenses granted prior to this rulemaking proceeding. Our exclusivity rules provided nationwide licensees with the right to continue to build out anywhere in the country on their designated channels, whereas non-nationwide paging licensees have been afforded no right to expand their service area beyond their interference contours. Thus, there are no areas available for auction on the channels on which nationwide geographic area licensees operate, while there are available areas on the channels on which non-nationwide licensees operate. Finally, our rules make clear that licenses will be subject to auction only if mutually exclusive applications are accepted for filing. We therefore affirm our decision in the *Second Report and Order* to grant nationwide geographic area licenses without competitive bidding to those licensees that met the exclusivity criteria established under our previous rules.<sup>288</sup>

## 2. MTel's Request for a Nationwide Geographic Area License

78. **Background.** In the *Notice*, we sought comment on whether 931.4375 MHz, a channel licensed extensively to MTel, should be redesignated as a nationwide channel.<sup>289</sup> We noted that this channel was allocated as a local paging channel and had not been reallocated as a nationwide channel.<sup>290</sup> In the *Second Report and Order*, we declined to extend nationwide exclusivity rights to MTel on 931.4375 MHz.<sup>291</sup> We concluded that MTel had no expectation that substantial build-out of its system would result in nationwide rights on this channel.<sup>292</sup>

79. **Discussion.** MTel argues that denying it a nationwide grant on 931.4375 MHz is inconsistent with the Commission's grant of nationwide geographic area licenses to paging carriers in the 929 MHz band because its system, which consists of over 800 transmitters, meets the nationwide exclusivity criteria established for 929 MHz licensees.<sup>293</sup> Thus, MTel contends that it is similarly situated with the 929

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<sup>287</sup> Blooston Reply at 1-7.

<sup>288</sup> *Second Report and Order and Further Notice*, 12 FCC Rcd at 2761-62, ¶¶ 50-54.

<sup>289</sup> *Notice*, 11 FCC Rcd at 3114, ¶ 27.

<sup>290</sup> *Id.*

<sup>291</sup> *Second Report and Order and Further Notice*, 12 FCC Rcd at 2762, ¶ 53.

<sup>292</sup> *Id.*

<sup>293</sup> Mobile Telecommunication Technologies, Corp. Petition for Reconsideration (MTel Petition) at 9-10.

MHz licensees that earned nationwide exclusivity, and reasonably expected to be treated similarly.<sup>294</sup> We disagree. In the *Second Report and Order*, we granted nationwide geographic area licenses to those 929 MHz carriers that, as of February 8, 1996, the adoption date of the *Notice*, either met the construction requirements for nationwide exclusivity or had sufficient authorizations to conditionally qualify for nationwide exclusivity. We recognize that MTel is extensively licensed on 931.4375 MHz with over 800 transmitters in various locations throughout the United States. In addition, several other 931 MHz channels are extensively licensed by one carrier. But these 931 MHz channels, including 931.4375 MHz, have never been designated as nationwide channels.<sup>295</sup> We did not establish rules for a licensee to earn nationwide exclusivity on the thirty-seven channels in the 931 MHz band reserved for local and regional paging, as we did for the thirty-five exclusive 929 MHz channels, so MTel could not reasonably have expected to be granted nationwide status.

80. We also reject MTel's contention that denying nationwide exclusivity to it on 931.4375 MHz is contrary to the public interest because it prevents MTel from providing for its customers' expanding coverage needs.<sup>296</sup> Our decision does not prevent MTel from expanding its system, since it may acquire MEA and EA licenses for this frequency in areas where it wishes to expand through competitive bidding. Previously, MTel obtained licenses on this channel on a transmitter-by-transmitter basis, with no assurance that its applications would be granted because they would be subject to competing applications. A geographic area licensee, however, will receive exclusive rights to the unserved area of the geographic area. We reaffirm our decision to deny MTel a nationwide geographic area license on the 931.4375 MHz channel.

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<sup>294</sup> *Id.* at 10.

<sup>295</sup> In 1982, well before commencement of this rulemaking proceeding, three 931 MHz channels (931.8875, 931.9125 and 931.9375 MHz) were designated for nationwide use. *See* Amendment of Parts 2 and 22 of the Commission's Rules to Allocate Spectrum in the 928-941 MHz Band and to Establish Other Rules, Policies, and Procedures for One-Way Paging Stations in the Domestic Public Land Mobile Radio Services, *First Report and Order*, 89 F.C.C.2d 1337, *on reconsideration (Part 1)*, 92 F.C.C.2d 631 (1982), *on reconsideration (Part 2)*, 93 F.C.C.2d 908 (1983), *aff'd sub nom., NARUC v. FCC*, 737 F.2d 1095 (D.C.Cir. 1984); Amendment of Parts 2 and 22 of the Commission's Rules to Allocate Spectrum in the 928-941 MHz Band and to Establish Other Rules, Policies, and Procedures for One-Way Paging Stations in the Domestic Public Land Mobile Radio Services, *Third Report and Order*, 97 F.C.C.2d 900 (1984). The remaining thirty-seven other channels were made available for regional and local one-way paging service.

<sup>296</sup> MTel Petition at 19.

## I. Competitive Bidding Procedures

### 1. Auction Sequence

81. **Background.** In the *Notice*, we sought comment on how paging licenses should be grouped for competitive bidding purposes and on possible license groupings.<sup>297</sup> A number of commenters suggested that the Commission should form at least two groups—the 929 MHz and 931 MHz licenses and the lower band licenses—and auction them separately, while some proposed that the 900 MHz licenses be auctioned first. In the *Second Report and Order and Further Notice*, we concluded that grouping interdependent licenses for simultaneous bidding promotes our goal of awarding licenses to bidders that value them most.<sup>298</sup> We reserved discretion, however, to determine specific license groupings based on administrative considerations.<sup>299</sup>

82. **Discussion.** PCIA suggests that the Commission conduct auctions for the lower band frequencies before it conducts auctions for the 929 MHz exclusive and 931 MHz frequencies. PCIA argues that this sequence of auctions would reduce the economic hardship of the many small carriers on the lower bands that will be subject to an application freeze pending the start of any auctions.<sup>300</sup> This is precisely the sort of issue that we believe the Bureau should consider in exercising its discretion, under the *Second Report and Order and Further Notice*, to determine the sequence of the paging auctions.<sup>301</sup> Moreover, as the Commission noted in the *Part 1 Third Report and Order and Second Further Notice*,<sup>302</sup>

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<sup>287</sup> *Notice*, 11 FCC Red at 3125, ¶ 79.

<sup>288</sup> *Second Report and Order and Further Notice*, 12 FCC Red at 2781-82, ¶ 97.

<sup>289</sup> *Id.*

<sup>300</sup> PCIA Petition at 18-19.

<sup>301</sup> *Second Report and Order and Further Notice*, 12 FCC Red at 2781-82, ¶ 97.

<sup>302</sup> *See Part 1 Third Report and Order and Second Further Notice*, 13 FCC Red at 447-49, ¶¶ 124-125.

the Balanced Budget Act of 1997<sup>303</sup> provides that "before the issuance of bidding rules," the Commission must provide adequate time for parties to comment on proposed auction procedures.<sup>304</sup> In response to this statutory requirement, the Commission directed the Bureau, under its existing delegated authority,<sup>305</sup> to seek comment prior to the commencement of each auction on a variety of auction-specific operational issues.<sup>306</sup> Since that time, it has been the Bureau's practice to issue a Public Notice seeking comment on these issues, and on the establishment of minimum opening bids or reserve prices, well in advance of the application deadline for each auction.<sup>307</sup> We therefore conclude that the Bureau, under its existing delegated authority and in accordance with the Balanced Budget Act of 1997, should seek further comment on license groupings and auctions sequence, among other auction-specific issues (e.g., minimum opening bids), prior to the start of the paging auctions.

## 2. Stopping Rule

83. **Background.** In the *Second Report and Order and Further Notice*, we noted that most commenters preferred a stopping rule based on licenses, frequencies, or markets, but that a few strongly favored a simultaneous stopping rule.<sup>308</sup> For the paging service auctions, we adopted a new hybrid simultaneous/license-by-license stopping rule to reduce the risk of prolonged auctions, while still "preserving most of the efficiency benefits of a simultaneous stopping rule."<sup>309</sup> This new rule, which we have not used in prior auctions, features three phases. Phase I would last one month or 100 rounds, whichever is later, and would employ the standard simultaneous stopping rule (i.e., bidding would remain open on all licenses until bidding stops on all licenses). During Phase II, the Bureau would have the discretion to employ a license-by-license stopping rule if it determines that the use of back-up strategies is minimal. If the Bureau chooses to employ license-by-license stopping in Phase II, bidding on a license would close whenever 10 consecutive rounds pass with no new valid bids for that license, while remaining licenses would close according to the standard simultaneous stopping rule. Phase III would begin after two months and 100 rounds. Thus, if it takes more than two months to complete 100 rounds, the auction would

<sup>303</sup> See Balanced Budget Act of 1997, Pub. L. No. 105-33, § 3002, 111 Stat. 251 (1997) (codified as amended at 47 U.S.C. § 309(j)(3)(E)(i)).

<sup>304</sup> See Part 1 Third Report and Order and Second Further Notice, 13 FCC Rcd at 447, ¶ 123 (citing Balanced Budget Act of 1997, § 3002(a)(1)(B)(iv)).

<sup>305</sup> See 47 C.F.R. §§ 0.131(c), 0.331, and 0.332; see also Amendment of Part 1 of the Commission's Rules—Competitive Bidding Procedures, Order, Memorandum Opinion and Order, and Notice of Proposed Rule Making, 12 FCC Rcd 5686, 5697, ¶ 16 (1997).

<sup>306</sup> See Part 1 Third Report and Order and Second Further Notice, 13 FCC Rcd at 448, ¶ 125.

<sup>307</sup> See, e.g., Location and Monitoring Service Spectrum Auction Scheduled for December 15, 1998; Comment Sought on Reserve Prices or Minimum Opening Bids and Other Auction Procedural Issues, Public Notice, 13 FCC Rcd 15501 (1998); 156-162 MHz VHF Public Coast Station Spectrum Auction Scheduled for December 3, 1998; Comment Sought on Reserve Prices or Minimum Opening Bids and Other Auction Procedural Issues, Public Notice, 13 FCC Rcd 17612 (1998).

<sup>308</sup> Second Report and Order and Further Notice, 12 FCC Rcd at 2783-84, ¶ 102.

<sup>309</sup> *Id.* at 2784, ¶ 103.

move directly from Phase I to Phase III. In Phase III, the Bureau would employ the license-by-license stopping rule described above. As we explained in the *Second Report and Order and Further Notice*, this approach "balances concerns about the time to complete the paging auction and the benefits of preserving back-up strategies which give bidders the flexibility to acquire licenses that are consistent with their business plans."<sup>310</sup> The Commission would retain the discretion in Phase III to declare after 200 rounds that the auction will end after some specified number of additional rounds, in which case bids would be accepted only on licenses for which the high bid increased in the three preceding rounds. We reserved discretion not to employ the hybrid stopping rule in future paging auctions based on our experience in the first paging auction.<sup>311</sup>

84. **Discussion.** Although two petitioners<sup>312</sup> now request reconsideration of the hybrid simultaneous/license-by-license stopping rule adopted in the *Second Report and Order and Further Notice*, we will maintain it for the paging auctions. As discussed in the preceding section, the Commission directed the Bureau in the *Part 1 Third Report and Order and Second Further Notice* to seek comment prior to the commencement of each auction on a variety of auction-specific operational issues, including stopping rules.<sup>313</sup> By providing potential bidders with an opportunity to comment on the most appropriate stopping rule for specific inventories of paging licenses (*i.e.*, for each paging auction), we believe that this approach is consistent with the Balanced Budget Act of 1997 and the Commission's goal of increasing the efficiency of the competitive bidding process.<sup>314</sup> We retain discretion in the Bureau, however, to utilize another stopping rule (*e.g.*, our standard simultaneous stopping rule) after seeking further comment on this issue in the pre-auction process, consistent with the Balanced Budget Act of 1997.<sup>315</sup>

### 3. Limiting Information Available to Bidders During the Auctions

<sup>310</sup> *Id.* at 2785, ¶ 103.

<sup>311</sup> *Id.*

<sup>312</sup> Metrocall asserts that such a stopping rule is unnecessarily complex, and renews its comments in favor of a market-by-market stopping approach. This approach would close bidding on a particular license if, after a certain number of additional rounds (*e.g.*, five or ten), there are no new bids or proactive waivers. Metrocall alternatively suggests that if the Commission maintains the hybrid approach, it should begin the auction in Phase II so that the Bureau could sooner exercise its discretion to stop bidding in particular markets. Finally, Metrocall suggests that the Commission permit requests from high bidders to close bidding on those licenses if no new bids are received during a certain number of rounds. The Bureau would announce the request and specify that bidding would close if no new bids were received during an additional period of time. *See* Metrocall Petition at 24-25. PageNet argues that a license-by-license stopping rule would focus the bidding on the most valuable spectrum, speed the auction, and deter speculation. Specifically, PageNet reiterates its suggestion that bidding close on any license for which new bids were not received after five rounds. PageNet Petition at 14-15.

<sup>313</sup> *See supra* notes 305 and 307 and accompanying text.

<sup>314</sup> *See Part 1 Third Report and Order and Second Further Notice*, 13 FCC Red at 376, ¶ 1 (1998).

<sup>315</sup> *See* 47 C.F.R. § 1.2104(e) ("The Commission may establish stopping rules before or during multiple round auctions in order to terminate auctions within a reasonable time").

85. **Background.** The *Second Report and Order and Further Notice* provided for the release of a public notice prior to the auctions announcing precisely what information would be available to bidders, but indicated that this information "may be limited to the high bids (no identities of bidders)."<sup>316</sup> The Commission noted that withholding bidder identities is likely to speed the pace of the auctions by reducing opportunities for strategic gaming practices and by reducing the time needed to report and analyze information at the end of each round.<sup>317</sup> We also noted that little loss of efficiency would result from withholding the identities of likely winners of adjacent licenses, because in the paging service, as opposed to broadband PCS, there is no roaming and little uncertainty about the technology.<sup>318</sup>

86. **Discussion.** Metrocall, PageNet, and PCIA seek reconsideration of the Commission's decision to: 1) limit generally the information available to bidders during the paging auctions; and 2) leave to a later Public Notice the announcement of whether bidder identities in particular will be withheld.<sup>319</sup> Specifically, petitioners state that withholding bidders' identities would ensure that bidders would not have equal access to information, because well-established paging companies would be easily identified by bidding on licenses for spectrum on which they are incumbents, while newcomers, that might be speculators, would not be similarly identifiable.<sup>320</sup> Thus, petitioners argue that withholding bidders' identities would encourage speculation, deny bidders information necessary to participate effectively in the auctions, and impair the efficiency of resulting license assignments.<sup>321</sup>

87. We retain discretion in the Bureau, pursuant to its existing delegated authority, to limit the information disclosed to bidders in the paging auctions. Consistent with the Balanced Budget Act of 1997,<sup>322</sup> the Bureau will issue a Public Notice seeking further comment on auction-related procedural issues, including what information should be available to bidders. This will provide the Bureau with an opportunity to weigh, in the unique context of the paging auctions, the benefits and disadvantages of limiting information such as bidder identities and related data. After seeking further comment on this issue, the Bureau will announce the precise information that will be available to bidders during the auctions.

<sup>316</sup> *See Second Report and Order and Further Notice*, 12 FCC Rcd at 2786, ¶ 106.

<sup>317</sup> *Id.*

<sup>318</sup> *Id.*

<sup>319</sup> Metrocall Petition at 18-19; PageNet Petition at 12-14; PCIA Petition at 13-15.

<sup>320</sup> Metrocall Petition at 18-19; PageNet Petition at 12-13; PCIA Petition at 14. Petitioners refer to Commission statements made in the context of other rulemakings that revealing bidder identities provides important information on the value of the spectrum and permits more informed bidding strategies that ensure licenses are won by bidders that value the spectrum most highly.

<sup>321</sup> Metrocall Petition at 18-19; PageNet Petition at 12-14; PCIA Petition at 13-15.

<sup>322</sup> *See supra* notes 305 and 307 and accompanying text.



#### 4. Short-form Applications and Upfront Payments

88. **Background.** Currently, applicants have the option to check "all markets" on their short-form applications but submit an upfront payment to cover only those licenses on which they intend to bid in any one round. Permitting the selection of "all markets" gives bidders the flexibility to pursue back-up strategies in the event they are unable to obtain their first choice of licenses.<sup>323</sup> In the *Second Report and Order and Further Notice*, we emphasized the importance of the "all markets" box in enabling the use of back-up strategies and noted that, absent the ability to pursue such strategies, the true value of the licenses might not be reflected in the final bid prices.<sup>324</sup>

89. **Discussion.** Several petitioners assert that permitting bidders to check the "all markets" box creates artificial mutual exclusivity contrary to the requirements of Section 309(j)(6)(E) of the Communications Act.<sup>325</sup> They also contend that, since bidders' upfront payments need only correspond to the "largest combination of activity units on which the bidder anticipates being active in any single round,"<sup>326</sup> the ability to check the "all markets" box encourages the participation of speculators in the auctions.<sup>327</sup> In turn, they argue, sincere bidders, including incumbents seeking to obtain geographic area licenses in their existing service areas, may expend greater amounts to obtain licenses than if the Commission required auction applicants to indicate each license on which they intend to bid.<sup>328</sup> To deter speculation, they suggest that the Commission should require each bidder to (1) specify the licenses on which it seeks to bid, and (2) submit an upfront payment corresponding to the total number of licenses specified.

90. In the *Second Report and Order and Further Notice*, the Commission expressly rejected identical arguments made by commenters that opposed use of the "all markets" box.<sup>329</sup> A bidder must submit an upfront payment sufficient to meet the eligibility requirements for any combination of licenses on which it might wish to bid in a round. This rule forces bidders to make a payment that reflects their level of interest and protects against speculation. Moreover, we continue to believe that bidders should have the flexibility to pursue back-up strategies if they are unable to obtain their first choice of licenses. As has been

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<sup>323</sup> *Second Report and Order and Further Notice*, 12 FCC Rcd at 2793-94, ¶ 126.

<sup>324</sup> *Id.*

<sup>325</sup> PageNet Petition at 10; PCIA Petition at 12; Priority Petition at 6; *see also* 47 U.S.C. § 309(j)(6)(E).

<sup>326</sup> *Second Report and Order and Further Notice*, 12 FCC Rcd at 2796, ¶ 136.

<sup>327</sup> Arch Petition at 5, 7-8; PageNet Petition at 10-12; PCIA Petition at 10-13; *see also* Advanced Petition at 3 n.1.

<sup>328</sup> *See* Advanced Petition at 8-9; PageNet Petition at 12; PCIA Petition at 12.

<sup>329</sup> *Second Report and Order and Further Notice*, 12 FCC Rcd at 2793, ¶ 126.

demonstrated by all recent auctions, providing bidders flexibility is crucial to an efficient auction and optimum license assignment.<sup>330</sup> Since petitioners do not raise any arguments that have not been previously considered and rejected by the Commission, we will retain the current rules, which permit use of the "all markets" box and require an upfront payment for each license.

91. Petitioners' claim that our current rules may require sincere bidders to pay more for geographic area licenses than if we implemented their proposal is, we feel, more closely related to the issue of minimum opening bids. The Commission is required to establish minimum opening bids for each auctionable license absent a finding that to do so would contravene the public interest.<sup>331</sup> We do not find circumstances here to convince us that establishing minimum opening bids for the paging auctions is contrary to the public interest objectives contained in section 309(j) of the Communications Act.<sup>332</sup> We note, however, that issues such as incumbency levels, limited available spectrum, and interference protection requirements, among others, will likely lead to modest minimum opening bids for many paging geographic area markets.<sup>333</sup> We further note that minimum opening bids are reducible at the Bureau's discretion.<sup>334</sup> These factors, we believe, adequately address petitioners' concerns regarding the risk of excessive bid amounts.

## 5. Bid Withdrawal

92. **Background.** In the *Second Report and Order and Further Notice*, we concluded that the Part 1 general bid withdrawal rule would apply in the paging auctions.<sup>335</sup> The general bid withdrawal rule requires a bidder that withdraws a high bid during the course of an auction to make a payment equal to the difference between the withdrawn bid amount and the amount of the winning bid the next time the license is offered by the Commission.<sup>336</sup> This payment amount is deducted from any upfront payments or down

<sup>330</sup> *Id.*

<sup>331</sup> *See, e.g.*, 47 U.S.C. § 309(j)(4)(F).

<sup>332</sup> These objectives include: fostering the rapid development and deployment of new technologies, products, and services; promoting competition by avoiding excessive concentration and disseminating licenses among a wide variety of applicants; recovering for the public a portion of the value of the spectrum resource and avoidance of unjust enrichment; fostering efficient use of electromagnetic spectrum; and scheduling auctions so that potential bidders have adequate time to develop business plans and assess the market; *see* 47 U.S.C. § 309(j)(3); *see also* Auction of 800 MHz SMR Upper 10 Band; Minimum Opening Bids or Reserve Prices, *Order*, 12 FCC Rcd 16354 (1997).

<sup>333</sup> *See Part 1 Third Report and Order and Second Further Notice*, 13 FCC Rcd at 456, ¶ 141 ("Among other factors, the Bureau should consider the amount of spectrum being auctioned, levels of incumbency, the availability of technology to provide service, the size of the geographic service areas, issues of interference with other spectrum bands, and any other relevant factors that could reasonably have an impact on valuation of the spectrum being auctioned.")

<sup>334</sup> *Id.* at 455, ¶ 140.

<sup>335</sup> *Second Report and Order and Further Notice*, 12 FCC Rcd at 2798, ¶ 143.

<sup>336</sup> *See* 47 C.F.R. § 1.2104(g).

payments that the withdrawing bidder has deposited with the Commission.<sup>337</sup> In response to some commenters' concerns about reducing the possibility of mistaken bids, we noted that we had recently implemented a new software feature designed to warn bidders of mistaken bids, and that this feature would be employed in the paging auctions.<sup>338</sup>

93. **Discussion.** Blooston requests that the Commission modify its rules to allow bid withdrawal without liability where it is demonstrated that the withdrawn bid was a typographical or clerical error, and the Commission was notified before other bidders relied on the information for bids placed in subsequent rounds. Blooston reasons that, in the paging auctions, the opportunities for errors will be increased because these auctions will involve some of the telecommunications industry's smallest businesses, many of which would be first-time participants in a spectrum auction and would, at the same time, be trying to serve their customers with small staffs.<sup>339</sup>

94. We will apply our Part 1 general bid withdrawal rule, as stated in the *Second Report and Order and Further Notice*. Most of Petitioners' concerns have been addressed by modifications to the auction software that permit bid removal during a round. In addition, the auction software has been reconfigured to provide for incremental bidding. To place a bid on a license, a bidder simply enters a number between 1 and 9 in the "Bid Increment Multiplier" field. The software multiplies this number by the pre-established minimum bid increment and adds the result to the high bid amount. Thus, bidders may place a bid that exceeds the standing high bid by between one and nine times the bid increment. For example, to bid the minimum acceptable bid, which is generally equal to one bid increment, a bidder will enter "1" in the "Bid Increment Multiplier" field and press submit. We believe that these software modifications provide adequate protection against the possibility of mistaken bids and also simplify the bidding process for inexperienced auction participants.

## 6. The Anti-Collusion Rule

95. **Background.** In the *Second Report and Order and Further Notice*, the Commission rejected commenters' requests for safe harbors for certain discussions when the anti-collusion rule is in effect.<sup>340</sup> We concluded that we lacked the record necessary to create these safe harbors and emphasized that the anti-collusion rule prohibits discussions of the substance of bids or bidding strategies.

96. **Discussion.** A number of petitioners request reconsideration of this conclusion. These petitioners assert that because established paging carriers are likely to participate in the auctions, the lack of safe harbors will disrupt normal business relationships during the auctions and inhibit discussions among

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<sup>337</sup> See 47 C.F.R. § 1.2106(e).

<sup>338</sup> *Second Report and Order and Further Notice*, 12 FCC Rcd at 2799, ¶ 146.

<sup>339</sup> Blooston Petition at 20-21.

<sup>340</sup> *Second Report and Order and Further Notice*, 12 FCC Rcd at 2802, ¶ 156; see also 47 C.F.R. § 1.2105(e) (the anti-collusion rule).

incumbent carriers on such issues as intercarrier agreements and mergers or consolidations which, they argue, are aimed at providing better service to customers.<sup>341</sup>

97. We will apply the Part 1 general anti-collusion rule in the paging auction. A similar proposal to create safe harbors was considered and dismissed in the *Part 1 Third Report and Order and Second Further Notice*, and we deny petitioners' requests for the reasons stated therein.<sup>342</sup> We continue to believe that bidders are in the best position to determine when their discussions may give rise to a potential violation of the rule. We note, however, that to the extent that discussions concerning normal business relationships do not directly or indirectly convey in any manner the substance of bids or bidding strategies, such discussions are not prohibited by the anti-collusion rule.<sup>343</sup> We further note that the anti-collusion rule was amended in the *Part 1 Third Report and Order and Second Further Notice* to permit holders of non-controlling attributable interests in one applicant for a particular license(s) to obtain an ownership interest in, or enter into a consortium arrangement with, a second applicant for a license in the same geographic area, provided the original applicant has withdrawn from the auction, is no longer placing bids, and has no further eligibility.<sup>344</sup> Thus, we clarify that the modified Part 1 anti-collusion rule will apply in the paging auctions.

## 7. Small Business Definition

98. **Background.** In the *Second Report and Order and Further Notice*, the Commission adopted tiered bidding credits based on small business size.<sup>345</sup> Specifically, entities with average gross revenues of not more than \$3 million would be eligible for a fifteen percent bidding credit, while entities with average gross revenues of not more than \$15 million would be eligible for a ten percent bidding credit.<sup>346</sup> We concluded that this approach furthered our mandate under Section 309(j) of the Communications Act to disseminate licenses to a variety of applicants.

99. **Discussion.** Blooston requests a number of clarifications with respect to the rules for qualifying as a "small business."<sup>347</sup> In particular, Blooston seeks (1) confirmation that "gross revenues of all

<sup>341</sup> Blooston Petition at 18-19; PageNet Petition at 15; PCIA Petition at 23-24; ProNet Petition at 25-26.

<sup>342</sup> *Part 1 Third Report and Order and Second Further Notice*, 13 FCC Rcd at 466-67, ¶ 162.

<sup>343</sup> See 47 C.F.R. § 1.2105(c); see also Wireless Telecommunications Bureau Provides Guidance on the Anti-Collusion Rule for D, E and F Block Bidders, *Public Notice*, 11 FCC Rcd 10134 (1996).

<sup>344</sup> *Id.* at 465-66, ¶ 160; see also 47 C.F.R. § 1.2105(c)(4)(iii).

<sup>345</sup> *Second Report and Order and Further Notice*, 12 FCC Rcd at 2811-12, ¶¶ 178-181.

<sup>346</sup> These small business size standards have been approved by the Small Business Administration. Letter from Aida Alvarez, Administrator, Small Business Administration to Amy J. Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau of 12/2/98.

<sup>347</sup> Blooston Petition at 21-22.

controlling principals"<sup>348</sup> does not refer to personal income (so as to avoid public disclosure of personal financial information and "double counting" where salaries are paid by the applicant to principals),<sup>349</sup> (2) specification of the equity requirement (*i.e.*, what constitutes "significant equity") or elimination of an equity requirement altogether; and (3) clarification that intercarrier agreements do not constitute affiliation for purposes of the small business definition.

100. In the context of competitive bidding for broadband PCS C and F blocks, the Commission issued a number of orders refining the definition of "small business"<sup>350</sup> by providing exceptions that govern which entities or persons are included for the purpose of aggregating gross revenues and total assets counted in determining eligibility for small business treatment.<sup>351</sup> In response to petitions seeking relaxation of the \$40 million personal net worth cap for members of the control group of a designated entity, attributable investors, and affiliates who are individuals, the Commission decided to eliminate the personal net worth cap altogether.<sup>352</sup> Personal net worth has been defined as "the market value of all assets (real and personal, tangible and intangible) owned by an individual, less all liabilities (including personal guarantees) owed by the individual in his individual capacity or as a joint obligor."<sup>353</sup> The Commission concluded that "the affiliation rules make the personal net worth rules largely unnecessary since most wealthy individuals are likely to have their wealth closely tied to ownership of another business."<sup>354</sup> The same principles apply in the paging context. Personal income is treated as an element of personal net worth, and thus is not attributable. This approach also alleviates Blooston's "double counting" and privacy concerns.

101. To determine whether an applicant meets the eligibility size standards adopted for the paging service in the *Second Report and Order and Further Notice*, gross revenues are calculated by aggregating the gross revenues of the applicant, its affiliates, and controlling principals.<sup>355</sup> The broadband

<sup>348</sup> *Second Report and Order and Further Notice*, 12 FCC Rcd at 2812, ¶ 180.

<sup>349</sup> Blooston Petition at 21.

<sup>350</sup> 47 C.F.R. § 24.720(b).

<sup>351</sup> *Id.*; *see also* Implementation of Section 309(j) of the Communications Act—Competitive Bidding, PP Docket No. 93-253, *Fifth Report & Order*, 9 FCC Rcd 5532, 5608-09, ¶¶ 175-176 (1994); Implementation of Section 309(j) of the Communications Act—Competitive Bidding, *Fifth Memorandum Opinion and Order*, 10 FCC Rcd 403, 420-21, ¶¶ 28-30, 435-56, ¶¶ 58-96 (1994) [*Competitive Bidding Fifth Memorandum Opinion and Order*] (modified by *Erratum*, 10 FCC Rcd 10659 (Jan 10, 1995)); *Sixth Report & Order*, 11 FCC Rcd 136, 143-50, ¶¶ 13-23 (1995).

<sup>352</sup> *Competitive Bidding Fifth Memorandum Opinion and Order*, 10 FCC Rcd at 421, ¶ 30.

<sup>353</sup> *See* former Narrowband PCS rules, 47 C.F.R. § 24.320(e) (1995).

<sup>354</sup> *Competitive Bidding Fifth Memorandum Opinion and Order*, 10 FCC Rcd at 421, ¶ 30.

<sup>355</sup> *See* 47 C.F.R. § 22.223(b)(2).

PCS rules mentioned above define an applicant's control group (the gross revenues and total assets of which were to be counted) as a group of qualifying investors holding an equity interest of at least 15 percent.<sup>356</sup> Under the paging rule, no equity requirement is imposed on controlling principals of applicants meeting the small business definition, but those principals whose gross revenues are counted must maintain control of the applicant.<sup>357</sup> We indicated in the *Second Report and Order and Further Notice* that guidance on the concept of control could be found in the definition of affiliation,<sup>358</sup> which was derived in part from the affiliation rules of the U.S. Small Business Administration.<sup>359</sup>

102. We said in the *Second Report and Order and Further Notice* that while specific equity requirements will not be employed, "the absence of significant equity could raise questions about whether the applicant qualifies as a *bona fide* small business."<sup>360</sup> The Commission is concerned only with the lack of significant equity, and this is but one of several factors that are evaluated when determining *de facto* control. The Commission did not create a bright-line equity test because of the desire to afford businesses the flexibility to structure themselves in ways they deem most viable.

103. In this *Memorandum Opinion and Order*, we clarify the paging size attribution rules as adopted in the *Second Report and Order and Further Notice* to enable qualified small businesses to attract adequate financing. We also provide a definition of "controlling interest" to clarify the application of the controlling interest threshold in determining whether an entity qualifies to bid as a small business. Thus, in calculating gross revenues for purposes of small business eligibility, applicants will be required to count the gross revenues of the controlling interests of the applicant and their affiliates.<sup>361</sup> This approach is consistent with our proposal in the *Part 1 Third Report and Order and Second Further Notice*,<sup>362</sup> and is similar to the attribution rules we applied in the 800 MHz SMR, LMDS, and VHF Public Coast auction proceedings.<sup>363</sup>

<sup>356</sup> 47 C.F.R. § 24.709(b).

<sup>357</sup> *Second Report and Order and Further Notice*, 12 FCC Rcd at 2812, ¶ 180.

<sup>358</sup> 47 C.F.R. § 22.223(d); *see also Second Report and Order and Further Notice*, 12 FCC Rcd at 2812,

¶ 180.

<sup>359</sup> *See, e.g.*, 13 C.F.R. § 121.103.

<sup>360</sup> *Second Report and Order and Further Notice*, 12 FCC Rcd at 2812, ¶ 180.

<sup>361</sup> *See, e.g.*, Baker Creek Communications, LP, *Memorandum Opinion and Order*, 13 FCC Rcd 18709 (1998).

<sup>362</sup> *See Part 1 Third Report and Order and Second Further Notice*, 13 FCC Rcd at 387-89, ¶¶ 16-19.

<sup>363</sup> *See 800 MHz Second Report and Order*, 12 FCC Rcd at 19169, ¶ 275; Amendment of Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5–29.5 GHz Frequency Band, to Reallocate the 29.5–30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, *Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking*, 12 FCC Rcd 12545, 12692-93, ¶ 352 (1997); Amendment of the Commission's Rules Concerning Maritime Communications, *Third Report and Order and Memorandum Opinion and Order*, 13 FCC Rcd 19853, 19886, ¶ 67 (1998).

104. A "controlling interest" includes individuals or entities with *de jure* and *de facto* control of the applicant. *De jure* control is 50.1 percent of the voting stock of a corporation or, in the case of a partnership, the general partners. *De facto* control is determined on a case-by-case basis, and includes the criteria set forth in *Ellis Thompson*.<sup>364</sup> The "controlling interest" definition also provides specific guidance on calculation of various types of ownership interests. For purposes of calculating equity held in an applicant, the definition provides for full dilution of certain stock interests, warrants, and convertible debentures.<sup>365</sup> In addition, the definition provides for attribution of partnership and other ownership interests, including stock interests held in trust, non-voting stock, and indirect ownership through intervening corporations. Once individuals or entities with a controlling interest are determined under the definition, only the revenues of those individuals or entities and their affiliates will be counted for small business eligibility.

105. When an applicant cannot identify controlling interests under the definition, the revenues of all interest holders in the applicant and their affiliates will be counted. For example, if a company is owned by four entities, each of which has 25 percent voting equity and no shareholders' agreement or voting trust gives any one of them control of the company, the revenues of all four entities must be counted. Treating such a corporation in this way is similar to our treatment of a general partnership—all general partners are considered to have a controlling interest. This rule, we believe, looks to substance over form in assessing eligibility for small business status.

106. We note that our intent here is to provide flexibility that will enable legitimate small businesses to attract passive financing in a highly competitive and evolving telecommunications marketplace. We believe that this controlling interest threshold will function effectively to ensure that only those entities truly meriting small business status are eligible for small business provisions. In particular, we believe that the *de jure* and *de facto* concepts of control used to determine controlling interest in an applicant and the application of our affiliation rules will effectively prevent larger firms from illegitimately seeking status as a small business.

107. Finally, Blooston requests that the Commission clarify that intercarrier agreements and other recognized arrangements between otherwise independent paging carriers do not constitute

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<sup>364</sup> See *Ellis Thompson Corp.*, 76 Rad. Reg. 2d (P&F) 1125 (1994) (*Ellis Thompson*) (in which the Commission identified factors used to determine control of a business. Specifically, the Commission identified the following indicia of control:

- (1) use of facilities and equipment;
- (2) control of day-to-day operations;
- (3) control of policy decisions;
- (4) personnel responsibilities;
- (5) control of financial obligations; and
- (6) receipt of monies and profits.

*Id.* at 1127-28; see also *Intermountain Microwave*, 24 Rad. Reg. (P&F) 983 (1963); Stephen F. Sewell, *Assignments and Transfers of Control of FCC Authorizations Under Section 309(d) of the Communications Act of 1934*, 43 FED. COMM. L.J. 277 (1991).

<sup>365</sup> See 47 C.F.R. § 1.2110(b)(4)(v). Compare 47 C.F.R. § 24.709(b)(7).

affiliations.<sup>366</sup> Blooston describes "intercarrier agreements" as arrangements between licensees to allow coordinated operation in overlapping areas, "so that the 'no man's land' required for interference protection becomes unnecessary."<sup>367</sup> Section 22.223(d)(2)(ii) of the Commission's rules states that for purposes of affiliation, "[c]ontrol can arise through . . . contractual or other business relations . . ."<sup>368</sup> Section 22.223(d)(9) is more explicit, stating that affiliation "arises where one concern is dependent upon another concern for contracts and business to such a degree that one concern has control, or potential control, of the other concern."<sup>369</sup> Thus, affiliation will arise whenever a business or contractual relationship, including intercarrier agreements as defined by Blooston, demonstrates that level of control. We believe that our existing rule provides sufficient guidance on the concept of control for purposes of affiliation.<sup>370</sup>

## 8. Bidding Credits and Installment Payment Plans for Designated Entities

108. **Background.** In the *Notice*, we sought comment on the type of designated entity provisions that should be incorporated into our competitive bidding rules for paging services.<sup>371</sup> Although many commenters supported adopting bidding credits and allowing installment payments, some commenters argued that numerous designated entities currently compete in the paging industry and need no special encouragement or assistance to participate.<sup>372</sup> In the *Second Report and Order and Further Notice*, we rejected those arguments and adopted bidding credits for two tiers of small businesses and provided for installment payments.<sup>373</sup>

109. **Discussion.** Several petitioners have renewed those arguments. Three petitioners object to the availability of bidding credits and installment payments in the context of competitive bidding for paging licenses.<sup>374</sup> PCIA reasons that such provisions are not necessary because (1) many of the established paging carriers are small businesses; (2) many licenses will cover relatively small service areas, making special

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<sup>366</sup> Blooston Petition at 22.

<sup>367</sup> *Id.* at 19.

<sup>368</sup> 47 C.F.R. § 22.223(d)(2)(ii).

<sup>369</sup> *Id.* § 22.223(d)(9).

<sup>370</sup> *See id.* § 22.223(d); *see also Part 1 Third Report and Order and Second Further Notice*, 13 FCC Red at 392, ¶ 27.

<sup>371</sup> *Notice*, 11 FCC Red at 3132, ¶ 117.

<sup>372</sup> *Second Report and Order and Further Notice*, 12 FCC Red at 2805, ¶ 166.

<sup>373</sup> *Id.* at 2811, ¶ 178, 2813, ¶ 184.

<sup>374</sup> Arch Petition at 5-6; PageNet Petition at 16; PCIA Petition at 21-23.



assistance to small businesses unnecessary; (3) paging requires less capital than other services that have been subject to competitive bidding; and (4) partitioning will provide adequate opportunity for participation of small businesses in the paging industry.<sup>375</sup> PageNet asserts that bidding credits and installment payments are unnecessary and unfair in the context of paging because of the large number of operating incumbents.<sup>376</sup> PageNet argues that with these preferences, non-incumbents may be able to pay a lower price for spectrum than an incumbent that has substantially built-out its service area.<sup>377</sup> PageNet also questions why such new entrants should be given preferences when the level of incumbency would prevent meeting construction benchmarks and providing wide-area service.<sup>378</sup> A number of established paging carriers express concern that competitive bidding for paging licenses will put them at the mercy of speculators who will acquire spectrum and "greenmail" those incumbents that need additional spectrum to expand their existing networks to better serve their customers.<sup>379</sup> Arch does not object to auctioning paging licenses generally but does object to the availability of bidding credits and installment payments, similarly arguing that such provisions would encourage speculation and unfairly disadvantage incumbents.<sup>380</sup>

110. In contrast, one petitioner believes that the bidding credits and installment payments, as adopted, do not do enough to assist small businesses. Specifically, CCTS suggests that the provisions for bidding credits, installment payments, and partitioning, which are designed to facilitate participation by designated entities, are inadequate to achieve that goal in the paging auctions. CCTS further argues that such provisions do not overcome the barriers that will be faced by small and rural paging companies that do not qualify as designated entities and do not have the resources to bid for licenses defined by Economic Areas. According to CCTS, EAs, which include urban areas and their suburban and rural surroundings, do not conform to the geographic areas served by small and rural companies,<sup>381</sup> and the availability of partitioning does not help small and rural companies, which may be at a disadvantage in attempting to negotiate with larger, better capitalized geographic licensees.<sup>382</sup>

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<sup>375</sup> **PCIA Petition at 22.**

<sup>376</sup> **PageNet Petition at 16.**

<sup>377</sup> *Id.*

<sup>378</sup> *Id.*

<sup>379</sup> **Advanced Petition at 6-8; Metrocall Petition at 16; Preferred Networks Petition at 1, 5-6.**

<sup>380</sup> **Arch Petition at 5-6.**

<sup>381</sup> **Consolidated Petition at 5-6; *see also* Blooston Petition at 2-3.**

<sup>382</sup> **Consolidated Petition at 6.**

111. The Commission concluded in the *Part 1 Third Report and Order and Second Further Notice* that installment payments should not be offered in auctions in the immediate future, including the paging auctions.<sup>383</sup> In eliminating installment payments, we stated that:

Congress did not require the use of installment payments in all auctions, but rather recognized them as one means of promoting the objectives of Section 309(j)(3) of the Communications Act. The Commission continues to experiment with different means of achieving its obligations under the statute, and has offered installment payments to licensees in several auctioned wireless services. Installment payments are not the only tool available to assist small businesses. Indeed, we have conducted auctions without installment payments. Moreover, Section 3007 of the Balanced Budget Act requires that the Commission conduct certain future auctions in a manner that ensures that all proceeds from such bidding are deposited in the U.S. Treasury not later than September 30, 2002.<sup>384</sup>

This conclusion was based on the record in the Part 1 proceeding, the record developed on installment financing for broadband PCS C block licensees, and on recent decisions eliminating installment payment financing for the Local Multipoint Distribution Service and 800 MHz Specialized Mobile Radio.<sup>385</sup> In addition, the Commission has explained that elimination of installment payments better serves the public interest because obligating licensees to pay for their licenses as a condition of receipt requires greater financial accountability from applicants.<sup>386</sup> Thus, consistent with (and for the reasons set forth in) the *Part 1 Third Report and Order and Second Further Notice*, we will not allow installment payment financing in the paging service auctions.

112. Petitioners have raised no arguments regarding bidding credits that were not previously considered and rejected by the Commission. We stated in the *Second Report and Order* that although bidding credits do not guarantee the success of small businesses, we believe that they provide such bidders with an opportunity to successfully compete against larger, well-financed bidders.<sup>387</sup> We also noted that adopting tiered bidding credits furthers our mandate under Section 309(j) of the Communications Act to

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<sup>383</sup> *See Part 1 Third Report and Order*, 13 FCC Rcd at 401, ¶ 43.

<sup>384</sup> *Id.* at 398-99, ¶ 40 (footnotes omitted).

<sup>385</sup> *See Part 1 Third Report and Order and Second Further Notice*, 13 FCC Rcd at 396, 397 ¶ 35, 398, ¶ 38 & n.91; *see also* Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, *Second Order on Reconsideration*, 12 FCC Rcd 15082, 15088-92, ¶¶ 9-12 (1997); *800 MHz Memorandum Opinion and Order*, 12 FCC Rcd at 10014, ¶ 130.

<sup>386</sup> *See, e.g., Part 1 Third Report and Order and Second Further Notice*, 13 FCC Rcd at 397-98, ¶ 38; *see also Fresno Mobile Radio, Inc. v. FCC*, No. 978-1459 (D.C. Cir. Feb. 5, 1999) (After thoroughly considering the competing statutory objectives set forth under 47 U.S.C. § 309(j)(3), the Commission's decision to rescind its installment payment plan for small businesses in the 800 MHz SMR auction was reasonable).

<sup>387</sup> *Second Report and Order and Further Notice*, 12 FCC Rcd at 2811, ¶ 178.

disseminate licenses to a variety of applicants.<sup>388</sup> Moreover, the tiered bidding credit structure we adopted achieves a reasonable compromise between the arguments of those advocating greater bidding credits and those advocating against the use of bidding credits.<sup>389</sup> In response to petitioners' arguments that the availability of bidding credits will facilitate speculation and "greenmail," we are confident that our unjust enrichment rule provides adequate protection against such practices. As we noted in the *Second Report and Order*, this rule was established specifically to deter speculation and participation in the licensing process by those who do not intend to offer service to the public, or intend to use our provisions to obtain a license at a lower cost than they otherwise would have to pay, and later to sell it for a profit.<sup>390</sup> Under the rule, if a licensee that utilized bidding credits seeks to make any change in ownership structure that would render the licensee ineligible for bidding credits, or eligible only for a lower bidding credit, the licensee must first seek Commission approval, and then reimburse the government for the amount of the bidding credit, or the difference between the original bidding credit and the one for which it is eligible after the change.<sup>391</sup>

113. To balance the impact on small businesses of eliminating installment payments, we amend our rules to increase the tiered bidding credits available to paging bidders, consistent with the schedule of bidding credits adopted in the *Part 1 Third Report and Order and Second Further Notice*.<sup>392</sup> Thus, an entity that, together with its affiliates and controlling interests, has average gross revenues for the preceding three years not to exceed \$3 million will qualify for a 35 percent bidding credit. An entity that, together with its affiliates and controlling interests, has average gross revenues for the preceding three years not to exceed \$15 million will qualify for a 25 percent bidding credit. Based on our past auction experience, we believe that these bidding credit levels will provide adequate opportunities for small businesses of varying sizes to participate in the paging auction(s).

114. We will not adopt separate bidding credits for rural telephone companies ("rural telcos"). As we observed in the *Fifth Memorandum Opinion and Order*, rural telcos' existing benefits allow them to compete effectively for licenses that serve rural territories.<sup>393</sup> In addition to partitioning, rural telcos may qualify for financial benefits from the Rural Electrification Administration and the Universal Service Fund.<sup>394</sup> These benefits compensate for lack of a bidding credit. The Commission has also noted in the past

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388 *Id.*

389 *Id.* at 2811, ¶ 179.

390 *Id.* at 2818, ¶ 195 (citing *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2394, ¶¶ 258-59).

391 47 C.F.R. § 22.217(b)(2).

392 *Part 1 Third Report and Order and Second Further Notice*, 13 FCC Rcd at 403-04, ¶ 47.

393 *Competitive Bidding Fifth Memorandum Opinion and Order*, 10 FCC Rcd at 462, ¶ 111.

394 *Id.*

that rural telcos may be able to benefit from the use of their existing infrastructure in the provision of some services, and that such economies of scale give rural telcos an advantage in bidding for licenses.<sup>395</sup>

115. The paging rules provide that winning bidders have ten (10) business days to make timely payment following notification that their authorizations are ready to be awarded.<sup>396</sup> We will permit auction winners to make their final payments within ten (10) business days after the applicable deadline, provided that they also pay a late fee of five percent of the amount due, without being considered in default. This change will conform our paging rules with the generally-applicable Part 1 rules.<sup>397</sup> As we stated in the *Part 1 Third Report and Order and Second Further Notice*, we believe that in establishing this additional ten business day period during which winning bidders will not be considered in default, we provide an adequate amount of time to permit winning bidders to adjust for any last-minute problems in arranging financing and making final payment.<sup>398</sup> We decline to provide a lengthier late payment period because we believe that extensive relief from initial payment obligations could threaten the integrity, fairness and efficiency of the auction process. A late fee of five percent is consistent with general commercial practice and provides some recompense to the federal government for the delay and administrative or other costs incurred. In addition, we believe that a five percent fee is large enough to deter winning bidders from making late payments and yet small enough so as not to be punitive. Therefore, winning bidders that do not submit the required final payment and five percent late fee within the 10 business days late payment period will be declared in default and will be subject to the default payment specified in section 1.2104(g)(2) of the Commission's rules.<sup>399</sup>

116. We emphasize that our decision to permit late payments is limited to payments owed by winning bidders that have submitted timely initial down payments. We continue to believe that the strict enforcement of payment deadlines enhances the integrity of the auction and licensing process by ensuring that applicants have the necessary financial qualifications. In this connection, we believe that the *bona fide* ability to pay demonstrated by a timely initial down payment is essential to a fair and efficient auction process. Thus, we have not proposed to modify our approach of requiring timely submission of initial down payments that immediately follow the close of an auction. We believe that it is reasonable to expect that winning bidders timely remit their down payments given that it is their first opportunity to demonstrate to the Commission their ability to make payments toward their licenses. Similarly, we do not allow for any late submission of upfront payments, as to do so would slow down the licensing process by delaying the start of an auction.

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<sup>395</sup> See Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, CC Docket No. 92-297, and Suite 12 Group Petition for Pioneer Preference, *Third Notice of Proposed Rulemaking and Supplemental Tentative Decision*, 11 FCC Rcd 53, 124, ¶ 194 (1995).

<sup>396</sup> See 47 C.F.R. § 22.215.

<sup>397</sup> See *Part 1 Third Report and Order and Second Further Notice*, 13 FCC Rcd at 428-30, ¶¶ 93-96 (amending 47 C.F.R. § 1.2109(a)).

<sup>398</sup> *Id.* at 429-30, ¶ 95.

<sup>399</sup> See 47 C.F.R. § 1.2104(g)(2).

117. Finally, we reiterate that the procedures set forth in Part 1, Subpart Q of our rules apply to the paging service unless otherwise indicated in Part 22 of our rules.<sup>400</sup> We therefore clarify that applicants at the short- and long-form application stages are subject to the reporting requirements contained in the Part 1 ownership disclosure rule.<sup>401</sup>

## V. THIRD REPORT AND ORDER

### A. Introduction and Background

118. In the *Second Report and Order*, the Commission adopted rules governing geographic area licensing of paging systems for exclusive channels in the 35-36 MHz, 43-44 MHz, 152-159 MHz, 454-460 MHz, 929-930 MHz, and 931-932 MHz bands allocated for paging. We adopted competitive bidding rules for granting mutually exclusive applications, adopted partitioning for non-nationwide geographic area licenses, imposed coverage requirements on non-nationwide geographic area licenses, and awarded nationwide geographic area licenses on the 929 MHz and 931 MHz bands. We concurrently adopted a *Further Notice* seeking comment on whether we should adopt coverage requirements for nationwide geographic area licenses,<sup>402</sup> various rules related to partitioning and disaggregation by paging licensees,<sup>403</sup> and whether we should revise the application procedures for shared channels.<sup>404</sup>

119. In this *Third Report and Order*, we adopt rules that address issues raised in the *Further Notice*. The rules we adopt today are designed to expedite the introduction of paging and messaging services to unserved and underserved areas and to increase the flexibility of entities, including small businesses, to tailor licenses to meet market demands.

### B. Discussion

#### 1. Coverage Requirements for Nationwide Geographic Area Licensees

120. **Background.** As we discussed in the *Memorandum Opinion and Order On Reconsideration* adopted today, the Commission designated three channels in the 931 MHz band for exclusive nationwide use.<sup>405</sup> Licensees on the nationwide 931 MHz frequencies were required initially to

<sup>400</sup> *See id.* § 22.201.

<sup>401</sup> *See id.* § 1.2112.

<sup>402</sup> *Second Report and Order and Further Notice*, 12 FCC Rcd at 2820, ¶ 202.

<sup>403</sup> *Id.* at 2821-25, ¶¶ 203-18.

<sup>404</sup> *Id.* at 2826, ¶¶ 219-20.

<sup>405</sup> *See supra* at ¶ 74.

construct stations in at least 15 Standard Metropolitan Statistical Areas, and to offer service on a nationwide basis within two years of the start of service.<sup>406</sup> In 1993, to encourage the development of wide-area paging systems, the Commission also implemented exclusive licensing of qualified local, regional, and nationwide paging systems on thirty-five of the forty 929 MHz channels licensed, at that time, under Part 90 of our rules.<sup>407</sup> To earn nationwide exclusivity on 929 MHz channels, licensees were required to construct 300 transmitters or more in the continental United States, Alaska, Hawaii, and Puerto Rico.<sup>408</sup> Licensees were also required to provide service to at least 50 urban markets, including 25 of the top 50 markets, and to two markets in each of the seven regions modeled on Regional Bell Operating Company regions.<sup>409</sup>

121. As we have already explained, the *Second Report and Order and Further Notice* awarded nationwide geographic area licenses on the three nationwide 931 MHz channels and to the eighteen licensees who had constructed sufficient stations to obtain nationwide exclusivity on 929 MHz channels under our rules as of February 8, 1996.<sup>410</sup> In addition, we granted nationwide geographic area licenses to four licensees on the 929 MHz band that had sufficient authorizations, as of February 8, 1996, to qualify for nationwide exclusivity on a conditional basis. We also granted nationwide exclusivity to Nationwide on 929.8875 MHz based on showings that it had met the criteria for nationwide exclusivity as of February 8, 1996. In the *Second Report and Order*, we noted that our existing Part 22 and Part 90 requirements for construction of nationwide systems were not consistent, and both sets of requirements differ from the construction and coverage requirements applicable to nationwide narrowband PCS licenses.<sup>411</sup> As a result, we sought comment in the *Further Notice* on whether to impose minimum coverage requirements for nationwide paging licenses, and on what the appropriate coverage area should be. We asked, for example, whether coverage should be required on a per MTA basis or a nationwide basis. We also sought comment on whether we should auction the entire nationwide license, or just a portion of the license, if the licensee fails to meet the coverage requirements.<sup>412</sup>

122. **Discussion.** We consider first the constitutional and statutory arguments commenters make in opposition to coverage requirements. PageNet and PageMart argue that additional coverage

<sup>406</sup> **Amendments of Parts 2 and 22 of the Commission's Rules to Allocate Spectrum in the 928-941 MHz Band and to Establish Other Rules, Policies, and Procedures for One-Way Paging Stations in the Domestic Public Land Mobile Radio Service, Memorandum Opinion and Order on Reconsideration (Part 2), 93 F.C.C.2d 908, 917 (1983); see 47 C.F.R. § 22.527(b)(5)(1994).**

<sup>407</sup> ***PCP Exclusivity Order*, 8 FCC Red at 8319-20, ¶ 6.**

<sup>408</sup> ***See* 47 C.F.R. § 90.495(c)(3).**

<sup>409</sup> ***Id.***

<sup>410</sup> ***See supra* at ¶ 74 (citing *Second Report and Order and Further Notice*, 12 FCC Red at 2761, ¶¶ 50-52).**

<sup>411</sup> ***Second Report and Order and Further Notice*, 12 FCC Red at 2762, ¶¶ 54.**

<sup>412</sup> ***Id.* at 2820, ¶ 202.**

requirements would be a taking without just compensation in violation of the Fifth Amendment of the United States Constitution.<sup>413</sup> PageMart contends that if the Commission does not allow some kind of grace period for nationwide licensees to conform to any new standard, the action "would be a *de facto* modification of a licensee's authorization, a taking, which raises serious legal considerations."<sup>414</sup> PageNet argues that additional coverage requirements would interfere with its investment-backed expectation that it would operate facilities on nationwide channels without additional licensing by third parties; auctioning unserved areas resulting from the loss of a nationwide license would secure a public financial benefit at the expense of the nationwide licensee; and additional coverage requirements would circumscribe PageNet's nationwide service area.<sup>415</sup> The first step in a takings analysis, however, is to determine whether there is a protected property right at issue,<sup>416</sup> and courts have held that licensees have no property right in their licenses.<sup>417</sup> Moreover, where, as here, the government retains the power to alter rights it has created,<sup>418</sup> the right is not considered "private property," and exercise of the retained power is not considered a "taking" for

<sup>413</sup> PageMart II, Inc. Comments (PageMart Comments) at 4; Comments of Paging Network, Inc. (PageNet Comments) at 5-9; Reply Comments of Paging Network, Inc. (PageNet Reply Comments) at 2-3 & 6.

<sup>414</sup> PageMart Comments at 4.

<sup>415</sup> PageNet Comments at 5-9 (relying on *Connolly v. Pension Benefit Guaranty Corp.*, 106 S. Ct. 1018, 1026 (1986) (setting out three factors for determining whether a federal agency action qualifies as a taking in violation of the Fifth Amendment: "(1) the extent to which regulation has interfered with distinct investment-backed expectations; (2) the character of the government action; and (3) the economic impact of the regulation on the claimant").

<sup>416</sup> *Peterson v. United States DOI*, 899 F.2d 799, 807 (9th Cir. 1990), *cert. denied*, 498 U.S. 1003 (1990) (citing *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 54-55 (1986); and *FHA v. The Darlington, Inc.*, 358 U.S. 84, 91 (1958)).

<sup>417</sup> See *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 331 (1945) ("No licensee obtains any vested interest in any frequency."); *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470, 475 (1940) (stating that "[t]he policy of the [Communications] Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license"); *National Association of Broadcasters v. FCC*, 740 F.2d 1190, 1211 (D.C. Cir. 1984) (citing *Sanders Brothers*); see also In re Application of Bill Welch, 3 FCC Rcd 6502, 6503, ¶ 11 (1998) (stating that the plain language of Sections 301 and 304 of the Act addresses "congressional concerns that the Federal Government retain ultimate control over radio frequencies, as against any rights, especially property rights, that might be asserted by licensees who are permitted to use the frequencies").

<sup>418</sup> In granting exclusivity, we neither intended to create a property right in favor of nationwide licensees, nor would creating a property right be a proper exercise of our authority under the Act. Section 301 explicitly states that "the purpose of this Act, among other things, [is] to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license." 47 U.S.C. § 301. Section 304 of the Act prohibits grant of a license "until the applicant thereof shall have waived any claim to the use of any particular frequency or of the electromagnetic spectrum as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise." *Id.* at § 304. Cf. *Peterson*, 899 F.2d at 807 (explaining that, for purposes of determining whether there is a constitutionally protected property interest in federal government contractual agreements, the "sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms (citations omitted)).

Fifth Amendment purposes.<sup>419</sup> Accordingly, the Commission's grant of exclusivity to nationwide licensees does not enjoy constitutional protection.

123. Metrocall and ProNet argue that imposing additional coverage requirements on nationwide carriers would modify nationwide licenses in violation of Section 316 of the Communications Act.<sup>420</sup> We disagree. Section 316 provides for a hearing process before Commission modification of a particular license. The provision does not deprive the Commission of its authority to establish rules of general applicability to an industry through its rulemaking authority.<sup>421</sup> It is well established that licenses may be modified in a rulemaking proceeding as long as a reasoned explanation is provided for doing so.<sup>422</sup>

124. Several commenters also argue that nationwide licensees' compliance with existing rules created a reasonable expectation that they would enjoy exclusivity on a nationwide basis, and imposing additional coverage requirements would improperly subject those licensees to retroactive rulemaking.<sup>423</sup> We disagree. We acknowledge that to the extent we decide to impose coverage requirements, it would be unfair to commence the construction period with the grant of the nationwide geographic area licenses, because these licenses would have been granted well before the adoption of any coverage requirements. However, if we adopt coverage requirements whose effect would be prospective only, giving nationwide licensees sufficient opportunity to know what the requirements are and to conform their conduct accordingly, we will not be engaging in retroactive rulemaking.<sup>424</sup> Moreover, as the Court of Appeals for the District of

<sup>419</sup> *Democratic Central Comm. v. Washington Metro. Area Transit Comm'n*, 38 F.3d 603, 606-07 (D.C. Cir. 1994).

<sup>420</sup> Comments of Metrocall, Inc. (Metrocall Comments) at 5-7; Reply Comments of Metrocall, Inc. (Metrocall Reply Comments) at 8; ProNet Inc. Comments on Further Notice of Proposed Rulemaking, (ProNet Comments) at 6-7; ProNet Reply Comments at 3.

<sup>421</sup> *See Committee for Effective Cellular Rules v. FCC*, 53 F.3d 1309 (D.C. Cir. 1995); *Upjohn Co. v. FDA*, 811 F.2d 1583 (D.C. Cir. 1987); *WBEN, Inc. v. FCC*, 396 F.2d 601, 618 (2d Cir.), *cert. denied*, 393 U.S. 914 (1968) (stating that "[a]djudicatory hearings serve an important function when the agency bases its decision on the peculiar situation of individual parties who know more than anyone else. But when, as here, a new policy is based upon the general characteristics of an industry, rational decision is not furthered by requiring the agency to lose itself in an excursion into detail that too often obscures fundamental issues rather than clarifies them."); *California Citizens Band v. United States*, 375 F.2d 43, 52 (9th Cir. 1967) (stating that the primary function of Section 316 "is to protect the individual licensee from a modification order of the Commission and is concerned with the conduct and facts peculiar to an individual licensee"); Amendment of Part 22 of the Commission's Rules to Provide for Filing and Processing of Applications for Unserved Areas in the Cellular Service and to Modify Other Cellular Rules, *Further Memorandum and Opinion on Reconsideration*, 12 FCC Red 2109, 2127-28, ¶ 37 (1997); and Revision of Rules and Policies for the Direct Broadcast Satellite Service, *Report and Order*, 11 FCC Red 9712, 9766, ¶ 139 (1995) (stating that "the Commission may modify any station license or construction permit if in its judgment such action will promote the public interest, convenience, and necessity, and, ... such modification may appropriately be accomplished through notice and comment rulemaking").

<sup>422</sup> *See CECR v. FCC*, 53 F.3d at 1317 (citing *Florida Cellular Mobile Communications Corp. v. FCC*, 28 F.3d 191 (D.C. Cir. 1994)); *Rainbow Broadcasting Co. v. FCC*, 949 F.2d 405 (D.C. Cir. 1991).

<sup>423</sup> AirTouch Comments on Further Notice of Proposed Rulemaking (AirTouch Comments) at 2; Metrocall Comments at 8; Metrocall Reply Comments at 7; PageNet Reply Comments at 4-5; PageMart Comments at 2-3; ProNet Comments at 3-4.

<sup>424</sup> *See Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994) (stating that in examining allegations of retroactive legislation, "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be



Columbia has stated, "[i]t is often the case that a business will undertake a certain course of conduct based on the current law, and will then find its expectations frustrated when the law changes. This has never been thought to constitute retroactive rulemaking, and indeed most economic regulation would be unworkable if all laws disrupting prior expectations were deemed suspect."<sup>425</sup> While additional coverage requirements might disrupt nationwide licensees' expectations, they would not make past behavior unlawful or otherwise impose a penalty for past actions and, thus, would not have an impermissible retroactive effect.

125. Certain commenters also argue against nationwide coverage requirements on the basis that nationwide licensees are not similarly situated with either MEA/EA paging licensees or narrowband PCS licensees. PageNet and ProNet argue that nationwide and non-nationwide geographic area licensees should not be subject to identical regulatory treatment because nationwide carriers have already complied with coverage requirements similar to the coverage requirements of other geographic area licensees.<sup>426</sup> Similarly, PCIA argues that nationwide and non-nationwide geographic area licensees are not similarly situated because nationwide licensees have already committed the resources necessary to construct nationwide networks consistent with pre-existing Commission build-out rules, and licenses were granted subject to these explicit requirements.<sup>427</sup> Blooston, however, argues that a failure to impose coverage requirements would result in similarly situated applicants being treated in a disparate manner in violation of the requirements of regulatory parity set forth in the Omnibus Budget Reconciliation Act of 1993.<sup>428</sup> ProNet and Metrocall argue that, whereas nascent paging services, including narrowband PCS, need regulatory incentives to promote competition, efficient spectrum use, and universal service, paging is a mature, highly competitive service, in which market forces compel licensees to use their allocations efficiently.<sup>429</sup> ProNet further notes that the Commission's pending *Narrowband PCS Further Notice* sought comment on relaxing or eliminating coverage requirements altogether for narrowband PCS.<sup>430</sup>

126. Commenters also present several other arguments against additional coverage requirements for nationwide geographic area licensees, contending that additional requirements are unjustified and would

lightly disrupted").

<sup>425</sup> *Chemical Waste Management, Inc. v. EPA*, 869 F.2d 1526, 1536 (D.C. Cir. 1989); see also *Landgraf*, 511 U.S. at 269 (stating that "[a] statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment ... or upsets expectations based on prior law" (citations omitted)).

<sup>426</sup> PageNet Comments at 4-5; PageNet Reply Comments at 5-6; ProNet Comments at 3-7.

<sup>427</sup> PCIA Reply Comments at 5.

<sup>428</sup> Comments of Blooston, Mordkofsky, Jackson & Dickens (Blooston Comments) at 2.

<sup>429</sup> Metrocall Comments at 9; ProNet Comments at 5-6; ProNet Reply Comments at 5.

<sup>430</sup> ProNet Reply Comments at 5 (emphasis in original) (referencing Amendment of the Commission's Rules to Establish New Personal Communications Services, *Narrowband PCS, Report and Order and Further Notice of Proposed Rulemaking*, 12 FCC Red 12972 (1997) (*Narrowband PCS Further Notice*)).

not serve the public interest.<sup>431</sup> Specifically, several commenters argue that nationwide licensees have already met the goal of providing nationwide service by meeting their original coverage requirements.<sup>432</sup> They also contend that competition in markets where customers demand wide-area service, in addition to the significant investment already made in developing nationwide systems, impels nationwide licensees to continue to expand nationwide systems and alleviates any concern about spectrum warehousing.<sup>433</sup> A number of commenters also contend that adding coverage requirements would create unnecessary economic burdens, disrupting business activities and service offerings created in reliance on previous rules.<sup>434</sup> AirTouch argues that nationwide licensees, like other CMRS providers, must already demonstrate that they provide "substantial service" to earn a license renewal expectancy.<sup>435</sup>

127. SBT, however, supports additional coverage requirements to prevent spectrum warehousing and ensure build-out.<sup>436</sup> SBT suggests that nationwide licensees should be required to construct, within one year of the effective date of this Order, enough base stations within each of the top 30 MTAs to cover at least 75 percent of the nation's population.<sup>437</sup> SBT further urges the Commission to publicly notice the filing of nationwide carriers' construction reports, so the public can review the reports for accuracy.<sup>438</sup> Blooston

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<sup>431</sup> **AirTouch Comments at 2-3; Reply Comments of Arch Communications Group, Inc. (Arch Reply Comments) at 2-4; Metrocall Comments at 3-9; Metrocall Reply Comments at 4-8; PageMart Comments at 2-4; PageNet Comments at 2-10; PageNet Reply Comments at 2-7; Comments of the Personal Communications Industry Association (PCIA Comments) at 4-6; PCIA Reply Comments at 3-5; and ProNet Comments at 2-7; ProNet Reply Comments at 2-6.**

<sup>432</sup> **AirTouch Comments at 3; Arch Reply Comments at 3; Metrocall Comments at 3-5; PageNet Comments at 2-3; PageNet Reply Comments at 3-4; and ProNet Comments at 3. Metrocall states that it has "constructed and is operating over 1,100 transmitters throughout the United States on two exclusive, nationwide 929 MHz frequencies, and continues to expand its nationwide systems." Metrocall Comments at 4. PageNet notes that it already serves "over 600,000 nationwide customers on its nationwide systems and has spent over 100 million dollars on the build-out of facilities." PageNet Comments at 3.**

<sup>433</sup> **AirTouch Comments at 3; Arch Reply Comments at 3; Metrocall Comments at 4, 8; Metrocall Reply Comments at 7-8; PageNet Reply Comments at 2, 3-4, 6; PCIA Comments at 5; PCIA Reply Comments at 3, 5; ProNet Comments at 3-5, 6; ProNet Reply Comments at 3, 6.**

<sup>434</sup> **AirTouch Comments at 3-4; Arch Reply Comments at 3-4; Metrocall Comments at 5; PageMart Comments at 2; PCIA Comments at 5; PCIA Reply Comments at 3; ProNet Reply Comments at 3. Metrocall argues that having expended considerable money and resources to build out nationwide networks, nationwide licensees would be forced to incur further expenses in meeting new requirements, not because of subscriber demand or sound network management, "but because of regulatory fiat." Metrocall Comments at 8. ProNet also states that additional coverage requirements would "disproportionately burden nationwide licensees by necessitating construction of multiple transmitters throughout sparsely populated portions of the country, requiring a substantial (but, probably, an inefficient) capital expenditure." ProNet Reply Comments at 4.**

<sup>435</sup> **AirTouch Comments at 3.**

<sup>436</sup> **Comments to Further Notice of Proposed Rulemaking by Small Business in Telecommunications (SBT Comments) at 2-6.**

<sup>437</sup> **// at 3.**

<sup>438</sup> **// at 5-6.**

argues that nationwide carriers should be required to serve one-third of the U.S. population within three years, and two-thirds within five years, but opposes allowing nationwide carriers to meet the requirement by showing substantial service.<sup>439</sup> Blooston argues that the coverage requirements are necessary to reduce the "distinct competitive advantage" nationwide licensees have because of their exemption from the paging auctions.<sup>440</sup> Blooston further contends that coverage requirements would prevent nationwide licensees from "skimming the cream" by serving only areas of high population density, which would result in lack of service to rural areas.<sup>441</sup> While acknowledging that nationwide licensees arguably have a competitive advantage because of their exemption from auctions, ProNet responds that the advantage was earned, at considerable expense, through compliance with construction requirements "that far exceed what will ultimately be required of geographic licensees."<sup>442</sup> PageNet responds that "cream skimming" is contrary to the interests of nationwide licensees because of the market realities they face.<sup>443</sup>

128. Commenters that oppose coverage requirements also oppose any cancellation of nationwide licenses based on a failure to meet those requirements. PageNet specifically argues that the loss of nationwide licenses based on new coverage requirements would be seriously damaging to nationwide carriers, would restrict the ability of nationwide licensees to expand their systems, and would ultimately lead to the public's being unable to receive nationwide service.<sup>444</sup> SBT opposes the cancellation of a nationwide geographic area license, in its entirety, for failure to meet coverage requirements.<sup>445</sup> SBT suggests that a failure to meet coverage requirements should result in a forfeiture of the licensee's nationwide authority and an auction of unserved areas; such an auction would be reserved for small business entities, which often provide service to underserved areas.<sup>446</sup> SBT further urges the Commission to impose a forfeiture on nationwide licensees that fail to meet coverage requirements and preclude them from further expanding their

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<sup>439</sup> **Blooston Comments at 2-3.**

<sup>440</sup> ***Id.* at 2.**

<sup>441</sup> ***Id.***

<sup>442</sup> **ProNet Reply Comments at 4; *see* Metrocall Reply Comments at 4-6.**

<sup>443</sup> **PageNet Reply Comments at 4.**

<sup>444</sup> **PageNet Comments at 3-4.**

<sup>445</sup> **SBT Comments at 6-9.**

<sup>446</sup> ***Id.* at 7-8.**

systems.<sup>447</sup> Blooston states that regulatory parity and the rural service mandate dictate that nationwide licenses be cancelled and auctioned upon a carrier's failure to meet coverage requirements.<sup>448</sup>

129. While petitioners have not persuaded us that there are any legal impediments to the adoption of coverage requirements for nationwide geographic area paging licensees, we conclude that it is best to defer any decision on this issue until we resolve similar issues raised in the *Narrowband PCS Further Notice*. Doing so will allow us to more fully consider the question of whether regulatory parity with respect to coverage requirements is appropriate not only for nationwide and MEA/EA paging licensees, but also for nationwide paging and narrowband PCS carriers. In the *Narrowband PCS Further Notice*, we sought comment on whether to conform narrowband PCS rules to our paging rules by allowing narrowband PCS licensees to meet their performance requirements through a demonstration of substantial service as an alternative to meeting the coverage requirements provided under the existing rules.<sup>449</sup> We further sought comment on whether to conform MTA-based narrowband PCS coverage requirements to the same requirements adopted for MTA and EA paging licenses in this proceeding.<sup>450</sup> As a result, commenters in the *Narrowband PCS* proceeding have raised the issue of whether narrowband PCS, nationwide paging, and MTA/EA licensees provide substantially similar services. We believe that we need to consider this issue more carefully and to make a decision on nationwide paging coverage requirements in conjunction with a decision on narrowband PCS.

130. This will enable us to better look into the question of whether nationwide paging carriers provide nationwide coverage that extends to rural areas. While a number of petitioners claim that they are providing service on a nationwide basis, they have not offered any information on the extent to which nationwide paging geographic area licensees have built out their markets. We have previously indicated that nationwide licensees have exceeded the construction thresholds required to earn nationwide exclusivity;<sup>451</sup> however, we find that we have little data on actual build-out, and we are concerned about whether rural areas have sufficient access to paging services.<sup>452</sup> When we sought comment in the *Narrowband PCS Further Notice* on whether to eliminate all coverage requirements for narrowband PCS, we asked about the potential

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<sup>447</sup> *Id.* at 7.

<sup>448</sup> Blooston Comments at 3.

<sup>449</sup> *Narrowband PCS Further Notice*, 12 FCC Rcd at 12996, ¶ 44.

<sup>450</sup> *Id.* at 12997, ¶ 45.

<sup>451</sup> *Second Report and Order and Further Notice*, 12 FCC Rcd at 2761, ¶ 50.

<sup>452</sup> We do not accept site-specific applications for facilities located within the geographic area, except where an environmental assessment, international coordination, or consent for transfer of control is required. *See* 47 C.F.R. § 22.503(g). In addition, incumbent licensees may add or modify sites without filing site-specific applications related to facilities located within their existing interference contour. *See id.* § 90.693; and *Second Report and Order and Further Notice*, 12 FCC Rcd at 2764, ¶ 58.

impact of doing so on service to rural areas.<sup>453</sup> Accordingly, we defer resolution of whether to impose coverage requirements on nationwide paging geographic area licensees to the *Narrowband PCS* proceeding. If we ultimately determine that coverage requirements are appropriate for either nationwide narrowband PCS or nationwide paging geographic area licensees, we will decide, at that time, what the consequence of failing to meet those requirements should be.

## 2.Partitioning

### a. Nationwide Geographic Area Licenses

131. **Background.** In the *Second Report and Order*, we adopted geographic partitioning provisions for MTA and EA paging licensees.<sup>454</sup> In the *Further Notice*, we sought comment on whether nationwide geographic area licensees should also be permitted to partition their license areas.<sup>455</sup>

132. **Discussion.** Metrocall states that nationwide geographic area licensees should be permitted to partition their licenses in the same manner as MTA and EA licensees.<sup>456</sup> ProNet supports partitioning for nationwide geographic area licensees because partitioning provides increased flexibility to tailor service offerings and will also allow local and rural telephone companies to operate in areas where a nationwide network is unlikely to expand.<sup>457</sup> PCIA and PageMart also support partitioning for nationwide licensees, contending that there is no reason to treat nationwide geographic area licensees differently than MTA and EA licensees.<sup>458</sup> Metrocall and ProNet further contend that the fact that nationwide geographic area licenses were not acquired through competitive bidding should not prevent nationwide licensees from having the right to partition their licenses.<sup>459</sup> We agree with these commenters. Geographic partitioning would be an effective means of providing nationwide geographic area licensees with the flexibility to tailor their service offerings to meet market demands and facilitating greater participation in the paging industry by small businesses and rural telephone companies. Although we recognize the value that other licensees place on their competitively won licenses, we believe that the overall goal of partitioning -- operational flexibility -- outweighs any possible disadvantage of allowing nationwide licensees to receive a financial windfall though

<sup>453</sup> *Narrowband PCS Further Notice*, 12 FCC Rcd at 12997-98, ¶¶ 45-46.

<sup>454</sup> Partitioning is the assignment of geographic portions of the geographic area paging license along geopolitical or other boundaries. *Second Report and Order and Further Notice*, 12 FCC Rcd at 2817, ¶ 192.

<sup>455</sup> *Id.* at 2821, ¶ 203.

<sup>456</sup> Metrocall Comments at 20.

<sup>457</sup> ProNet Comments at 8.

<sup>458</sup> PageMart Comments at 4; PCIA Comments at 6.

<sup>459</sup> Metrocall Comments at 20; ProNet Comments at 8.

partitioning. We therefore will permit partitioning of nationwide geographic area licenses to any eligible party.

133. Consistent with our partitioning rules established for broadband PCS licensees, we permitted MTA and EA licensees to partition service areas along any boundaries defined by the parties.<sup>460</sup> We adopt the same rule for partitioning of nationwide geographic area licenses. Thus, we will permit partitioning of nationwide geographic area paging licenses based on any boundaries defined by the parties.<sup>461</sup>

#### b. Build-out Requirements

134. **Background.** In the *Further Notice*, we tentatively concluded that both the partitioner and partitionee of a geographic area should be subject to coverage requirements that ensure that both portions of the license area will be served.<sup>462</sup> We proposed to require that a partitionee meet the same build-out requirements as the original licensee within its partitioned area, regardless of when the license was acquired. Under this proposal, a partitionee of a geographic area would be required to provide coverage to one-third of the population in its partitioned area within three years of the license grant, and to two-thirds of the population within its partitioned area within five years of the license grant. In the alternative, partitionees would have the option of providing "substantial service" within five years of license grant.<sup>463</sup> We also sought comment on build-out requirements for partitioned nationwide geographic area licenses, and what build-out requirements should apply where a licensee partitions a portion of its license area after the initial ten-year license term has expired.<sup>464</sup>

135. **Discussion.** AirTouch agrees with the Commission that both the partitioner and partitionee should be subject to the same build-out requirements within their respective licensed areas.<sup>465</sup> AirTouch and ProNet, however, support the elimination of the "substantial service" option.<sup>466</sup> PageNet believes that partitioning should be allowed only after the initial geographic area licensee has met the build-out requirements for the entire geographic area, and proposes that partitioning before a geographic area licensee meets its construction requirements should be allowed only on a waiver basis where good cause is shown.<sup>467</sup>

<sup>460</sup> *Second Report and Order and Further Notice*, 12 FCC Rcd 2817, ¶ 192 (referencing *Partitioning and Disaggregation Report and Order and Further Notice*).

<sup>461</sup> *Second Report and Order and Further Notice*, 12 FCC Rcd at 2817, ¶ 192.

<sup>462</sup> *Id.* at 2822, ¶ 209.

<sup>463</sup> *Id.*

<sup>464</sup> *Id.*

<sup>465</sup> AirTouch Comments at 5.

<sup>466</sup> *Id.* at 5-6; ProNet Comments at 8-9.

<sup>467</sup> PageNet Comments at 12; PageNet Reply Comments at 8.

PageNet believes that the ability to partition may encourage bidders in the auction to have unlawful contact with other bidders, particularly if the market is highly contested, and that geographic area licensees may seek to avoid the cancellation of their licenses by partitioning to a "straw man" when they fail to meet our coverage requirements.<sup>468</sup> Metrocall opposes PageNet's proposal, contending that permitting partitioning only on a waiver basis would unduly restrict a licensee's flexibility in the mature paging industry.<sup>469</sup>

136. PCIA and Metrocall are also concerned that the partitioning rules may be used to circumvent the Commission's construction requirements.<sup>470</sup> Metrocall suggests that geographic area licensees' coverage benchmarks should be based on the entire geographic area, which includes the partitioned area, to prevent the geographic area licensee from using partitioning to circumvent the coverage requirements.<sup>471</sup> PCIA states that certain unscrupulous licensees might construct only part of their systems, and then, shortly before the construction deadline, partition the unconstructed area to another party in a pre-arranged, sham transaction.<sup>472</sup> PCIA explains that such a transaction would allow the geographic area licensee to maintain its license even though the partitionee would forfeit its license.<sup>473</sup> To avoid this result, PCIA suggests that the partitioner should be responsible for build-out in the partitioned area if the partitionee fails to build out.<sup>474</sup> Thus, PCIA supports cancellation of the entire license if build-out in the partitioned area is not completed by either the partitionee or the partitioner.<sup>475</sup> SBT responds that the partitioner should not be responsible for the partitionee's failure to construct.<sup>476</sup>

137. We find that commenters have not provided evidence that "sham" arrangements between geographic area licensees and other parties to avoid construction requirements are likely to occur in the paging service or have already taken place in other services. We also disagree with PageNet's concern that allowing the geographic area licensee to partition prior to completing its coverage requirements will result in unlawful activity between bidders concerning partitioning because, as Metrocall notes, this type of activity

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<sup>468</sup> *Id.*

<sup>469</sup> **Metrocall Reply Comments at 11; *see also* ProNet Comments on Petitions for Reconsideration at 13.**

<sup>470</sup> **Metrocall Comments at 22; PCIA Comments at 6-7.**

<sup>471</sup> **Metrocall Comments at 22.**

<sup>472</sup> **PCIA Comments at 7.**

<sup>473</sup> *Id.*

<sup>474</sup> *Id.*

<sup>475</sup> *Id.*

<sup>476</sup> **SBT Comments at 11.**

falls within our anti-collusion rules.<sup>477</sup> Therefore, we will allow all MEA and EA licensees to partition at any time after the grant of their geographic area licenses, and all nationwide geographic area licensees to partition upon the effective date of this Order.<sup>478</sup>

138. We adopt the proposal set forth in the *Further Notice*, and provide an additional option for meeting our coverage requirements, as we have for several other services.<sup>479</sup> Under the first option, partitionees of MEA or EA licenses must provide coverage to one-third of the population in their partitioned area within three years of the initial grant of the license, and to two-thirds of the population in their partitioned area within five years of the initial grant of the license; or, licensees may provide, in the alternative, substantial service within five years of the grant of the MEA or EA license. Under the second option, the original licensee may certify at the time of the partitioning transaction that it has already met, or will meet, the coverage requirements for the entire geographic area.

139. Under the first option, both the partitioner and partitionee are individually responsible for meeting the coverage requirements for their respective areas. Failure by either party to meet its coverage requirements will result in the automatic cancellation of its license without further Commission action.<sup>480</sup> Under the second option, only the partitioner's license will be cancelled if it fails to meet the coverage requirements for the entire geographic area. The partitionee will not be subject to coverage requirements except for those necessary to obtain renewal.<sup>481</sup> Partitioners whose licenses are cancelled will retain those sites authorized, constructed, and operating at the time the geographic area license was granted. We reject commenters' proposal to eliminate the "substantial service" option because we believe that this option will encourage licensees to build out their systems while safeguarding the financial investments made by those licensees who are financially unable to meet specific population coverage requirements. Thus, the substantial service alternative will promote service growth while helping licensees to remain financially viable and retain their licenses.

140. We have explained above that we will defer any decision regarding whether to impose coverage requirements on nationwide geographic area licensees to our *Narrowband PCS* proceeding. Accordingly, we will not impose coverage requirements at this time on partitionees of a nationwide

<sup>477</sup> 47 C.F.R. § 1.2105(c); *see* Metrocall Reply Comments at 11.

<sup>478</sup> We note that with the adoption of the ULS rules, FCC Form 603 will be used for requesting approval of assignment of licenses, including partitioning and disaggregation requests. We also note that no parties commented on the question of what build-out requirements should apply where a licensee partitions its license area after the initial ten-year license term has expired, and we will not address this issue at this time.

<sup>479</sup> *See* 47 C.F.R. § 24.714(f) (Broadband PCS); *id.* § 90.911 (Upper and lower channels of 800 MHz band); *id.* § 90.813 (MTA 900 MHz SMR); *id.* § 90.1019 (Phase II EA, Regional, or Nationwide 220 MHz bands).

<sup>480</sup> *See* 47 C.F.R. § 24.714(f) (Broadband PCS); *id.* § 90.911 (Upper and lower channels of 800 MHz band); *id.* § 90.813 (MTA 900 MHz SMR); *id.* § 90.1019 (Phase II EA, Regional, or Nationwide 220 MHz bands).

<sup>481</sup> *See* 47 C.F.R. § 90.813 (MTA 900 MHz SMR); *see also* 800 MHz *Second Report and Order*, 12 FCC Rcd at 19144-45, ¶¶ 195 & 196 (Upper and Lower 800 MHz Band).



geographic area license, and will defer reaching a decision on this issue until we resolve the question of coverage requirements for nationwide licensees generally. We believe that it would be inappropriate to subject entities that obtain partitioned licenses from nationwide geographic area licensees to coverage requirements when no such requirements have been established for partitioners.<sup>482</sup> However, partitionees of nationwide licenses may be subject to coverage requirements in the future.

**c. License Term**

141. **Background.** In the *Further Notice*, we proposed that a partitionee (including a nationwide license partitionee) be authorized to hold its license for the remainder of the partitioner's original ten-year term and be afforded the same renewal expectancy as a geographic area licensee. We further proposed to grant a partitionee a preference in a renewal proceeding if it can demonstrate that it has provided substantial service during its past license term and has substantially complied with the Communications Act and applicable Commission rules and policies.<sup>483</sup>

142. **Discussion.** AirTouch, Metrocall, and SBT support our proposal to authorize a partitionee (including a nationwide geographic area license partitionee) to hold its license for the remainder of the partitioner's original ten-year term.<sup>484</sup> No commenters opposed this proposal. However, SBT proposes that when an area is partitioned within one year of the renewal date of the original license, the partitionee should receive the license for a one-year term.<sup>485</sup> Thus, the partitionee's license term would extend beyond the partitioner's license term. The majority of commenters also support our proposal to grant a partitionee the same renewal expectancy as the original licensee.<sup>486</sup> We also note that no commenters opposed this proposal.

143. We conclude that partitionees should be authorized to hold their licenses for the remainder of the partitioner's original ten-year term. As we stated in the *Further Notice*, we find this approach to be reasonable in that a partitioner should not be able to confer greater rights than it was awarded under the terms of its license grant. We also believe that authorizing partitionees to hold licenses for the partitioner's original term will promote our goal of providing service to all areas. We decline to adopt SBT's proposal that a partitionee receive a one-year term when any partitioning transaction occurs within one year of the renewal date of the original license because, in this instance, the partitioner would be conferring greater rights than it was awarded under the terms of its license grant. We also find that a partitionee should be granted the same renewal expectancy as the partitioner. In the *CMRS Third Report and Order*, we adopted a

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<sup>482</sup> See *800 MHz Second Report and Order*, 12 FCC Rcd at 19144, ¶ 194 (“It would be inappropriate to subject entities that obtain partitioned licenses or disaggregated spectrum from incumbent SMR licensees to additional performance requirements when no such requirements currently exist for these licenses.”).

<sup>483</sup> *Second Report and Order and Further Notice*, 12 FCC Rcd at 2823, ¶ 211.

<sup>484</sup> AirTouch Comments at 6; Metrocall Comments at 23; SBT Comments at 18.

<sup>485</sup> SBT Comments at 23.

<sup>486</sup> *Id.*

renewal expectancy standard for all CMRS providers, including paging licensees.<sup>487</sup> Under this standard, a CMRS licensee will be entitled to a renewal expectancy if it demonstrates that it has provided substantial service during the license term and has complied with the Commission's rules and policies and the Communications Act.<sup>488</sup> This renewal expectancy standard provides additional incentive for licensees to provide service, thereby promoting investment in and rapid deployment of new technologies and services.

### 3. Disaggregation

#### a. In General

144. **Background.** In the *Notice*, we sought comment on whether we should allow spectrum disaggregation.<sup>489</sup> We did not receive sufficient comment on this issue, and therefore we sought further comment. In the *Further Notice*, we specifically asked commenters to address the feasibility of spectrum disaggregation for paging.<sup>490</sup> Commenters were also asked to address whether minimum disaggregation standards are necessary for paging services, and whether nationwide geographic area licensees should be permitted to disaggregate spectrum.<sup>491</sup>

145. **Discussion** Several commenters oppose the adoption of paging spectrum disaggregation rules.<sup>492</sup> PageMart states that there are no public benefits to allowing the disaggregation of paging spectrum.<sup>493</sup> PageMart and PCIA state that the more spectrum is divided, the less desirable it becomes, and the more difficult it is to reaggregate.<sup>494</sup> PageNet contends that the Commission's inquiry into disaggregation of paging channels is premature because it is unaware of any technology designed for 900 MHz paging channels using less than 25 kHz.<sup>495</sup> PCIA also contends that disaggregation is neither

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<sup>487</sup> *See CMRS Third Report and Order*, 9 FCC Rcd at 8157, ¶ 386.

<sup>488</sup> *Id.*

<sup>489</sup> Disaggregation is the assignment of discrete portions or "blocks" of spectrum licensed to a geographic area licensee.

<sup>490</sup> *Second Report and Order and Further Notice*, 12 FCC Rcd at 2824, ¶ 212.

<sup>491</sup> *Id.*

<sup>492</sup> Arch Reply Comments at 4; PageNet Comments at 11; PageMart Comments at 4-5; PCIA Comments at 7-8.

<sup>493</sup> PageMart at 4.

<sup>494</sup> *Id.*; PCIA Comments at 8.

<sup>495</sup> PageNet Comments at 11.

technically nor practically feasible given the current status of paging technology.<sup>496</sup> PCIA states that disaggregation poses substantial and unacceptable risks of interference.<sup>497</sup> PCIA explains that co-channel and adjacent interference will occur because paging equipment is designed to operate over 25 kHz channels, and a "spill-over" effect will occur if the equipment is used on a smaller bandwidth.<sup>498</sup> Metrocall states that it is not convinced that disaggregating spectrum from a single paging frequency is a viable option at this time, but it does not believe that the rules should completely forbid disaggregation.<sup>499</sup> Thus, Metrocall indicates that the Commission should retain discretion to review disaggregation proposals on a case-by-case basis, and allow disaggregation if it can be demonstrated that it is technically feasible and both parties can provide legitimate signaling services on their respective portions of spectrum.<sup>500</sup>

146. AirTouch supports disaggregation, contending that disaggregation provides licensees with flexibility, encourages efficient use of spectrum, and promotes regulatory parity.<sup>501</sup> AirTouch also argues that disaggregation is consistent with the Commission's policy of permitting flexible use of the spectrum.<sup>502</sup> SBT contends that disaggregation should be limited to only small businesses during the original licensee's construction period.<sup>503</sup>

147. Although several commenters oppose establishing disaggregation rules at this time, we will permit MEA, EA, and nationwide geographic area licensees to engage in disaggregation. We also will not impose a minimum limit on spectrum disaggregation in the paging service.<sup>504</sup> We conclude that the market should determine if paging spectrum is technically and economically feasible to disaggregate. In addition, allowing disaggregation will encourage the further development of paging equipment capable of operating on less than 25 kHz. Our experience in broadband PCS demonstrates that parties are capable of determining the economic and technical feasibility of disaggregation arrangements and will make sound business

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<sup>496</sup> **PCIA Comments at 7-8.**

<sup>497</sup> ***Id.* at 8.**

<sup>498</sup> ***Id.***

<sup>499</sup> **Metrocall Comments at 23.**

<sup>500</sup> ***Id.***

<sup>501</sup> **AirTouch Comments at 6-7.**

<sup>502</sup> ***Id.* at 7.**

<sup>503</sup> **SBT Comments at 19.**

<sup>504</sup> **This is consistent with the approach with have taken in broadband PCS, 220 MHz, WCS, 800 MHz, and 900 MHz services.**

judgments regarding the propriety of these arrangements.<sup>505</sup> We further conclude that allowing spectrum disaggregation at this time could potentially expedite the introduction of service to underserved areas, provide increased flexibility to licensees, and encourage participation by small businesses in the provision of services. We also find that commenters have not provided sufficient evidence that interference to adjacent or co-channel licensees is a substantial risk that should preclude the Commission from allowing disaggregation of paging spectrum. We find that our existing technical rules provide parties with sufficient protection from interference. We also believe that all qualified parties should be eligible to disaggregate any geographic area license. Open eligibility to disaggregate spectrum promotes prompt service to the public by facilitating the assignment of spectrum to the entity that values it most.

#### b. Build-out Requirements

148. **Background.** In the *Further Notice*, we proposed the adoption of a flexible approach to construction requirements for disaggregators and disaggregatees.<sup>506</sup> We proposed that either the disaggregator or disaggregatee entering the geographic market should be obligated to provide coverage to one-third of the population within three years of the license grant, and to two-thirds of the population within five years of the license grant.<sup>507</sup> In the alternative, we would permit either the disaggregator or the disaggregatee to provide substantial service to the geographic area within five years of license grant.<sup>508</sup>

149. **Discussion.** AirTouch and SBT are the only commenters that addressed this issue, and both support the imposition of build-out requirements on the disaggregator and the disaggregatee.<sup>509</sup> AirTouch believes that the Commission's proposal to allow either party to meet the construction requirements would permit licensees who have not utilized their spectrum to engage in sham transactions to retain only the portion of the spectrum they intend to use.<sup>510</sup> SBT also argues that the original licensee should not be able to use disaggregation as a means of meeting the coverage requirements for its spectrum.<sup>511</sup>

<sup>505</sup> *Partitioning and Disaggregation Report and Order and Further Notice*, 11 FCC Rcd at 21860, ¶ 49 (“We will not restrict the amount of broadband PCS spectrum that can be disaggregated. ...While our broadband PCS rules do not contain specific channelization requirements, the rules do require compliance with emission limitations in the frequency bands immediately outside and adjacent to each of the broadband PCS frequency blocks. Therefore, while we will allow disaggregating parties to negotiate channelization plans among themselves as part of their disaggregation agreements, we will continue to require that such plans provide the necessary out-of-band emission protections to third party licensees as required by our rules.”).

<sup>506</sup> *Second Order and Further Notice*, 12 FCC Rcd at 2825, ¶ 216.

<sup>507</sup> *Id.*

<sup>508</sup> *Id.*

<sup>509</sup> AirTouch Comments at 8; SBT Comments at 19.

<sup>510</sup> *Id.* at 7-8.

<sup>511</sup> SBT Comments at 19.

150. We adopt the coverage proposal set forth in the *Further Notice* for MEA and EA licenses, and also provide disaggregating parties with an additional option. Under the first option, which is the option proposed in the *Further Notice*, the parties may agree that either the disaggregator or the disaggregatee will be responsible for meeting the coverage requirements for the geographic service area.<sup>512</sup> Under this option, the disaggregating party certifying responsibility for the coverage requirements of an MEA or EA license will be required to provide coverage to one-third of the population of the licensed geographic area within three years of license grant, and to two-thirds of the population within five years of license grant; or, in the alternative, provide substantial service to the geographic area within five years of license grant. Under the second option, the disaggregator and disaggregatee may certify that they will share the responsibility for meeting the coverage requirements for the entire geographic area.<sup>513</sup> Under this option, both parties jointly will be required to provide coverage to one-third of the population of the licensed geographic area within three years of license grant, and to two-thirds of the population within five years of license grant; or, in the alternative, provide substantial service to the geographic area within five years of license grant.

151. We believe that these options are appropriate because our rules for disaggregation should allow for flexibility, and also be consistent with our rules established in other services. The goal of our coverage requirements in both the partitioning and disaggregation contexts is to ensure that the spectrum is used to the same degree that would have been required had the partitioning or disaggregation transaction not taken place.<sup>514</sup> Our rules do not dictate the amount of spectrum that licensees must use to meet coverage requirements. Thus, a licensee who disaggregates a portion of its spectrum block to another party may still meet its preexisting construction requirements for the entire geographic area by using the spectrum it has retained. Similarly, a party who receives a portion of the spectrum from the original licensee can also meet the construction requirements for the entire geographic area by using the spectrum it has acquired. In addition, parties can share responsibility for meeting construction requirements for the entire geographic area by combining areas they serve.

152. We recognize that if the parties to a disaggregation agreement select the first option, situations may arise where a party minimally builds its system but will retain its license because the other party has met the coverage requirements for the geographic area. Nonetheless, we believe that it is appropriate for one party to assume full responsibility for construction within the shared service area, because service would be offered to the required percentage of the population on a common frequency, even if not on the entire spectrum. Under the first option, if the certifying party fails to meet the coverage requirements for the entire geographic area, that party's license will be subject to cancellation, but the non-certifying party's license will not be affected.<sup>515</sup> However, if the parties to a disaggregation agreement select

<sup>512</sup> See 47 C.F.R. § 24.714 (Broadband PCS); *id.* § 90.911 (Lower channels of 800 MHz band); *id.* § 90.813 (MTA 900 MHz SMR); *id.* § 90.1019 (Phase II EA, Regional, or Nationwide 220 MHz bands).

<sup>513</sup> See 47 C.F.R. § 24.714 (Broadband PCS); *id.* § 90.911 (Lower channels of 800 MHz band); *id.* § 90.813 (MTA 900 MHz SMR); *id.* § 90.1019 (Phase II EA, Regional, or Nationwide 220 MHz bands).

<sup>514</sup> See *Partitioning and Disaggregation Report and Order and Further Notice*, 11 FCC Rcd at 21864, ¶ 61.

<sup>515</sup> See Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, *Fifth Report and Order*, PR Docket No. 89-552, FCC 98-186, ¶ 24 (Aug. 6, 1998) (*220 MHz Fifth Report and Order*); (Phase II EA, Regional, or Nationwide 220 MHz Band); *800 MHz*

the second option and jointly fail to satisfy the coverage requirements for the entire geographic area, both parties' licenses will be subject to cancellation.<sup>516</sup> We note that MEA or EA licensees whose licenses are cancelled will retain those sites authorized, constructed, and operating at the time the geographic area license was granted.

153. As we did with respect to the issue of coverage requirements for partitionees of nationwide geographic area licenses, we will defer any decision on such requirements for disaggregates of nationwide geographic area licensees until we decide the question of whether to impose coverage requirements on nationwide geographic area licensees generally.<sup>517</sup> Thus, disaggregates of nationwide licenses may be subject to coverage requirements in the future.

### c. License Term

154. **Background.** The *Further Notice* proposed the adoption of a similar license term for disaggregates as was proposed for partitionees, *i.e.*, a disaggregatee would be authorized to hold its license for the remainder of the disaggregator's original ten-year license term.<sup>518</sup> We also proposed that a disaggregatee should be afforded a renewal expectancy if it can demonstrate that it has provided substantial service during the past license term and has substantially complied with the Communications Act and applicable Commission rules and policies.<sup>519</sup>

155. **Discussion.** AirTouch, the only commenter to address this issue, supports our proposal,<sup>520</sup> which we adopt. Disaggregates will therefore be authorized to hold licenses for the remainder of the disaggregator's original ten-year term. As we concluded with respect to partitioners, the disaggregator should not be entitled to confer greater rights than it was awarded under the initial license grant. We also conclude that a disaggregatee should be afforded the same renewal expectancy as the disaggregator.

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*Second Report and Order*, 12 FCC Rcd at 19145-46, ¶¶ 197 & 199 (Upper and lower channels of 800 MHz band and MTA 900 MHz SMR); *Partitioning and Disaggregation Report and Order and Further Notice*, 11 FCC Rcd at 21865, ¶ 63 (Broadband PCS).

<sup>516</sup> See *220 MHz Fifth Report and Order*, FCC 98-186 at ¶ 24; *800 MHz Second Report and Order*, 12 FCC Rcd at 19145-46, ¶ 199 (Lower channels of 800 MHz band and MTA 900 MHz SMR); *Partitioning and Disaggregation Report and Order and Further Notice*, 11 FCC Rcd at 21865, ¶ 63 (Broadband PCS).

<sup>517</sup> See *supra* at ¶¶ 129-30.

<sup>518</sup> *Second Order and Further Notice*, 12 FCC Rcd at 2825, ¶ 217.

<sup>519</sup> *Id.*

<sup>520</sup> AirTouch Comments at 7.

#### 4. Combination of Partitioning and Disaggregation

156. **Background.** In the *Further Notice*, we tentatively concluded that if disaggregation is feasible, we should permit combinations of partitioning and disaggregation, subject to the rules we proposed for each.<sup>521</sup>

157. **Discussion.** As the sole commenter on this issue, AirTouch supports a combination of partitioning and disaggregation for paging licenses. AirTouch contends that the Commission should adopt rules that accommodate both partitioning and disaggregation because each promotes the participation of small businesses in the paging industry and the efficient use of spectrum. We agree and adopt our proposal. We believe that allowing carriers to engage in combinations of partitioning and disaggregation will expedite the introduction of service to underserved areas, foster efficient spectrum use, provide increased flexibility to licensees, eliminate market entry barriers, and encourage market participation by small businesses. As in other wireless services, we further conclude that in the event that there is a conflict in the application of the partitioning and disaggregation rules, the partitioning rules should prevail.<sup>522</sup>

#### 5. Unjust Enrichment Provisions Regarding Partitioning and Disaggregation

158. **Background.** In the *Further Notice*, the Commission sought comment on proposals for adjusting installment payments for licensees that partition or disaggregate spectrum. With regard to partitioning, the Commission proposed that unjust enrichment rules apply to small businesses that partition to non-small businesses or to small businesses qualifying for a lower bidding credit.<sup>523</sup> We sought comment on how these unjust enrichment payments should be calculated. With regard to disaggregation, we sought comment on a tentative conclusion that, if we permit a qualified small business licensee to disaggregate to a non-small business entity or a small business qualifying for a lower bidding credit, the disaggregating licensee should be required to repay on a *pro rata* basis any benefits it received from the special small business provisions.<sup>524</sup> This would include accelerated payment of bidding credits, unpaid principal, and accrued interest. We sought comment on how these repayments should be calculated.

159. **Discussion.** ProNet recommends that small businesses be subject to the Commission's unjust enrichment rules when such businesses partition to a non-small business.<sup>525</sup> AirTouch concurs that unjust enrichment provisions should extend to partitioning, and believes that non-small business partitionees should reimburse the Commission "for the amount of benefit received from bidding credits . . . relating to the

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<sup>521</sup> *Second Report and Order and Further Notice*, 12 FCC Rcd at 2825, ¶ 218.

<sup>522</sup> *See Partitioning and Disaggregation Report and Order and Further Notice*, 11 FCC Rcd at 21866, ¶ 66.

<sup>523</sup> *Second Report and Order and Further Notice*, 12 FCC Rcd at 2822, ¶ 207.

<sup>524</sup> *Id.* at 2884, ¶ 214.

<sup>525</sup> ProNet Comments at 9.

portion of the geographic area which has been partitioned."<sup>526</sup> AirTouch suggests that the amount of repayment be calculated according to the population and amount of spectrum in the partitioned area,<sup>527</sup> and suggests a similar unjust enrichment approach for disaggregation.<sup>528</sup>

160. In the *Memorandum Opinion and Order on Reconsideration*, we eliminated the use of installment payments for auctioned spectrum in the paging service.<sup>529</sup> We need not address, therefore, how partitioning and disaggregation will affect installment payments. Further, since the release of the *Further Notice*, the Commission has adopted a general rule that determines the amount of unjust enrichment payments assessed for all current and future licensees that engage in partitioning and disaggregation.<sup>530</sup> Specifically, the rules adopted in the *Part 1 Third Report and Order and Second Further Notice* indicate that if a licensee seeks to partition any portion of its geographic area, the amount of the unjust enrichment payment will be calculated based on the ratio of the population in the partitioned area to the overall population of the license area.<sup>531</sup> In the event of disaggregation, the amount of the unjust enrichment payment will be based upon the ratio of the amount of spectrum disaggregated to the amount of spectrum held by the disaggregating licensee.<sup>532</sup> The unjust enrichment provisions adopted in the *Part 1 Third Report and Order and Second Further Notice* will apply to any MEA or EA paging licensee that receives a bidding credit and later elects to partition or disaggregate its license. When combined partitioning and disaggregation is proposed, we will, consistent with our rules for other services, use a combination of both population of the partitioned area and amount of spectrum disaggregated to make these pro rata calculations.<sup>533</sup>

## 6. Application Fraud

<sup>526</sup> **AirTouch Comments at 4.**

<sup>527</sup> ***Id.* at 4-5.**

<sup>528</sup> ***Id.* at 7.**

<sup>529</sup> ***See supra* at ¶ 111.**

<sup>530</sup> ***See Part 1 Third Report and Order and Second Further Notice*, 13 FCC Rcd at 409, ¶ 57.**

<sup>531</sup> ***Id.***

<sup>532</sup> ***Id.***

<sup>533</sup> ***See, e.g., Partitioning and Disaggregation Report and Order and Further Notice*, 11 FCC Rcd at 21866, ¶ 66; Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, *Fourth Report and Order*, 13 FCC Rcd 11655, 11669, ¶ 25 (1998); *220 MHz Fifth Report and Order*; FCC 98-186, ¶ 19.**



161. **Background.** In response to the *Notice*, the Federal Trade Commission (FTC) raised the issue of paging application fraud.<sup>534</sup> According to the FTC, telecommunications investment frauds are of two basic types: (1) "application mills," which use telemarketing to sell application preparation services for wireless licenses for thousands of dollars to consumers, claiming that telecommunications businesses will seek to lease or buy the licenses for many times the telemarketers' applications fees; and (2) "buildout" schemes, through which telemarketers sell, again for thousands of dollars, interests in limited liability companies or partnerships that supposedly will acquire wireless licenses, build and operate telecommunications systems, and pay the consumers high dividends.<sup>535</sup> Although the FTC stated that awarding licenses on a geographic area basis through competitive bidding will reduce the incidence of such fraud, the shared PCP channels, which will not be subject to geographic area licensing, remain vulnerable to abuse.<sup>536</sup>

162. In the *Further Notice*, we sought comment on: (1) how the Form 600, which is the long form application for an authorization in the Wireless Telecommunications Bureau (and which is being replaced by Form 601), could be revised to provide applicants with information regarding the risks of telecommunications investment and warning signs of possible investment fraud; (2) whether application preparation services should be required to sign the Form 600 and to certify that the applicant has received in writing pertinent information regarding the Commission's rules and the obligations of licensees; and (3) whether PCIA, as frequency coordinator, should be required to implement additional procedures in the coordination process to reduce fraudulent or speculative applications.<sup>537</sup>

163. **Discussion.** Initially, we note that we recently have established electronic filing procedures for wireless license applications.<sup>538</sup> However, applicants for shared PCP channels must currently file manually because electronic filing via the universal licensing system (ULS) has not yet been instituted for the shared channels. Nonetheless, electronic filing for the shared paging channels will be mandatory six months after the date it first becomes possible to file applications electronically. The FTC suggests that we modify the long-form application to include: specific information on the Commission's rules against speculation and trafficking, applicable construction requirements and penalties for non-compliance, and general information on fraud, including the number of the FCC Call Center in case the applicant has any questions.<sup>539</sup> Additionally, the FTC urges us to require that application preparers certify that they have

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<sup>534</sup> *See* Comment of the Federal Trade Commission, filed March 18, 1996 (FTC Comments on *Notice*).

<sup>535</sup> *See* FTC Comments on *Notice* at 1; *see also* *Second Report and Order and Further Notice*, 12 FCC Rcd at 2826, ¶ 219.

<sup>536</sup> FTC Comments on *Notice* at 9-11. The shared PCP channels are all the non-929 MHz Part 90 shared channels and the five 929 MHz shared channels.

<sup>537</sup> *Second Report and Order and Further Notice*, 12 FCC Rcd at 2826, ¶ 220.

<sup>538</sup> *See* Wireless Telecommunications Bureau Announce New Procedures for Filing Part 22 Paging Applications in Universal Licensing System (ULS) Starting June 1, 1998, *Public Notice*, DA 98-989 (May 22, 1998).

<sup>539</sup> FTC Comments at 10.

forwarded pertinent information concerning the possibility of fraud to the applicants -- a standardized document that contains clear warnings about Commission regulations and includes a number for the FCC Call Center.<sup>540</sup> SBT suggests that we modify Form 600 to include a warning near the signature block stating that failure to construct will result in the cancellation of licenses.<sup>541</sup> SBT also suggests that we require the applicant to include a showing of reasonable assurance of transmitter site availability upon reasonable notice by the Commission; and that we request additional information (*i.e.*, name, address, employer, telephone number, and signature) about the application preparers, if they are not the applicant.<sup>542</sup> AirTouch requests that the language from paragraph 219 of the *Second Report and Order and Further Notice*, setting forth the FTC's description of the types of telecommunications investment fraud, be incorporated into publicly distributed information and into the signature block on FCC Form 600.<sup>543</sup> Metrocall suggests that the Commission require information showing that the applicant has a reasonable assurance of a transmitter site and is financially qualified,<sup>544</sup> and specific information about whether grant of the application would serve the public interest.<sup>545</sup>

164. We are currently in the process of modifying FCC Form 601 to include language near the signature block that warns applicants that the failure of the licensee to construct will result in cancellation of the license. Specifically, Form 601 will state: "Upon grant of this license application, the licensee may be subject to certain construction or coverage requirements. Failure to meet the construction or coverage requirements may result in cancellation of the license. Consult appropriate FCC regulations to determine the construction or coverage requirements that apply to the type of license requested in this application." We believe this language will be helpful to applicants in all services and may be of some use in deterring fraud. At the same time, we agree with PCIA and Metrocall that fraud victims may or may not be given a meaningful opportunity to read the application forms submitted on their behalf by application preparation services.<sup>546</sup> Further, when electronic filing is implemented for the shared channels, applicants will not submit a handwritten signature, thus raising the possibility that the applicant may never see the electronic form.<sup>547</sup> Therefore, we are not convinced that the inclusion of specific information on the long-form

<sup>540</sup> *Id.* at 11.

<sup>541</sup> SBT suggests the following warning: "The person signing this form acknowledges that they will construct and operate the proposed radio facilities. Failure to construct the proposed radio facilities within the required construction period shall result in cancellation of the license granted hereunder." SBT Comments at 21.

<sup>542</sup> *Id.*

<sup>543</sup> AirTouch Comments at 8.

<sup>544</sup> Metrocall Comments at 16-17. Metrocall also suggests that the Commission may only want to send a "defect letter" inquiring about site specifications to "applicants that display speculative warning signs." *Id.*

<sup>545</sup> *Id.* at 13.

<sup>546</sup> Metrocall Comments at 17-18; PCIA Reply Comments at 8.

<sup>547</sup> All that is required is the applicant's taxpayer identification number (TIN).

application regarding application fraud will necessarily decrease such fraud. Additionally, an application mill may obtain reasonable assurance of a transmitter site and file hundreds of applications specifying that single site. Therefore, the "reasonable assurance" requirement will not necessarily reduce fraud and we will not require applicants to supply this additional information. Nor will we require application preparers to certify as to the accuracy of the application. According to PCIA and Metrocall, this could possibly affect legitimate professional consulting and engineering services wary of attesting to the accuracy of information supplied by applicants.<sup>548</sup>

165. Consequently, we must look to additional methods of combatting fraud, including through PCIA, the frequency coordinator. PCIA acknowledges that it is willing to educate the public concerning issues that are typically the focus of misleading statements by application mills.<sup>549</sup> Further, PCIA, as a

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<sup>548</sup> Metrocall Comments at 18; PCIA Reply Comments at 10.

<sup>549</sup> PCIA October 26, 1998 *Ex Parte* at 16.

result of discussions with the FTC, has already taken steps to reduce application fraud.<sup>550</sup> Previously, PCIA only sent confirmation of coordination to the application preparer.<sup>551</sup> Now, PCIA's coordination confirmation form (as well as all other correspondence during the coordination process) is sent to the applicant as well as the contact representative.<sup>552</sup> PCIA also states that it is working with the FTC to revise the postcard it sends to applicants and their contact representatives, which indicates that the application has been received and gives a PCIA file number, to include more information about the Commission's application and construction requirements.<sup>553</sup> In addition, PCIA now always provides a co-channel printout indicating co-channel licensees for new applicants whenever the channel is shared.<sup>554</sup> We applaud these measures and encourage PCIA to do as much as possible to make applicants aware of the potential for fraud by application mills.<sup>555</sup>

166. PCIA also contends that application mills thrive because the Commission has failed to provide clear information on licensing, construction, assignment of licenses, management agreements, and frequency availability.<sup>556</sup> Thus, PCIA suggests that the Commission issue public notices concerning those issues that are the subject of misleading statements by application mills.<sup>557</sup> The Commission has issued such public notices in the past,<sup>558</sup> and will continue to issue public notices in the future that are designed to inform the public and warn them of the potential for fraud arising out of the preparation and filing of FCC applications. Such public notices will also provide information regarding the application and licensing process, specifically focusing on construction requirements and frequency availability.<sup>559</sup> Further, we will

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<sup>550</sup> PCIA Comments at 12-13.

<sup>551</sup> *Id.* at 13; PCIA October 26, 1998 *Ex Parte* at 16.

<sup>552</sup> PCIA Comments at 13; PCIA October 26, 1998 *Ex Parte* at 16.

<sup>553</sup> PCIA Comments at 12-13.

<sup>554</sup> *Id.* at 13.

<sup>555</sup> PCIA states that in an auction environment, frequency coordination will not be required prior to the submission and grant of market area licenses. PCIA October 26, 1998 *Ex Parte* at 16. However, applicants on the shared PCP channels will still be subject to frequency coordination because these channels are not subject to competitive bidding.

<sup>556</sup> *Id.* at 15.

<sup>557</sup> *Id.* at 15-16.

<sup>558</sup> *See, e.g.,* WTB's Enforcement Division Releases Consumer Brochure on Telecommunications Investment Scams, *Public Notice*, 1996 WL 627923, (Oct. 31, 1996).

<sup>559</sup> PCIA also suggests modifying the Form 800A construction letter, which is a computer-generated letter sent to Part 90 licensees requesting confirmation that construction has been completed. Comments of PCIA at 13-15; and PCIA October 26, 1998 *ex parte* at 16. PCIA suggests that Form 800A should only be generated

modify our website so that information regarding fraud on the shared paging channels will be accessible directly from the Commission's homepage as well as from the Wireless Telecommunications Bureau's homepage. We believe these steps will help reduce speculation and application fraud by increasing the amount of information available to the public.

167. Finally, once we have completed the modification of FCC Form 601 to include warning language as described above, the Wireless Telecommunications Bureau will release a public notice that removes our interim licensing rules for both the lower band shared PCP channels and the five shared 929 MHz PCP channels.<sup>560</sup> Presently, our interim paging rules for the shared PCP paging channels permit only incumbents to file for new sites at any location.<sup>561</sup> We allow non-incumbents to file applications, but only for private, internal-use systems.<sup>562</sup> Once the interim licensing rules are removed, non-incumbents will be permitted to file applications on the shared PCP paging channels for new sites at any location. We further note that while frequency coordination is no longer required on the exclusive paging channels, all applications for new sites filed on the shared PCP paging channels will continue to require frequency coordination prior to the filing of these applications with the Commission. Accordingly, we amend section 90.175(f) to clarify that frequency coordination is only needed for shared frequencies in the 929-930 MHz band.

## VI. CONCLUSION

168. In the *Order on Reconsideration*, we modify rules adopted in the *Second Report and Order and Further Notice* by replacing MTAs with MEAs for geographic area licensing of the 929 and 931 MHz bands. We affirm our decision in the *Second Report and Order and Further Notice* to award licenses for EAs for paging systems operating in the 35-36 MHz, 43-44 MHz, 152-159 MHz, and 454-460 MHz bands. In addition, we clarify and amend our rules to permit holders of system-wide licenses to include remote, stand-alone transmitters under the system-wide call sign or, alternatively, to maintain separate licenses for any remote, stand-alone transmitters. We clarify that grandfathered non-exclusive licensees on the thirty-five exclusive 929 MHz channels will continue to operate under the same arrangements established with the exclusive incumbent licensees and other non-exclusive incumbent licensees prior to the adoption of the

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when newly issued licenses would give rise to a new construction obligation. PCIA Comments at 13-14; and PCIA October 26, 1998 *Ex Parte* at 16. PCIA also states that the Commission should require both the licensee and the person or entity that actually performed the construction to sign the Form 800A attesting to the completion of construction. PCIA Comments at 14-15; and PCIA October 26, 1998 *Ex Parte* at 16. We note that Form 800A will be replaced in the ULS system with a Construction/Coverage Reminder Notice that will be sent to all licensees prior to their construction/coverage deadline to remind them to notify the Commission upon completion. At the time the Form 800A or the Construction/Coverage Reminder Notice is first sent, the licensee has presumably already paid its fee to the application preparer and any fraudulent activity has most likely occurred. We believe that alerting the public to the possibility of fraud will be better accomplished through Commission public notices, the Commission's website, and PCIA's distribution of information.

<sup>560</sup> In the public notice, the Wireless Telecommunications Bureau will remove section 90.494(g) of our rules, which outlines the interim licensing procedures for the five shared 929 MHz PCP channels.

<sup>561</sup> *Second Report and Order and Further Notice*, 12 FCC Red at 2757-58, ¶ 43.

<sup>562</sup> *Id.*

*Second Report and Order and Further Notice.* We also amend Section 22.503(k) of our rules to provide that holders of MEA and EA paging licenses who fail to meet their coverage requirements will be permitted to retain licenses only for those facilities authorized, constructed, and operating at the time the geographic area license was granted.

169. With regard to our competitive bidding rules for the paging service, we direct the Bureau, consistent with the Balanced Budget Act of 1997, to seek further comment on: the license groupings and sequence of the paging auctions; an appropriate stopping rule for the paging auctions; and what information, such as bidder identities, should be disclosed to bidders during the paging auctions. We decline to require that bidders specify each individual license on which they will bid and submit an upfront payment for each license; permit bid withdrawal without monetary liability; or modify our anti-collusion rule to provide safe harbors for certain business discussions during the auctions. In addition, consistent with our actions in the recent *Part 1 Third Report and Order and Second Further Notice*, we will not allow installment payments, but will allow licensees to make their final payments within ten (10) business days of the payment deadline subject to a late fee of five (5) percent of the amount due. Lastly, consistent with our proposal in the *Part 1 Third Report and Order and Second Further Notice*, we clarify our attribution rules by providing a definition of "controlling interest."

170. In the *Third Report and Order*, we defer any decision on whether we should impose coverage requirements on nationwide geographic area licensees until the Commission resolves similar issues raised in the *Narrowband PCS* proceeding. The *Third Report and Order* also adopts rules for partitioning and disaggregation of MEA, EA, and nationwide geographic area licenses. Finally, in order to deter fraud by application mills on the shared channels, we will add language to the long-form application regarding construction and coverage requirements and we will disseminate information regarding the potential for fraud and our licensing rules through public notices and our website.

## VII. PROCEDURAL MATTERS AND ORDERING CLAUSES

### A. Procedural Matters

171. This is a permit-but-disclose notice and comment rule making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's rules.<sup>563</sup>

172. As required by the Regulatory Flexibility Act (RFA), the Commission has prepared a Supplemental Final Regulatory Flexibility Analysis (Supplemental FRFA) of the possible impact on small entities of the rules adopted in this *Memorandum Opinion and Order on Reconsideration*.<sup>564</sup> The Supplemental FRFA is set forth in Appendix C. As also required by the RFA, the Commission has prepared a Final Regulatory Flexibility Analysis (FRFA) of the expected impact on small businesses of the rules adopted in this *Third Report and Order*.<sup>565</sup> The FRFA is set forth in Appendix D. The Office of Public

<sup>563</sup> See generally 47 C.F.R. §§ 1.1201, 1.1203, 1.1206(a).

<sup>564</sup> 5 U.S.C. § 604.

<sup>565</sup> *Id.* § 601 *et seq.*

Affairs, Reference Operations Division, will send a copy of the *Memorandum Opinion and Order on Reconsideration*, including the Supplemental FRFA, and *Third Report and Order*, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with the RFA.

173. This *Memorandum Opinion and Order on Reconsideration and Third Report and Order* contains information collection requirements that the Commission is submitting to the Office of Management and Budget requesting clearance under the Paperwork Reduction Act.

#### **B. Ordering Clauses**

174. Authority for issuance of this *Memorandum Opinion and Order on Reconsideration and Third Report and Order* is contained in Sections 4(i), 303(r), 309(j), 332, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), 309(j), 332, and 405.

175. Accordingly, IT IS ORDERED that the petitions for reconsideration or clarification listed in Appendix A ARE GRANTED to the extent provided herein and otherwise ARE DENIED; and that the Petition for Partial Reconsideration of PSWF Corporation filed April 11, 1997, is to the extent provided herein DISMISSED as moot. This action is taken pursuant to Sections 4(i), 303(r), 309(j), 332, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), 309(j), 332, and 405, and Section 1.429(i) of the Commission's rules, 47 C.F.R. § 1.429(i).

176. IT IS FURTHER ORDERED that the petitions for reconsideration and application for review of the *CWD Order* listed in footnote 52 ARE DENIED. This action is taken pursuant to Sections 4(i), 303(r), 309(j), 332, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), 309(j), 332, and 405, and Sections 1.429(i) and 1.115 of the Commission's rules, 47 C.F.R. §§ 1.429(i), 1.115.

177. IT IS FURTHER ORDERED that the Commission's rules ARE AMENDED as set forth in Appendix B. IT IS FURTHER ORDERED that the provisions of this *Memorandum Opinion and Order on Reconsideration and Third Report and Order* and the Commission's rules, as amended in Appendix B, SHALL BECOME EFFECTIVE 60 days after publication of this *Memorandum Opinion and Order on Reconsideration and Third Report and Order* in the Federal Register.

178. IT IS FURTHER ORDERED that a Public Notice will be issued by the Wireless Telecommunications Bureau following the adoption of this *Memorandum Opinion and Order on Reconsideration and Third Report and Order* that will remove the interim licensing rules on the shared PCP channels from the Commission's rules.

179. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this *Memorandum Opinion and Order on Reconsideration and Third Report and Order*, including the Supplemental Final Regulatory Flexibility Analysis and Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas  
Secretary



## APPENDIX A

## PETITIONS

1. Advanced Paging, Inc. (Advanced)
2. AirStar Paging, Inc. (AirStar)
3. American Paging, Inc. (API)
4. Arch Communications Group (Arch)
5. Big Bend Telephone Company, Inc. (Big Bend)
6. Blooston, Mordkofsky, Jackson & Dickens (Blooston)
  - Arthur Dale & Angela Hickman d/b/a Omnicom
  - AzCOM Paging, Inc.
  - Cascade Utilities, Inc.
  - Cleveland Mobile Radio Sales, Inc.
  - Clifford D. Moeller & Barbara J. Moeller d/b/a Valley Answering Service
  - Com-Nav, Inc. d/b/a Radiotelephone of Maine (Com-Nav)
  - Lubbock Radio Paging Service, Inc. (Lubbock)
  - Oregon Telephone Corporation
  - Penasco Valley Telephone Cooperative, Inc.
  - Prairie Grove Telephone Company
  - Professional Answering Service, Inc.
  - Radiofone, Inc.
  - Robert F. Ryder d/b/a Radio Paging Service
  - Telephone & Two Way
  - Teletouch Licenses, Inc.
  - Ventures in Paging, L.C.
7. Century Telephone Enterprises, Inc. (Century)
8. Consolidated Communications Telecom Services, Inc. (Consolidated)
9. Lincoln County Telephone System, Inc. (Lincoln)
10. Metrocall, Inc. (Metrocall)
11. Mid-Rivers Telephone Cooperative, Inc. (Mid-Rivers)
12. Morris Communications, Inc. (Morris)
13. Mobile Telecommunications Technologies Corp. (MTel)
14. National Telephone Cooperative Association (NTCA)
15. Nationwide Paging, Inc. (Nationwide)
16. Nucla-Naturita Telephone Company (Nucla-Naturita)
17. Paging Network, Inc. (PageNet)
18. Personal Communications Industry Association (PCIA)
19. Preferred Networks, Inc. (Preferred Networks)
20. Priority Communications, Inc. (Priority)
21. ProNet, Inc. (ProNet)
22. PSWF Corporation (PSWF)<sup>566</sup>
23. Puerto Rico Telephone Company (PRTC)
24. Robert Kester, *et. al.* (Robert Kester)

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<sup>566</sup> PSWF filed separate petitions on March 26, 1997, and April 11, 1997.

25. Schuylkill Mobile Fone, Inc. (Schuylkill)
26. Teletouch Licenses, Inc. (Teletouch)
27. TSR Paging, Inc. (TSR)
28. Western Maryland Wireless Company (Western Maryland)
29. Western Paging I Corporation and Western Paging II Corporation (Western Paging)

#### **OPPOSITIONS/COMMENTS**

1. AirTouch Opposition
2. AirTouch Comments
3. API Comments
4. Arch Opposition
5. Com-Nav Comments
6. Communication Innovations Corporation (CIC) Opposition
7. Lubbock Comments
8. Metrocall Response to Petition
9. MTel Comments
10. Nationwide Opposition
11. Nucla-Naturita Comments
12. Oregon Telephone Corporation (OTC) Comments
13. PageMart II, Inc. (PageMart) Opposition
14. PageNet Comments
15. PCIA Opposition
16. Penasco Valley Telephone Cooperative (Penasco) Comments
17. Professional Answering Service (Professional) Comments
18. ProNet Comments
19. SpaceMark Communications Comments
20. Ventures in Paging, L.C. Comments

#### **REPLIES TO OPPOSITIONS/COMMENTS**

1. AirStar
2. AirTouch
3. API
4. Arch
5. Big Bend
6. Blooston
7. Century
8. Mid-Rivers
9. NTCA
10. Nucla-Naturita
11. PageNet
12. ProNet
13. PRTC

**EX PARTE**

1. AirTouch -- filed July 15, 1997
2. Electronic Engineering Company -- filed September 10, 1997
3. Federal Trade Commission (FTC) -- filed June 10, 1997
4. NTCA -- filed November 18, 1997
5. PageNet -- filed October 27, 1998
6. PCIA -- filed June 18, 1997
7. PCIA -- filed December 1, 1997
8. PCIA -- filed April 7, 1998
9. PCIA -- filed April 29, 1998
10. PCIA -- filed September 3, 1998
11. PCIA -- filed September 18, 1998
12. PCIA -- filed September 21, 1998
13. PCIA -- filed October 13, 1998
14. PCIA -- filed October 26, 1998

**OTHER**

1. Metrocall -- Motion for Stay Pending Reconsideration and Clarification -- filed April 11, 1997
2. Radiofone, Inc. -- Notice of Withdrawal as Party<sup>567</sup> -- filed June 11, 1997
3. TSR Wireless LLC -- Notification<sup>568</sup> -- filed April 20, 1997
4. TSR Wireless LLC -- Withdrawal of Petition for Partial Reconsideration<sup>569</sup> -- filed October 22, 1998

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<sup>567</sup> Pursuant to this notice of withdrawal, Radiofone, Inc. withdrew as a party to the petition for reconsideration filed on April 11, 1997, by Blooston, Mordkofsky, Jackson & Dickens.

<sup>568</sup> TSR Paging, Inc. merged with American Paging, Inc. and its subsidiaries to form a new entity, TSR Wireless LLC.

<sup>569</sup> TSR Wireless LLC withdrew the petition for reconsideration filed on March 26, 1997, by American Paging Inc.

**COMMENTS IN RESPONSE TO FURTHER NOTICE**

1. AirTouch
2. Blooston
3. FTC
4. Metrocall
5. Nucla-Naturita
6. PageMart
7. PageNet
8. PCIA
9. ProNet
10. Small Business in Telecommunications (SBT)

**REPLIES**

1. AirTouch
2. Arch
3. Blooston
4. Century
5. Metrocall
6. PageNet
7. PCIA
8. ProNet

**APPENDIX B**

Part 22 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 22 continues to read as follows:

AUTHORITY: Sections 4, 303, 309 and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, 309 and 332, unless otherwise noted.

2. Section 22.213 is revised to read as follows:

**§ 22.213 Long-form application (FCC Form 601).**

Each successful bidder for a paging geographic area authorization must submit a "long-form" application (Form 601) within ten (10) business days after being notified by Public Notice that it is the winning bidder. Applications for paging geographic area authorizations on FCC Form 601 must be submitted in accordance with § 1.2107 and § 1.2112 of this chapter, all applicable procedures set forth in the rules in this part, and any applicable Public Notices that the FCC may issue in connection with an auction. After an auction, the FCC will not accept long-form applications for paging geographic area authorizations from anyone other than the auction winners and parties seeking partitioned authorizations pursuant to agreements with auction winners under § 22.221.

3. Section 22.215 is amended by revising paragraph (a) to read as follows:

**§ 22.215 Authorization, grant, denial, default, and disqualification.**

(a) Each winning bidder will be required to pay the full balance of its winning bid no later than ten (10) business days following the release date of a Public Notice establishing the payment deadline. If a winning bidder fails to pay the balance of its winning bids in a lump sum by the applicable deadline as specified by the Commission, it will be allowed to make payment no later than ten (10) business days after the payment deadline, provided that it also pays a late fee equal to five (5) percent of the amount due. When a winning bidder fails to pay the balance of its winning bid by the late payment deadline, it is considered to be in default on its authorization(s) and subject to the applicable default payments. Authorizations will be awarded upon the full and timely payment of winning bids and any applicable late fees.

\* \* \* \* \*

4. Section 22.217 is amended by revising paragraph (a) and adding paragraph (b)(4) to read as follows:

**§ 22.217 Bidding credits for small businesses.**

(a) A winning bidder that qualifies as a small business or a consortium of small businesses as defined in § 22.223(b)(1)(i) may use a bidding credit of thirty-five (35) percent to lower the cost of its winning bid. A winning bidder that qualifies as a small business or a consortium of small businesses as

defined in § 22.223(b)(1)(ii) may use a bidding credit of twenty-five (25) percent to lower the cost of its winning bid.

(b) \* \* \*

(4) If a small business that utilizes a bidding credit under this section partitions its authorization or disaggregates its spectrum to an entity not meeting the eligibility standards for the same bidding credit, the partitioning or disaggregating licensee will be subject to the provisions concerning unjust enrichment as set forth in § 1.2111(e)(2) and (3) of this chapter.

5. Section 22.219 is removed.

6. Section 22.221 is amended by revising paragraphs (b) and (c) to read as follows:

**§ 22.221 Eligibility for partitioned authorizations.**

\* \* \* \* \*

(b) Each party to an agreement to partition the authorization must file a long-form application (FCC Form 601) for its respective, mutually agreed-upon geographic area together with the application for the remainder of the MEA or EA filed by the auction winner.

(c) If the partitioned authorization is being applied for as a partial assignment of the MEA or EA authorization following grant of the initial authorization, request for authorization for partial assignment of an authorization shall be made pursuant to § 1.948.

7. Section 22.223 is amended by revising paragraphs (b)(1) and (b)(2) and adding paragraphs (b)(4) and (e) to read as follows:

**§ 22.223 Definitions concerning competitive bidding process.**

\* \* \* \* \*

(b) \* \* \*

(1) \* \* \*

(i) Together with its affiliates and controlling interests has average gross revenues that are not more than \$3 million for the preceding three years; or

(ii) Together with its affiliates and controlling interests has average gross revenues that are not more than \$15 million for the preceding three years.

(2) For purposes of determining whether an entity meets either the \$3 million or \$15 million average annual gross revenues size standard set forth in paragraph (b)(1), the gross revenues of the entity, its affiliates, and controlling interests shall be considered on a cumulative basis and aggregated.

(3) \* \* \* \* \*

(4) Applicants without identifiable controlling interests. Where an applicant (or licensee) cannot identify controlling interests under the standards set forth in this section, the gross revenues of all interest holders in the applicant, and their affiliates, will be attributable.

\* \* \* \* \*

(e) Controlling interest.

(1) For purposes of this section, controlling interest includes individuals or entities with de jure and de facto control of the applicant. De jure control is greater than 50 percent of the voting stock of a corporation, or in the case of a partnership, the general partner. De facto control is determined on a case-by-case basis. An entity must disclose its equity interest and demonstrate at least the following indicia of control to establish that it retains de facto control of the applicant:

(i) The entity constitutes or appoints more than 50 percent of the board of directors or management committee;

(ii) The entity has authority to appoint, promote, demote, and fire senior executives that control the day-to-day activities of the licensee; and

(iii) The entity plays an integral role in management decisions.

(2) Calculation of certain interests.

(i) Ownership interests shall be calculated on a fully diluted basis; all agreements such as warrants, stock options and convertible debentures will generally be treated as if the rights thereunder already have been fully exercised.

(ii) Partnership and other ownership interests and any stock interest equity, or outstanding stock, or outstanding voting stock shall be attributed as specified below.

(iii) Stock interests held in trust shall be attributed to any person who holds or shares the power to vote such stock, to any person who has the sole power to sell such stock, and, to any person who has the right to revoke the trust at will or to replace the trustee at will. If the trustee has a familial, personal, or extra-trust business relationship to the grantor or the beneficiary, the grantor or beneficiary, as appropriate, will be attributed with the stock interests held in trust.

(iv) Non-voting stock shall be attributed as an interest in the issuing entity.

(v) Limited partnership interests shall be attributed to limited partners and shall be calculated according to both the percentage of equity paid in and the percentage of distribution of profits and losses.

(vi) Officers and directors of an entity shall be considered to have an attributable interest in the entity. The officers and directors of an entity that controls a licensee or applicant shall be considered to have an attributable interest in the licensee or applicant.

(vii) Ownership interests that are held indirectly by any party through one or more intervening corporations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, except that if the ownership percentage for an interest in any link in the chain exceeds 50 percent or represents actual control, it shall be treated as if it were a 100 percent interest.

(viii) Any person who manages the operations of an applicant or licensee pursuant to a management agreement shall be considered to have an attributable interest in such applicant or licensee if such person or its affiliate pursuant to paragraph (d) has authority to make decisions or otherwise engage in practices or activities that determine, or significantly influence

(A) The nature or types of services offered by such an applicant or licensee;

(B) The terms upon which such services are offered; or

(C) The prices charged for such services.

(ix) Any licensee or its affiliate who enters into a joint marketing arrangement with an applicant or licensee, or its affiliate, shall be considered to have an attributable interest, if such applicant or licensee, or its affiliate, has authority to make decisions or otherwise engage in practices or activities that determine, or significantly influence,

(A) The nature or types of services offered by such an applicant or licensee;

(B) The terms upon which such services are offered; or

(C) The prices charged for such services.

8. Section 22.225 is amended by revising paragraphs (a)(1), (b)(1) and (e) to read as follows:

**§ 22.225 Certifications, disclosures, records maintenance and audits.**

(a) \* \* \*

(1) The identity of the applicant's controlling interests and affiliates, and, if a consortium of small businesses, the members of the joint venture; and

\* \* \* \* \*

(b) \* \* \*

(1) Disclose separately and in the aggregate the gross revenues, computed in accordance with § 22.223, for each of the following: the applicant, the applicant's affiliates, the applicant's controlling interests, and, if a consortium of small businesses, the members of the joint venture;

\* \* \* \* \*

(e) Definitions. The terms affiliate, small business, consortium of small businesses, gross revenues, and controlling interest used in this section are defined in § 22.223.

9. Section 22.503 is amended by revising paragraphs (b)(2), (b)(3), (h), (i), and (k) to read as follows:

**§ 22.503 Paging geographic area authorizations.**

\* \* \* \* \*

(b) \* \* \*

(2) Major Economic Areas (MEAs) and Economic Areas (EAs) are defined below. EAs are defined by the Department of Commerce, Bureau of Economic Analysis. See Final Redefinition of the MEA Economic Areas, 60 FR 13114 (March 10, 1995). MEAs are based on EAs. In addition to the Department of Commerce's 172 EAs, the FCC shall separately license Guam and the Northern Mariana Islands, Puerto Rico and the United States Virgin Islands, and American Samoa, which have been assigned FCC-created EA numbers 173-175, respectively, and MEA numbers 49-51, respectively.

(3) The 51 MEAs are composed of one or more EAs as defined in the table below:

MEAs	EAs
1 (Boston)	1-3
2 (New York City)	4-7, 10
3 (Buffalo)	8
4 (Philadelphia)	11-12



5 (Washington)	13-14
6 (Richmond)	15-17, 20
7 (Charlotte-Greensboro-Greenville-Raleigh)	18-19, 21-26, 41-42, 46
8 (Atlanta)	27-28, 37-40, 43
9 (Jacksonville)	29, 35
10 (Tampa-St. Petersburg- Orlando)	30, 33-34
11 (Miami)	31-32
12 (Pittsburgh)	9, 52-53
13 (Cincinnati-Dayton)	48-50
14 (Columbus)	51
15 (Cleveland)	54-55
16 (Detroit)	56-58, 61-62
17 (Milwaukee)	59-60, 63, 104-105, 108
18 (Chicago)	64-66, 68, 97, 101
19 (Indianapolis)	67
20 (Minneapolis-St. Paul)	106-107, 109-114, 116
21 (Des Moines-Quad Cities)	100, 102-103, 117
22 (Knoxville)	44-45
23 (Louisville-Lexington-Evansville)	47, 69-70, 72
24 (Birmingham)	36, 74, 78-79
25 (Nashville)	71
26 (Memphis-Jackson)	73, 75-77
27 (New Orleans-Baton Rouge)	80-85
28 (Little Rock)	90-92, 95
29 (Kansas City)	93, 99, 123
30 (St. Louis)	94, 96, 98
31 (Houston)	86-87, 131
32 (Dallas-Fort Worth)	88-89, 127-130, 135, 137-138
33 (Denver)	115, 140-143

34 (Omaha)	118-121
35 (Wichita)	122
36 (Tulsa)	124
37 (Oklahoma City)	125-126
38 (San Antonio)	132-134
39 (El Paso-Albuquerque)	136, 139, 155-157
40 (Phoenix)	154, 158-159
41 (Spokane-Billings)	144-147, 168
42 (Salt Lake City)	148-150, 152
43 (San Francisco-Oakland-San Jose)	151, 162-165
44 (Los Angeles-San Diego)	153, 160-161
45 (Portland)	166-167
46 (Seattle)	169-170
47 (Alaska)	171
48 (Hawaii)	172
49 (Guam and the Northern Mariana Islands)	173
50 (Puerto Rico and U.S. Virgin Islands)	174
51 (American Samoa)	175

\* \* \* \* \*

(h) *Adjacent geographic area coordination required.* Before constructing a facility for which the interfering contour (as defined in § 22.537 or § 22.567, as appropriate for the channel involved) would extend into another paging geographic area, a paging geographic area licensee must obtain the consent of the relevant co-channel paging geographic area licensee, if any, into whose area the interfering contour would extend. Licensees are expected to cooperate fully and in good faith attempt to resolve potential interference problems before bringing matters to the FCC. In the event that there is no co-channel paging geographic area licensee from whom to obtain consent in the area into which the interfering contour would extend, the facility may be constructed and operated subject to the condition that, at such time as the FCC issues a paging geographic area authorization for that adjacent geographic area, either consent must be obtained or the facility modified or eliminated such that the interfering contour no longer extends into the adjacent geographic area.

(i) *Protection of existing service.* All facilities constructed and operated pursuant to a paging geographic area authorization must provide co-channel interference protection in accordance with § 22.537 or § 22.567, as appropriate for the channel involved, to all authorized co-channel facilities of *exclusive*

licensees within the paging geographic area. Non-exclusive licensees on the thirty-five exclusive 929 MHz channels are not entitled to exclusive status, and will continue to operate under the sharing arrangements established with the exclusive licensees and other non-exclusive licensees that were in effect prior to February 19, 1997. MEA, EA, and nationwide geographic area licensees have the right to share with non-exclusive licensees on the thirty-five exclusive 929 MHz channels on a non-interfering basis.

\* \* \* \* \*

(k) *Coverage Requirements.* Failure by an MEA or EA licensee to meet either the coverage requirements in paragraphs (k)(1) and (k)(2), or alternatively, the substantial service requirement in paragraph (k)(3), will result in automatic termination of authorizations for those facilities that were not authorized, constructed, and operating at the time the geographic area authorization was granted. MEA and EA licensees have the burden of showing when their facilities were authorized, constructed, and operating, and should retain necessary records of these sites until coverage requirements are fulfilled. For the purpose of this paragraph, to "cover" area means to include geographic area within the composite of the service contour(s) determined by the methods of §§ 22.537 or 22.567, as appropriate for the particular channel involved. Licensees may determine the population of geographic areas included within their service contours using either the 1990 census or the 2000 census, but not both.

(1) No later than three years after the initial grant of an MEA or EA geographic area authorization, the licensee must construct or otherwise acquire and operate sufficient facilities to cover one third of the population in the paging geographic area. The licensee must notify the FCC at the end of the three-year period pursuant to § 1.946, either that it has satisfied this requirement or that it plans to satisfy the alternative requirement to provide substantial service in accordance with paragraph (k)(3).

(2) No later than five years after the initial grant of an MEA or EA geographic area authorization, the licensee must construct or otherwise acquire and operate sufficient facilities to cover two thirds of the population in the paging geographic area. The licensee must notify the FCC at the end of the five year period pursuant to § 1.946, either that it has satisfied this requirement or that it has satisfied the alternative requirement to provide substantial service in accordance with paragraph (k)(3).

\* \* \* \* \*

10. Section 22.507 is amended by revising paragraph (c) to read as follows:

**§ 22.507 Number of transmitters per station.**

\* \* \* \* \*

(c) *Consolidation of separate stations.* The FCC may consolidate site-specific contiguous authorizations upon request (FCC Form 601) of the licensee, if appropriate under paragraph (a). Paging licensees may include remote, stand-alone transmitters under the single system-wide authorization, if the remote, stand-alone transmitter is linked to the system via a control/repeater facility or by satellite. Including a remote, stand-alone transmitter in a system-wide authorization does not alter the limitations provided under § 22.503(f) on entities other than the paging geographic area licensee. In the alternative, paging licensees may maintain separate site-specific authorizations for stand-alone or remote transmitters. The earliest expiration date of the authorizations that make up the single system-wide authorization will determine the expiration date for the system-wide authorization. Licensees must file timely renewal applications for site-specific authorizations included in a single system-wide authorization request until the request is approved. Renewal of the system-wide authorization will be subject to § 1.949.

11. Paragraph (c) of Section 22.509 is removed.

12. New Section 22.513 is added to read as follows:

**§ 22.513 Partitioning and disaggregation.** MEA and EA licensees may apply to partition their authorized geographic service area or disaggregate their authorized spectrum at any time following grant of their geographic area authorizations. Nationwide geographic area licensees may apply to partition their authorized geographic service area or disaggregate their authorized spectrum at any time as of [insert effective date of the *Third Report and Order*].

(a) *Application required.* Parties seeking approval for partitioning and/or disaggregation shall apply for partial assignment of a license pursuant to § 1.948.

(b) *Partitioning.* In the case of partitioning, requests for authorization for partial assignment of a license must include, as attachments, a description of the partitioned service area and a calculation of the population of the partitioned service area and the authorized geographic service area. The partitioned service area shall be defined by 120 sets of geographic coordinates at points at every 3 degrees azimuth from a point within the partitioned service area along the partitioned service area boundary unless either an FCC-recognized service area is used (*e.g.*, MEA or EA) or county lines are followed. The geographical coordinates must be specified in degrees, minutes, and seconds to the nearest second latitude and longitude, and must be based upon the 1983 North American Datum (NAD83). In the case where FCC-recognized service areas or county lines are used, applicants need only list the specific area(s) through use of FCC designations or county names that constitute the partitioned area.

(c) *Disaggregation.* Spectrum may be disaggregated in any amount.

(d) *Combined partitioning and disaggregation.* Licensees may apply for partial assignment of authorizations that propose combinations of partitioning and disaggregation.

(e) *License term.* The license term for a partitioned license area and for disaggregated spectrum shall be the remainder of the original licensee's license term as provided for in § 1.955.

(f) *Coverage Requirements for partitioning.*

(1) Parties to a partitioning agreement must satisfy at least one of the following requirements:

(i) The partitionee must satisfy the applicable coverage requirements set forth in § 22.503 (k)(1), (2) and (3) for the partitioned license area; or

(ii) The original licensee must meet the coverage requirements set forth in § 22.503 (k)(1), (2) and (3) for the entire geographic area. In this case, the partitionee must meet only the requirements for renewal of its authorization for the partitioned license area.

(2) Parties seeking authority to partition must submit with their partial assignment application a certification signed by both parties stating which of the above options they select.

(3) Partitionees must submit supporting documents showing compliance with their coverage requirements as set forth in § 22.503 (k)(1), (2) and (3).

(4) Failure by any partitionee to meet its coverage requirements will result in automatic cancellation of the partitioned authorization without further Commission action.

(2) *Coverage Requirements for disaggregation.*

(1) Parties to a disaggregation agreement must satisfy at least one of the following requirements:

(i) Either the disaggregator or disaggregatee must satisfy the coverage requirements set forth in § 22.503 (k)(1), (2) and (3) for the entire license area; or

(ii) Parties must agree to share responsibility for meeting the coverage requirements set forth in § 22.503 (k)(1), (2) and (3) for the entire license area.

(2) Parties seeking authority to disaggregate must submit with their partial assignment application a certification signed by both parties stating which of the above requirements they meet.

(3) Disaggregatees must submit supporting documents showing compliance with their coverage requirements as set forth in § 22.503 (k)(1), (2) & (3).

(4) Parties that accept responsibility for meeting the coverage requirements and later fail to do so will be subject to automatic license cancellation without further Commission action.

13. Section 22.531 is amended by revising paragraph (f) to read as follows:

**§ 22.531 Channels for paging operation.**

\* \* \* \* \*

(f) For the purpose of issuing paging geographic authorizations, the paging geographic areas used for UHF channels are the MEAs, and the paging geographic areas used for the low and high VHF channels are the EAs (see § 22.503(b)).

14. Section 90.175 is amended by revising paragraph (f) to read as follows:

**§ 90.175 Frequency coordination requirements.**

\* \* \* \* \*

(f) For frequencies in the 929-930 MHz band listed in paragraph (b) of § 90.494. A statement from the coordinator recommending the most appropriate frequency.

## APPENDIX C

**Supplemental Final Regulatory Flexibility Analysis**  
*Memorandum Opinion and Order on Reconsideration*

As required by the Regulatory Flexibility Act (RFA),<sup>570</sup> an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in Appendix A of the *Notice* in this proceeding, and a Final Regulatory Flexibility Analysis (FRFA) was incorporated in Appendix C of the subsequent *Second Report and Order*.<sup>571</sup> As described below, two petitions for reconsideration of the *Second Report and Order* raise an issue concerning the previous FRFA. The *Memorandum Opinion and Order on Reconsideration* addresses those reconsideration petitions, among others. This associated Supplemental Final Regulatory Flexibility Analysis (Supplemental FRFA) also addresses those petitions and conforms to the RFA.

**I. Need for and Purpose of this Action**

In the *Second Report and Order*, the Commission adopted rules for geographic area licensing of Common Carrier Paging and exclusive 929 MHz Private Carrier Paging and procedures for auctioning mutually exclusive applications for these licenses. The actions taken in this *Memorandum Opinion and Order on Reconsideration* are in response to petitions for reconsideration or clarification of the *Second Report and Order*. Throughout this proceeding, we have sought to promote Congress's goal of regulatory parity for all Commercial Mobile Radio Services (CMRS), and to encourage the participation of a wide variety of applicants, including small businesses, in the paging industry. In addition, we have sought to establish rules for the paging services that will streamline the licensing process and provide a flexible operating environment for licensees, foster competition, and promote the delivery of service to all areas of the country, including rural areas.

**II. Summary of Significant Issues Raised in Response to the Final Regulatory Flexibility Analysis**

Priority Communications, Inc.'s (Priority) petition for reconsideration raises various issues, one of which is in direct response to the FRFA contained in the *Second Report and Order*. Priority states that the FRFA did not address alternatives to competitive bidding, *e.g.*, granting geographic area licenses, without competitive bidding, to incumbents of highly encumbered areas.<sup>572</sup> We disagree with the contention that the Commission failed to consider alternatives to competitive bidding. In the *Second Report and Order*, the Commission considered and rejected proposals to retain site-by-site licensing for the paging industry. In rejecting the proposals, the Commission found that geographic area licensing provides flexibility for licensees and ease of administration for the Commission, facilitates further build-out of wide-area systems, and enables paging operators to meet the needs of their customers more easily. Moreover, the Commission

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<sup>570</sup> 5 U.S.C. §§ 603 & 604. Congress amended the RFA, *id.* § 601 *et seq.*, by the Contract With America Advancement Act of 1996, Pub. L. No. 1045-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996.

<sup>571</sup> *Notice of Propose Rulemaking*, 11 FCC Rcd 3108 (1996); *Second Report and Order and Further Notice*, 12 FCC Rcd 2732 (1997).

<sup>572</sup> Priority Communications, Inc. Petition for Reconsideration at 11-13.

concluded that geographic area licensing will further the goal of providing carriers that offer substantially similar services more flexibility to compete, and will enhance regulatory symmetry between paging and other service in the CMRS marketplace.<sup>573</sup>

The Commission further concluded that it would grant mutually exclusive applications for geographic area licenses through competitive bidding even in areas extensively built out by an incumbent licensee. The Commission specifically considered and rejected proposals to award geographic area licenses, without competitive bidding, to any incumbent providing coverage to 70 percent or more of the population or to two-thirds of the population in the license area. Similarly, the Commission rejected a proposal not to hold auctions where an incumbent licensee is serving at least 50 percent of the geographic area or 50 percent of the population in that market. The Commission also considered and rejected proposals to award a dispositive preference in the auction to a licensee that provides service to one-third or greater of the population, or one-half or greater of the geographic area, or to restrict competitive bidding to incumbent licensees.<sup>574</sup> In rejecting these proposals, the Commission concluded that market forces, not regulation, should determine participation in competitive bidding for geographic area licenses.

In its petition for reconsideration, the National Telephone Cooperative Association (NTCA) contends that the FRFA failed to address alternatives that parties suggested in response to the *Notice* to minimize the impact of the rule changes adopted in the *Second Report and Order* on small BETRS operators. NTCA specifically contends that the Commission did not address the investment BETRS operators would be unable to recover once they were required to terminate operations upon notification by a geographic area licensee of interference. NTCA further contends that the Commission did not address the adverse impact on small BETRS operators resulting from auctions that "pit them against paging operations that have no interest in the site licenses needed for BETRS operations."<sup>575</sup> Initially, we note that NTCA did not raise these issues in response to the *Notice*. NTCA has raised these issues only in response to the *Second Report and Order*. We also disagree with the contention that the Commission failed to consider alternatives that would minimize the impact on small BETRS operators. The Commission specifically found it unnecessary to adopt the plan that Puerto Rico Telephone proposed, under which (1) BETRS operators would be given preferential treatment over paging operators for mutually exclusive applications (on a site-by-site basis), and (2) the Commission would designate a frequency block for reallocated frequencies solely for BETRS use.<sup>576</sup> Based on the potentially competitive environment in local exchange services, the Commission saw no basis for distinguishing BETRS from other commercial radio services that are auctionable under Section 309(j) of the Communications Act.<sup>577</sup> Rather, the Commission determined that BETRS licensees should be required to participate in competitive bidding for paging licenses. In

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<sup>573</sup> *Second Report and Order and Further Notice*, 12 FCC Red at 2744, ¶ 15 & 2748, ¶ 23.

<sup>574</sup> *Id.* at 2758-59, ¶ 45.

<sup>575</sup> NTCA Petition for Reconsideration at 7-8.

<sup>576</sup> *Second Report and Order and Further Notice*, 12 FCC Red at 2751, ¶ 29.

<sup>577</sup> *Id.* at 2752-54, ¶¶ 32-35.



considering proposals to continue licensing BETRS facilities on a site-specific basis, the Commission decided that BETRS licensees could obtain site licenses on a secondary basis and enter into partitioning agreements with paging geographic area licensees. With respect to the issue of stranded costs, the *Second Report and Order* does not limit BETRS operators' options to that of obtaining licenses on a secondary basis. As already explained, they may also obtain co-primary licenses through partitioning. Moreover, the Commission has adopted specific procedures in the *Memorandum Opinion and Order on Reconsideration* to limit the extent to which BETRS providers will be required to discontinue operations at secondary sites.

### III. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply

The rules adopted in the *Memorandum Opinion and Order on Reconsideration* will affect all small businesses that hold or seek to acquire commercial paging licenses. As noted, a FRFA was incorporated into the *Second Report and Order*.<sup>578</sup> In that analysis, we described the small businesses that might be significantly affected at that time by the rules adopted in the *Second Report and Order*. Those entities include existing commercial paging operators and new entrants into the paging market. To ensure the more meaningful participation of small business entities in the auctions, the Commission adopted a two-tiered definition of small businesses in the *Second Report and Order*: (1) an entity that, together with its affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$3 million; or (2) an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$15 million.<sup>579</sup> Because the Small Business Administration (SBA) had not yet approved this definition, the Commission relied in the FRFA on the SBA's definition applicable at that time to radiotelephone companies, *i.e.*, an entity employing less than 1,500 persons.<sup>580</sup> Given the fact that nearly all radiotelephone companies had fewer than 1,000 employees, and that no reasonable estimate of the number of prospective paging licensees could be made, the Commission assumed, for purposes of the evaluations and conclusions in the FRFA, that all the auctioned 16,630 geographic area licenses would be awarded to small entities. In December 1998, the SBA approved the two-tiered size standards for paging services set forth in the *Second Report and Order*.<sup>581</sup>

In the FRFA, the Commission anticipated that approximately 16,630 non-nationwide geographic area licenses will be auctioned. No party submitting or commenting on the petitions for reconsideration giving rise to this *Memorandum Opinion and Order on Reconsideration* commented on the potential number of small businesses that might participate in the commercial paging auction and no reasonable estimate can be made. While we are unable to predict accurately how many paging licensees meeting one of the above definitions will choose to participate in or be successful at auction, our *Third CMRS Competition Report*

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<sup>578</sup> // at 2861-69.

<sup>579</sup> // at 2811, ¶ 179.

<sup>580</sup> // at 2863 (citing 13 C.F.R. § 121.201, Standard Industrial Classification Code 4812).

<sup>581</sup> Letter from Aida Alvarez, Administrator, Small Business Administration, to Amy J. Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau of 12/2/98.

estimated that, as of January 1998, there were more than 600 paging companies in the United States.<sup>582</sup> The *Third CMRS Competition Report* also indicates that at least ten of the top twelve publicly held paging companies had average gross revenues in excess of \$15 million for the three years preceding 1998.<sup>583</sup> Data obtained from publicly available company documents and SEC filings indicate that this is also true for the three years preceding 1999. While the Commission expects these ten companies to participate in the paging auction, the Commission also expects, for the purposes of the evaluations and conclusions in this Supplemental FRFA, that a number of geographic area paging licenses will be awarded to small businesses.

#### IV. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

With one exception, this *Memorandum Opinion and Order on Reconsideration* does not impose additional recordkeeping or other compliance requirements beyond the requirements contained in the *Second Report and Order*. If an MEA or EA licensee fails to meet its coverage requirements, that licensee will have the burden of showing which of its facilities were authorized, constructed, and operating at the time the geographic area license was granted. MEA and EA licensees will need to retain necessary records of any such facilities until they meet the geographic area license coverage requirements.

#### V. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

The previous FRFA stated that the rules adopted for geographic area licensing will affect the Common Carrier Paging and exclusive 929 MHz Private Carrier Paging services. This Supplemental FRFA concludes that a number of geographic area commercial paging licenses may be awarded to small businesses. As described below, our actions taken to implement the transition to geographic area licensing and competitive bidding represent a balancing of various factors.

Certain petitioners suggested replacing Rand McNally MTAs with Major Economic Areas (MEAs) for the 929 MHz and 931 MHz bands. Considering these requests, we have decided to adopt MEAs instead of MTAs.<sup>584</sup> Because MEAs are composed of EAs, licensees with paging systems on both the lower channels and the 929 and 931 MHz bands, including small businesses, will be able to operate their systems more efficiently. The MEA designation will also enhance competition because paging systems on the lower channels, including small business paging systems, will be able to combine their EAs to form MEAs. In addition, we considered and rejected a recommendation to use Basic Trading Areas (BTAs) for geographic area licensing on the lower paging bands. In rejecting the BTA designation, we concluded that EAs, which the majority of commenters supported, best reflect the geographic area that the paging licensees on the lower channels seek to serve. We also found that the use of EAs will not prevent paging operators of small systems from participating in the auction. We noted that bidding credits will allow small businesses to

<sup>582</sup> Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, *Third Report*, FCC 98-9, at 40 (June 11, 1998) (*Third CMRS Competition Report*).

<sup>583</sup> See *Third CMRS Competition Report*, App. C at 5.

<sup>584</sup> *Memorandum Opinion and Order on Reconsideration* at Section IV.B.1.

compete against larger bidders. In addition, our partitioning rules will allow entities, including small businesses, to acquire licenses for areas smaller than EAs.

A number of petitioners have requested that we reconsider our decision to grant mutually exclusive applications for geographic area licenses through competitive bidding even in areas extensively built out by an incumbent licensee. Again balancing various interests, we have affirmed the use of competitive bidding to grant mutually exclusive paging applications. We have rejected the petitioners' request because open eligibility promotes prompt service to the public by allocating spectrum to the entity that values it most.<sup>585</sup> We believe that the market should decide whether an economically viable paging system can be established in the unserved area of a geographic market. Our decision on this issue will provide adjacent geographic area licensees and new entrants, including small businesses, with the opportunity to establish a viable system that serves the public as well as an incumbent. Moreover, we see no reason to give licensees that serve a substantial portion of a geographic area an advantage over other entities, including small businesses, that may also value the spectrum in that particular market.

Several petitioners request that we clarify section 22.723 of our rules, which requires Rural Radiotelephone Service (RRS) licensees, including BETRS operators, to discontinue operations once the paging geographic area licensee notifies the RRS licensee that its co-channel secondary facilities may cause interference to the geographic area licensee's existing or planned facilities. The petitioners argue that our rules will allow geographic area licensees to terminate BETRS upon any allegation of harmful interference. In response to this concern, we are adopting new procedures in the *Memorandum Opinion and Order* that geographic area licensees must follow in notifying a BETRS operator that its facility causes or will cause interference with the geographic area licensee's service contour in violation of our interference rules.<sup>586</sup> The new procedures limit the termination of operating BETRS co-channel secondary facilities until harmful interference would occur.

In the *Second Report and Order*, we defined a system-wide license by the aggregate of the interference contours around each of the incumbent's contiguous sites operating on the same channel. We also concluded that incumbent licensees may add or modify sites within their existing interference contours without filing site-specific applications, but may not expand their existing interference contours without the consent of the geographic area licensee.<sup>587</sup> Several petitioners expressed confusion over our definition of "contiguous sites" for the purpose of determining an incumbent's "aggregate interference contour." In addition, one petitioner asked that we define "composite interference contours" to include all authorized transmitters, including valid construction permits, regardless of the grant date. Another petitioner requested that we include remote transmitters within system-wide licenses, or in the alternative maintain separate licenses for any stand-alone or remote transmitter. Recognizing these concerns and balancing various interests as explained more fully in the *Memorandum Opinion and Order*,<sup>588</sup> we have maximized the

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<sup>585</sup> *Id.* at Section IV.B.3.

<sup>586</sup> *Id.* at ¶ 31.

<sup>587</sup> *Second Report and Order and Further Notice*, 12 FCC Rcd at 2764, ¶ 58.

<sup>588</sup> *Memorandum Opinion and Order on Reconsideration* at Section IV.B.6.

definition of composite interference contour to reduce unnecessary regulatory burdens on licensees, reduce administrative costs on the industry, and thereby benefit consumers. In this regard, we have clarified that contiguous sites, for the purpose of defining an incumbent's composite interference contour, are defined by overlapping interference contours, not service contours. We further state that all authorized site-specific paging licenses and construction permits are included in a composite interference contour. Finally, we have amended section 22.507 to allow system-wide licensees to maintain separate licenses for any stand-alone or remote transmitters, or to include remote and stand-alone sites within the system-wide license.

On a related matter, petitioners asked the Commission to allow reversion to the geographic area licensee of spectrum recovered from an incumbent in all instances except where an incumbent licensee discontinues operations in a location wholly encompassed by the incumbent's composite interference contour. In balancing the various relevant considerations, we concluded that no demonstration had been made showing that the geographic area licensee would be unable to serve areas wholly surrounded by an incumbent.<sup>589</sup> Moreover, we do not believe the public interest would be served by withholding such areas from the geographic area licensee in hope that the incumbent will one day resume service to those areas. We further noted that if incumbents, including small businesses, wish to serve reverted areas, they may seek to enter into partitioning agreements with the geographic area licensees. Similarly, a number of petitioners contended that system-wide licenses should include areas where an incumbent licensees' interference contours do not overlap, but where no other licensee could place a transmitter because of interference rules. We considered and rejected this proposal, finding that inclusion of areas outside of an incumbent's interference contours would be contrary to our objective of prohibiting encroachment on the geographic area licensee's operations.<sup>590</sup> Incumbents seeking to expand their contours, including small businesses, may participate in the auction or seek partitioning agreements with geographic area licensees.

In the *Second Report and Order*, the Commission elected not to impose a limit or "cap" on the number of licensees that may operate on shared paging channels.<sup>591</sup> Two petitioners asked us to reconsider that determination. Again, balancing the options, we reaffirmed our prior decision.<sup>592</sup> A "cap" would not promote efficient use of spectrum because the capacity limits on paging channels are based primarily on use and not the number of licensees. Our goal is to increase the use of these shared channels, not to unduly restrict access to them. This decision will provide new entrants, including small businesses, with another opportunity to acquire paging spectrum.

In the *Second Report and Order*, the Commission also eliminated the Part 90 height and power limitations on 929 MHz stations and increased the maximum permitted effective radiated power (ERP) to 3,500 watts.<sup>593</sup> Some petitioners have asked for clarification as to whether incumbent 929 MHz licensees

<sup>589</sup> *Id.* at Section IV.B.5.

<sup>590</sup> *Id.* at Section IV.B.6.

<sup>581</sup> *Second Report and Order and Further Notice* at 2757, ¶ 42.

<sup>582</sup> *Memorandum Opinion and Order on Reconsideration*, at Section IV.D.

<sup>583</sup> *Second Report and Order and Further Notice*, 12 FCC Rcd at 2773-74, ¶ 78.

must file a modification application to increase the current ERP for their base stations up to the maximum permissible. In response to this request, we have clarified that incumbent 929 MHz licensees need not file a modification application to increase the ERP for base stations at any location, including exterior base stations, as long as they do not expand their existing composite interference contour.<sup>594</sup> This clarification conforms our technical requirements for height and power with the general rule that incumbents need not file applications for internal system changes. Adopting this rule will minimize burdens on all entities, including small businesses, that increase the ERP of their base stations.

One petitioner advocated that we make our coverage requirements more stringent by requiring geographic area licensees to provide coverage to one-third of the market area within one year, and two-thirds within three years. We considered and rejected this proposal because we believe that our coverage requirements adequately promote prompt service to the public without being unduly burdensome on licensees, including small businesses, that need a reasonable amount of time to complete construction. Moreover, we believe that overly stringent coverage requirements unfairly favor incumbents by erecting formidable barriers to new entrants, including small businesses. Several petitioners also requested that we eliminate the "substantial service" option for meeting MEA or EA coverage requirements. We have rejected this request because we believe that the "substantial service" option will facilitate build-out in rural areas, encourage licensees to provide new services, and enable new entrants to satisfy our coverage requirements in geographic areas where incumbents are already substantially built out.<sup>595</sup> We believe that rural service providers as well as new entrants are likely to include small businesses, and thus retaining the "substantial service" option should benefit small businesses. While we will presume that the "substantial service" option is satisfied if an MEA or EA licensee provides coverage to two-thirds of the population in unserved areas within five years of license grant, we decline to adopt specific coverage requirements as the sole means of defining "substantial service." Giving licensees flexibility to satisfy the "substantial service" option in different ways should benefit small businesses.

In the *Part 1 Third Report and Order and Further Notice*, the Commission suspended the availability of installment payment financing for small businesses participating in future auctions.<sup>596</sup> Consistent with this decision, the *Memorandum Opinion and Order on Reconsideration* rescinds installment payment financing for the paging auctions. To balance the impact of this decision on small businesses, however, we are increasing the bidding credits available to qualifying entities. The revised rule conforms to a schedule of bidding credits adopted in the *Part 1 Third Report and Order and Second Further Notice*.<sup>597</sup> Under this rule, an applicant will qualify for a twenty-five percent (25%) bidding credit if the average gross revenues for the preceding three years of the applicant, its affiliates and controlling interests do not exceed \$15 million. Similarly, an applicant will qualify for a thirty-five percent (35%) bidding credit if the average gross revenues for the preceding three years of the applicant, its affiliates and controlling interests do not

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<sup>594</sup> *Memorandum Opinion and Order on Reconsideration* at Section IV.F.

<sup>595</sup> *Memorandum Opinion and Order on Reconsideration* at Section IV.G.

<sup>596</sup> *See Part 1 Third Report and Order*, 13 FCC Rcd at 397-98, ¶ 38.

<sup>597</sup> *See id.* at 403-04, ¶ 47.

exceed \$3 million. As we stated in the *Part 1 Third Report and Order and Second Further Notice*, we believe that these increased bidding credits will provide small businesses with adequate opportunities to participate in the paging auctions.<sup>598</sup> Moreover, we are further conforming the paging competitive bidding rules to the Part 1 rules by allowing winning bidders to make their final payments within ten (10) business days after the payment deadline, provided that they also pay a late fee of five (5) percent of the amount due.<sup>599</sup> As we stated in the *Part 1 Third Report and Order and Second Further Notice*, we believe that this additional ten-day period provides winning bidders with adequate time to adjust for any last-minute problems in arranging financing and making final payment.<sup>600</sup>

## VI. Report to Congress

The Commission will send a copy of the *Memorandum Opinion and Order on Reconsideration*, including this Supplemental FRFA, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996.<sup>601</sup> In addition, the Commission will send a copy of the *Memorandum Opinion and Order on Reconsideration*, including this Supplemental FRFA, to the Chief Counsel for Advocacy of the Small Business Association. A copy of the *Memorandum Opinion and Order on Reconsideration* and Supplemental FRFA (or summaries thereof) will also be published in the Federal Register.<sup>602</sup>

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588 *Id.*

589 *See Part 1 Third Report and Order*, 13 FCC Rcd at 428-30, ¶¶ 93-96 (amending 47 C.F.R. § 1.2104(g)(2)).

600 *Id.* at 429-30, ¶ 93.

601 *See* 5 U.S.C. § 801(a)(1)(A).

602 *See id.* § 604(b).

## APPENDIX D

## Final Regulatory Flexibility Analysis

*Third Report and Order*

As required by the Regulatory Flexibility Act (RFA),<sup>603</sup> an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in Appendix D of the *Second Report and Order and Further Notice of Proposed Rulemaking* in this proceeding.<sup>604</sup> The Commission sought written public comment on the proposals in that *Further Notice of Proposed Rulemaking*, including comment on the IRFA. As described below, no commenter raised an issue concerning the IRFA. The Commission's Final Regulatory Flexibility Analysis in this *Third Report and Order* conforms to the RFA.<sup>605</sup>

## I. Need for and Purpose of this Action

In the *Second Report and Order*, the Commission adopted coverage requirements for and decided to allow partitioning by non-nationwide geographic area licensees, including small businesses. In the *Further Notice of Proposed Rulemaking*, the Commission sought comment on whether to adopt coverage requirements for nationwide geographic area licenses, whether to allow partitioning by nationwide geographic area licensees, whether to permit disaggregation of paging licenses, and whether to revise the application procedures for shared channels. In the *Third Report and Order*, the Commission concludes that it is best to defer any decision on coverage requirements for nationwide geographic area licenses until similar issues raised in the *Narrowband PCS Further Notice of Proposed Rulemaking* are resolved.<sup>606</sup> The Commission further modifies the paging rules to permit partitioning by all nationwide geographic area licensees and to allow disaggregation by all MEA, EA, and nationwide geographic area licensees. The *Third Report and Order* also adopts rules governing the coverage requirements for parties to partitioning or disaggregation agreements involving MEA or EA licenses, and the license term of partitioned or disaggregated MEA, EA, and nationwide geographic area licenses. Further, the *Third Report and Order* permits MEA, EA, and nationwide geographic area licensees to combine partitioning and disaggregation. These partitioning and disaggregation rules will allow entities in addition to the initial geographic area licensees, including small businesses, to participate in providing paging services. Indeed, partitioning and disaggregation should be well suited to small businesses that do not wish to acquire an entire geographic area license. Finally, the *Third Report and Order* establishes additional mechanisms to inform consumers of the rules governing paging licenses and the danger of fraudulent schemes perpetrated by application mills. These mechanisms should help to reduce application fraud and protect consumers.

<sup>603</sup> 5 U.S.C. § 603. Congress amended the RFA, *id.* § 601 *et seq.*, by the Contract With America Advancement Act of 1996, Pub L. No. 1045-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996.

<sup>604</sup> *Second Report and Order and Further Notice*, 12 FCC Rcd 2732 (1997).

<sup>605</sup> *See* 5 U.S.C. § 604.

<sup>606</sup> *Third Report and Order* at Section V.B.1. (citing *Narrowband PCS Further Notice*, 12 FCC Rcd 12972 (1997)).

## II. Summary of Issues Raised in Response to the Initial Regulatory Flexibility Analysis

None of the commenters submitted comments specifically in response to the IRFA. We have, however, taken small business concerns into account in the *Third Report and Order*, as discussed in Sections V and VI of the FRFA.

## III. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply

The rules adopted in the *Third Report and Order* will affect small businesses that hold or seek to acquire commercial paging licenses. These entities include small business nationwide geographic area licensees that decide to partition or disaggregate, small businesses that obtain MEA or EA licenses through auction and subsequently decide to partition or disaggregate, and small businesses that may acquire partitioned and/or disaggregated MEA, EA, or nationwide geographic area licenses. To ensure the more meaningful participation of small business entities in the auctions, the Commission adopted a two-tiered definition of small businesses in the *Second Report and Order*: (1) an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$3 million; or (2) an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$15 million.<sup>607</sup> In December 1998, the Small Business Association approved the two-tiered size standards for paging services set forth in the *Second Report and Order*.<sup>608</sup>

### MEA and EA Licenses

In the Final Regulatory Flexibility Analysis incorporated in Appendix C of the *Second Report and Order*, the Commission anticipated that approximately 16,630 non-nationwide geographic area licenses will be auctioned. No parties, however, commented in response to the *Further Notice of Proposed Rulemaking* on the number of small businesses that might elect to use the proposed partitioning and disaggregation rules and no reasonable estimate can be made. While we are unable to predict accurately how many paging licensees meeting one of the above definitions will participate in or be successful at auction, our *Third CMRS Competition Report* estimated that, as of January 1998, there were more than 600 paging companies in the United States.<sup>609</sup> The *Third CMRS Competition Report* also indicates that at least ten of the top twelve publicly held paging companies had average gross revenues in excess of \$15 million for the three years preceding 1998.<sup>610</sup> The Commission expects that these ten companies will participate in the paging auction

<sup>607</sup> *Second Report and Order and Further Notice*, 12 FCC Rcd at 2811, ¶ 179.

<sup>608</sup> Letter from Aida Alvarez, Administrator, Small Business Administration, to Amy J. Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau of 12/2/98.

<sup>609</sup> Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, *Third Report*, FCC 98-9, at 40 (June 11, 1998) (*Third CMRS Competition Report*).

<sup>610</sup> See *Third CMRS Competition Report*, App. C at 5.



and may employ the partitioning or disaggregation rules. The Commission also expects, for purposes of the evaluations and conclusions in this Final Regulatory Flexibility Analysis, that a number of paging licenses will be awarded to small businesses, and at least some of those small business licensees will likely also take advantage of the partitioning and disaggregation rules. We are unable to predict accurately the number of small businesses that may choose to acquire partitioned or disaggregated MEA or EA licenses. The Commission expects, however, for purposes of the evaluations and conclusions in this Final Regulatory Flexibility Analysis, that entities meeting one of the above definitions will use partitioning and disaggregation as a means to obtain a paging license from an MEA or EA licensee at a cost lower than the cost of the license for the entire MEA or EA.

#### Nationwide Geographic Area Licenses

The partitioning and disaggregation rules pertaining to nationwide geographic area licenses adopted in the *Third Report and Order* will affect the 26 licensees holding nationwide geographic area licenses to the extent they choose to partition or disaggregate, as well as any entity that enters into a partitioning or disaggregation agreement with a nationwide geographic area licensee. No parties, however, commented on the number of small business nationwide geographic area licensees that might elect to partition or disaggregate their licenses and no reasonable estimate can be made. While we are unable to state accurately how many nationwide geographic area licensees meet one of the above small business definitions, our *Third CMRS Competition Report* indicates that at least eight of the top twelve publicly held paging companies hold nationwide geographic area licenses and had average gross revenues in excess of \$15 million for the three years preceding 1998.<sup>611</sup> The Commission expects at least some of these eight companies to employ the partitioning or disaggregation rules, and also expects, for the purposes of evaluations and conclusions in this Final Regulatory Flexibility Analysis, that nationwide geographic area licensees meeting one of the above definitions may use the partitioning or disaggregation rules. No parties commented on the number of small businesses that may choose to acquire partitioned or disaggregated licenses from nationwide geographic area licensees and, again, no reasonable estimate can be made. While we are unable to predict accurately the number of small businesses that may choose to acquire partitioned or disaggregated licenses from nationwide geographic area licensees, the Commission expects, for purposes of the evaluations and conclusions in the Final Regulatory Flexibility Analysis, that entities meeting one of the above small business definitions will use partitioning and disaggregation as a means to obtain a paging license from a nationwide geographic area licensee.

#### Fraud on Shared Paging Channels

The additional mechanisms established to inform consumers of the paging rules and the potential for paging application fraud on the shared channels will not affect small businesses seeking to acquire a license on a shared paging channel, except that small businesses interested in investing in shared channel licenses will be more informed of the potential for fraud.

### **IV. Summary of Projected Reporting, Recordkeeping, and Other Compliance Requirements**

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<sup>611</sup> *Third CMRS Competition Report*, App. C at 5.

The rules adopted in the *Third Report and Order* impose reporting and recordkeeping requirements on small businesses, as well as others, seeking to obtain or transfer licenses through partitioning and disaggregation. The information requirements would be used to determine whether the proposed partitionee or disaggregatee is an entity qualified to obtain a partitioned license or disaggregated spectrum. This information will be a one-time filing by any applicant requesting such a license. The information can be submitted on FCC Form 490 or Form 603 for Part 22 paging services until July 1, 1999. Part 22 applicants must file electronically in the Universal Licensing System (ULS) on Form 603 on or after July 1, 1999. The Commission estimates that the average burden on the applicant is three hours for the information necessary to complete these forms. The Commission estimates that seventy-five percent of the respondents, which may include small businesses, will contract out the burden of responding. The Commission estimates that it will take approximately 30 minutes to coordinate information with those contractors. The remaining twenty-five percent of respondents, which may include small businesses, are estimated to employ in-house staff to provide the information. Applicants filing electronically, including small businesses, will not incur any per minute on-line charge. The Commission estimates that applicants contracting out the information would use an attorney or engineer (average of \$200 per hour) to prepare the information.

#### **V. Steps Taken to Minimize Burdens on Small Entities**

The rules adopted in the *Third Report and Order* are designed to implement Congress' goal of giving small businesses, as well as other entities, the opportunity to participate in the provision of spectrum-based services. The rules are also consistent with the Communications Act's mandate to identify and eliminate market entry barriers for entrepreneurs and small businesses in the provision and ownership of telecommunications services.

##### Partitioning and Disaggregation

Partitioning of nationwide geographic area licenses and disaggregation of MEA, EA, and nationwide geographic area licenses will facilitate market entry by parties that may lack the financial resources to participate in auctions, including small businesses. Partitioning and disaggregation are expected to enable small businesses to obtain licenses for areas smaller than MEA, EA, and nationwide areas, or smaller amounts of spectrum, at costs they will be able to afford. Allowing for the partitioning and disaggregation of MEA and EA licenses prior to fulfillment of construction requirements by the initial licensees will facilitate the immediate entry of new competitors, including small businesses, into the paging market. Finally, the Commission's decision to allow parties to partitioning or disaggregation agreements of MEA and EA licenses to choose between two options to meet the coverage requirements will provide small businesses with more flexibility in managing their resources.

##### Fraud on Shared Paging Channels

As stated above, the additional mechanisms established to deter paging application fraud on the shared channels are not expected to have an impact on any small business or other entity applying for a paging license on a shared channel. The changes are intended to protect consumers from application fraud. Small businesses interested in investing in shared channel licenses, however, will be more informed of the potential for fraud.

#### **VI. Significant Alternatives Considered**

The Commission considered and rejected the following alternative proposals concerning partitioning, disaggregation, coverage requirements for parties to partitioning and disaggregation agreements, and license terms.

### Partitioning

The Commission declined to adopt Paging Network, Inc.'s (PageNet) proposal that partitioning should be allowed only after the initial geographic area licensee has met the build-out requirements for the entire geographic area, and that partitioning before a geographic area licensee meets its construction requirements should be allowed only on a waiver basis where good cause is shown. PageNet's concern was that the ability to partition may encourage bidders in the auction to engage in unlawful contact with other bidders, particularly if the market is highly contested, and that geographic area licensees may seek to avoid the cancellation of their licenses by partitioning to a "straw man" when they fail to meet our coverage requirements.<sup>612</sup> The Commission found, however, that there was no evidence that "sham" arrangements between geographic area licensees and other parties to avoid construction requirements are likely to occur in the paging service or have already taken place in other services. The Commission also determined that any unlawful activity between bidders concerning partitioning falls within our anti-collusion rules. Finally, allowing parties to partition spectrum immediately after license grant will facilitate the entry of new competitors to the paging market, many of whom will be small businesses seeking to acquire a smaller service area or smaller amount of paging spectrum at a reduced cost.

### Disaggregation

A number of petitioners opposed our proposal to allow MEA, EA, and nationwide geographic area licensees to disaggregate, contending that disaggregation of paging spectrum is neither technically nor practically feasible. Small Business in Telecommunications (SBT) proposes that disaggregation should be limited only to small businesses during the original licensee's construction period. In considering and rejecting the petitioners' arguments, we concluded that the market should determine whether it is technically or economically feasible to disaggregate spectrum.<sup>613</sup> We further concluded that all qualified parties should be eligible to disaggregate any geographic area license because open eligibility to disaggregate spectrum promotes prompt service to the public by facilitating the assignment of spectrum to the entity that values it most. We found that allowing spectrum disaggregation at this time could potentially expedite the introduction of service to underserved areas, provide increased flexibility to licensees, and encourage participation by small businesses in the provision of services.

### Coverage Requirements

The Commission declined to adopt Metrocall, Inc.'s proposal that geographic area licensees' coverage benchmarks should be based on the entire geographic area, including the partitioned area, to prevent the geographic area licensee from using partitioning to circumvent coverage requirements. As stated previously, we found that there was no evidence that "sham" arrangements between geographic area

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<sup>612</sup> *Third Report and Order at Section V.B.2.b.*

<sup>613</sup> *Id.* at Section V.B.3.a.

licensees and other parties to avoid construction requirements are likely to occur in the paging service or have already taken place in other services. The Commission also declined to adopt PCIA's proposal that the partitioner should be responsible for build-out in the partitioned area if the partitionee fails to build out, and that the entire license should be cancelled if build-out in the partitioned area is not completed by either the partitionee or the partitioner.<sup>614</sup> The decision not to place the ultimate responsibility for the partitionee's coverage requirements on the partitioner, as well as the decision to provide parties to partitioning agreements with two options for meeting the coverage requirements, is expected to encourage more partitioning agreements, including agreements involving small businesses. The resulting benefits will be the same for disaggregation arrangements.

Finally, the Commission declined to adopt commenters' proposal to eliminate the "substantial service" option as it applies to coverage requirements in the partitioning and disaggregation context. We found that maintaining the "substantial service" option will encourage licensees to build out their systems while safeguarding the financial investments made by those licensees who are financially unable to meet specific population coverage requirements. Thus, we found that the substantial service alternative will promote service growth while helping licensees to remain financially viable and retain their licenses.<sup>615</sup> Retaining the "substantial service" option will also allow small businesses flexibility in meeting their coverage requirements.

#### License Term

We decline to adopt SBT's proposal that when an area is partitioned within one year of the renewal date of the original ten-year license term, the partitionee should receive the license for a one-year term. We found that adopting this proposal would result in the partitioner conferring greater rights than it was awarded under the original terms of its license grant.

### VII. Report to Congress

The Commission shall send a copy of the *Third Report and Order*, including this Final Regulatory Flexibility Analysis, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996.<sup>616</sup> In addition, the Commission will send a copy of the *Third Report and Order*, including this Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Association. A copy of the *Third Report and Order* and Final Regulatory Flexibility Analysis (or summaries thereof) will also be published in the Federal Register.<sup>617</sup>

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<sup>614</sup> *Id.* at Section V.B.2.b.

<sup>615</sup> *Id.*

<sup>616</sup> *See* 5 U.S.C. § 801(a)(1)(A).

<sup>617</sup> *See id.* § 604(b).