

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
PP Docket No. 93-253

SECOND REPORT AND ORDER
AND FURTHER NOTICE OF PROPOSED RULEMAKING

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By the Commission:

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I. INTRODUCTION

1. In this Second Report and Order (*Order*) we adopt rules governing geographic area licensing of Common Carrier Paging (CCP) and 929 MHz Private Carrier Paging (PCP), and competitive bidding procedures for auctioning mutually exclusive applications for these licenses. We also allow geographic area paging licensees to partition their license area. In this Further Notice of Proposed Rulemaking (*Further Notice*) we seek comment on (1) whether we should adopt coverage requirements for nationwide licenses, (2) various issues related to geographic partitioning by paging licensees and whether spectrum disaggregation is appropriate for paging, and (3) whether to revise the application procedures for shared channels.

II. EXECUTIVE SUMMARY

2. In the *Notice*,¹ we proposed a transition to geographic area licensing for CCP and PCP channels, and competitive bidding procedures for resolving mutually exclusive applications for these licenses. We received 83 comments and 17 reply comments to the issues raised in the *Notice*.² After considering the record of this proceeding, we are adopting geographic area licensing and competitive bidding procedures for paging, as follows:

- All mutually exclusive applications for non-nationwide 931 MHz channels and exclusive non-nationwide 929 MHz channels will be subject to competitive bidding for geographic area licenses for 51 Major Trading Areas (MTAs).³ In addition to the 47 Rand McNally MTAs,

¹ Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, WT Docket No. 96-18, *Notice of Proposed Rulemaking*, 11 FCC Rcd 3108 (1996) (*Notice*).

² Appendix B provides the full and abbreviated names of the parties filing comments and reply comments. In the case of joint comments we have used the name of the first party listed on the joint comments. In addition to comments filed in response to the issues raised in the *Notice* regarding the final rules, we also received 76 comments and 36 reply comments (denoted here as "interim comments" or "interim reply comments") to the interim licensing proposals. The interim rules are set forth in the *First Report and Order* in this docket. See Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, WT Docket No. 96-18, *First Report and Order*, 11 FCC Rcd 16570 (1996) (*First Report and Order*); *reconsideration in Order on Reconsideration of First Report and Order*, 11 FCC Rcd 7409 (1996) (*Reconsideration Order*).

³ Rand McNally organizes the 50 states and the District of Columbia into 47 MTAs and 487 Basic Trading Areas (BTAs). Rand McNally is the copyright owner of the MTA/BTA Listings, which list the counties contained in each BTA/MTA, as embodied in Rand McNally's Trading Area System BTA/MTA Diskette and geographically represented in the map contained in Rand McNally's *Commercial Atlas & Marketing Guide*. Rand McNally has licensed the use of its copyrighted MTA/BTA Listings and maps for certain services such as PCS, 800 MHz and 900 MHz Specialized Mobile Radio (SMR), and Local Multipoint Distribution Services. A paging authorization grantee who does not obtain a copyright license (either through a blanket license agreement or some other arrangement) from Rand McNally for use of the copyrighted material may not rely on grant of a Commission authorization as a defense

we are adding three MTAs for the U.S. territories of (1) Guam and the Northern Mariana Islands, (2) Puerto Rico and the U.S. Virgin Islands, and (3) American Samoa. We are also licensing Alaska as a single area separate from the Seattle MTA.

- Nationwide 931 MHz and 929 MHz geographic area licenses will be granted for the nationwide channels. The three nationwide CCP channels are those identified in 47 C.F.R. § 22.531(b). The 23 nationwide 929 MHz channels are those channels where a licensee had sufficient authorizations as of February 8, 1996 to qualify for nationwide exclusivity under 47 C.F.R. § 90.945. The nationwide geographic area licenses will not be subject to competitive bidding.
- All remaining CCP channels (*i.e.*, 35-36 MHz, 43-44 MHz, 152-159 MHz, and 454-460 MHz) will be subject to competitive bidding for geographic area licenses in 172 Economic Areas (EAs)⁴ for each channel. The Rural Radiotelephone Service, including Basic Exchange Telecommunications Radio Service (BETRS),⁵ is included in the geographic area licensing and the competitive bidding process on paging channels for which these services are also eligible. Rural Radiotelephone Service and BETRS operators may also obtain additional facilities on a secondary basis.
- Shared Part 90 paging channels will not be subject to geographic area licensing or competitive bidding.
- After receiving an MTA or EA license for a channel, licensees will be subject to the following coverage requirements: for each MTA or EA, the licensee must 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. In the alternative, the MTA or EA licensee may provide substantial service to the geographic license area within five years of license grant.

to any claim of copyright infringement brought by Rand McNally against such grantee.

⁴ The Bureau of Economic Analysis of the Department of Commerce has divided the U.S. into 172 EAs, effective April 10, 1995, to facilitate regional economic analysis. Each EA consists of one or more economic nodes -- metropolitan areas or similar areas that serve as centers of economic activity -- and the surrounding counties that are economically related to the nodes. Final Redefinition of the BEA Economic Areas, Department of Commerce, Docket No. 950-3020-64-5064-01, 60 Fed. Reg. 13,114 (Mar. 10, 1995).

⁵ BETRS are radio loops that can take the place of expensive wire or cable to remote areas, and are a part of intrastate basic exchange service. Basic Exchange Telecommunications Radio Service, CC Docket No. 86-495, *Report and Order*, 3 FCC Rcd 214, 217, ¶ 27 (1987). Only local exchange carriers that have been state certified to provide basic exchange telephone service (or others having state approval to provide such service) in the pertinent area are eligible to hold authorizations for BETRS. 47 C.F.R. § 22.702.

- If the MTA or EA licensee fails to meet the above coverage requirements, the geographic area license will be terminated and subject to auction. The licensee may retain any sites that were authorized, constructed, and operating at the time the geographic area license was granted.
- For co-channel interference protection (with respect to incumbent licensees) we will use the fixed distances in Tables E-1 and E-2 in Section 22.537 of the Commission's rules for the exclusive 929 MHz and 931 MHz channels. The formulas for determining the service and interference contours for the remaining CCP channels will not be changed.
- All pending mutually exclusive applications for paging licenses filed with the Commission on or before the adoption date of this *Order* will be dismissed. All non-mutually exclusive applications filed with the Commission on or before July 31, 1996 will be processed. All applications (other than applications on nationwide and shared channels) filed after July 31, 1996 will be dismissed.

Further Notice of Proposed Rulemaking

- In the *Further Notice*, we seek comment on coverage requirements for nationwide licensees, partitioning of paging licenses by small businesses, the feasibility of disaggregating paging spectrum, and modifying the application process for shared channels to reduce or eliminate paging license application fraud.

* * * * *

The Commission makes no representations or warranties about the use of this spectrum for particular services. Applicants should be aware that an FCC auction represents an opportunity to become an FCC licensee in this service, subject to certain conditions and regulations. An FCC auction does not constitute an endorsement by the FCC of any particular services, technologies or products, nor does an FCC license constitute a guarantee of business success. Applicants should perform their individual due diligence before proceeding as they would with any new business venture.

III. BACKGROUND

3. In this proceeding we examine our paging regulations for Part 22 and Part 90 paging services pursuant to the statutory objective for regulatory symmetry for all Commercial Mobile Radio Services (CMRS) set forth in the Omnibus Budget Reconciliation Act of 1993 (1993 Budget Act).⁶ The 1993 Budget Act mandated that substantially similar mobile services receive comparable

⁶ Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66 (1993 Budget Act), Title VI § 6002(b)(2)(A), (B), 107 Stat. 312 (largely codified at 47 U.S.C. § 332 *et seq.*).

regulatory treatment. In the *CMRS Second Report and Order*, we held that PCP services offered for profit were subject to reclassification as CMRS as of August 10, 1996.⁷ In our *Further Notice of Proposed Rulemaking*, we tentatively concluded that these paging services, CMRS and former PMRS reclassified as CMRS, should be deemed substantially similar for statutory purposes.⁸ In the *CMRS Third Report and Order*, we concluded that all CMRS are substantially similar services.⁹ We noted, however, that not all substantially similar services must have identical technical and operational rules, especially if the imposition of such identical rules would require carriers to reconfigure their services in ways that would adversely affect their ability to compete.¹⁰ We also stated that our goal is to give carriers offering substantially similar services the flexibility to compete in whatever manner they choose.¹¹

4. In our *Notice*, we proposed a transition from site-by-site licensing to geographic area licensing for all exclusive, non-nationwide paging services.¹² We also proposed to adopt competitive bidding rules for the geographic area licenses.¹³ We stated that a goal in this proceeding is to ensure that our rules for paging services are consistent with our rules for competing services, such as

⁷ Implementation of Section 3(n) and 332 of the Communications Act, GN Docket No. 93-252, *Second Report and Order*, 9 FCC Rcd 1411, 1452, ¶ 97 (1994) (*CMRS Second Report and Order*). The *CMRS Second Report and Order* discussed the reclassification of PCP as CMRS, noted that there are no longer any real differences between private carrier and common carrier paging systems, and concluded that PCPs should be reclassified as CMRS. *CMRS Second Report and Order*, 9 FCC Rcd at 1452-53, ¶ 97. The Commission noted that the CMRS classification is not extended to not-for-profit, non-interconnected paging systems, which would be presumptively classified as private mobile radio services (PMRS). *Id.* Therefore, we are not revising the rules governing the non-reclassified PMRS systems in this proceeding. To the extent that a PMRS provider may use or wish to obtain an exclusive channel for which we are establishing geographic licensing and competitive bidding, the geographic licensing and competitive bidding rules adopted herein will apply.

⁸ Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No. 93-252, *Further Notice of Proposed Rulemaking*, 9 FCC Rcd 2863, 2868, ¶ 19 (1994) (*Further Notice of Proposed Rulemaking*).

⁹ Implementation of Sections 3(n) and 332 of the Communications Act, *Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, *Third Report and Order*, 9 FCC Rcd 7988, 8007, 8035 ¶¶ 35, 78 (1994) (*CMRS Third Report and Order*).

¹⁰ *CMRS Third Report and Order*, 9 FCC Rcd at 8036, ¶ 79. We deferred further action to modify the rules governing paging services, stating that we would examine the paging rules in a future proceeding to determine whether further conforming of the rules is feasible. *Id.* at 8053, ¶ 122.

¹¹ *Id.* at 8036, ¶ 79.

¹² *Notice*, 11 FCC Rcd at 3113, ¶ 21.

¹³ *Id.* at 3123, ¶¶ 71-72.

narrowband Personal Communications Services (PCS),¹⁴ so that competitive success is dictated by the marketplace, rather than by regulatory distinctions.¹⁵

5. Due to the fundamental changes we proposed in the *Notice*, we suspended acceptance of new applications for paging channels as of February 8, 1996.¹⁶ We observed that continuing to accept new applications after releasing the *Notice* with the proposed rule changes would impair the objectives of this proceeding.¹⁷ Subsequently, we partially lifted the paging freeze for incumbent licensees by allowing incumbents to file applications for additional sites within 65 kilometers (40 miles) of operating sites in the *First Report and Order* in this docket.¹⁸ We stated that the Bureau would process all paging applications filed by July 31, 1996 for additional sites under the interim rules.¹⁹

6. In this *Order* we adopt final rules governing licensing of paging systems, including a transition to geographic area licensing for exclusive, non-nationwide 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; competitive bidding rules for granting the mutually exclusive geographic area non-nationwide licenses; and a standard methodology for providing protection to incumbent licensees from co-channel interference for the 929-930 MHz and 931-932 MHz paging bands. Due to the transition to geographic area licensing in this *Order*, all pending mutually exclusive paging applications will be dismissed, including those filed under the interim rules. Non-mutually exclusive paging applications filed on or before July 31, 1996 will be processed. All applications filed after July 31, 1996 will be dismissed (other than applications for nationwide or shared channels) and, other than for the shared channels, no additional site-by-site applications will 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.*) The Bureau will also release a Public

¹⁴ Narrowband PCS is defined as PCS services operating in the 901-902 MHz, 930-931 MHz, and 940-941 MHz bands. 47 C.F.R. § 24.5. See Amendment of the Commission's Rules to Establish New Narrowband Personal Communications Services, GEN Docket No 90-314, *First Report and Order*, 8 FCC Rcd 7162, ¶ 1 (1993).

¹⁵ *Notice*, 11 FCC Rcd at 3109, ¶ 2.

¹⁶ *Id.* at 3136-37, ¶¶ 139-143. The nationwide channels were excluded from the interim licensing freeze. *Id.* at 3137, ¶ 142.

¹⁷ *Id.* at 3136, ¶ 139.

¹⁸ See *First Report and Order* at ¶ 25. Additionally, the *First Report and Order* exempted BETRS, Rural Radiotelephone Service, and Special Emergency Radio Service (SERS) from the interim paging freeze. *First Report and Order* at ¶ 36.

¹⁹ FCC Clarifies Processing of License Applications Under Interim Paging Rules, *Public Notice*, DA 96-930 (released June 10, 1996).

Notice setting forth the deadlines and instructions for filing the FCC Form 175 for geographic area licenses.

IV. DISCUSSION

A. Geographic Licensing for Non-Nationwide Channels

1. Overview

7. Common Carrier Paging. Under our current rules, all CCP channels are assigned on an exclusive basis.²⁰ Licensees must apply for additional transmitter locations on a site-by-site basis when expanding their systems.²¹ On CCP applications for the paging channels below 931 MHz, the applicant specifies a channel. Any timely filed applications for the same channel in the same area are considered mutually exclusive.²² A paging license applicant may request a particular channel in the 931 MHz band, but the Commission has the discretion to assign a channel different from the one requested. Mutually exclusive CCP applications are subject to selection by competitive bidding; however, competitive bidding procedures had not been adopted prior to commencement of this proceeding.²³

8. Private Carrier Paging. Under the rules in effect when the *Notice* was adopted, applicants for all non-929 MHz Part 90 paging channels and five of the forty 929 MHz channels submit their applications to a frequency coordinator who recommends a channel to be assigned by the Commission.²⁴ In the *PCP Exclusivity Order*, we established a mechanism for exclusive licensing on thirty-five of the forty 929 MHz channels in order to encourage the development of wide-area paging systems.²⁵ We allowed licensees to earn exclusivity on a local, regional, or nationwide basis by

²⁰ See 47 C.F.R. § 22.351.

²¹ See 47 C.F.R. §§ 22.3, 22.105, 22.123(e), and 22.567.

²² Part 22 defines applications as mutually exclusive if (1) more than one application is pending, and (2) the grant of one application would preclude the grant of the other(s) under applicable Commission rules. 47 C.F.R. § 22.131.

²³ See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, *Second Report and Order*, 9 FCC Rcd 2348, 2359, ¶ 61 (1994) (*Competitive Bidding Second Report and Order*).

²⁴ The 929-930 MHz channels available on an exclusive basis are listed in Section 90.494(a). 47 C.F.R. § 90.494(a). The shared 929-930 MHz channels, 929.0375, 929.0625, 929.0875, 929.1625, and 929.2625, are listed in 90.494(b). 47 C.F.R. § 90.494(b).

²⁵ Amendment of the Commission's Rules to Provide Channel Exclusivity to Qualified Private Paging Systems at 929-930 MHz, PR Docket No. 93-35, *Report and Order*, 8 FCC Rcd 8318 (1993) (*PCP Exclusivity Order*). We declined to reconsider our rules defining regional exclusivity for 929 MHz regional systems. See Amendment of the Commission's Rules to Provide Channel Exclusivity to Qualified Private Paging Systems at 929-930 MHz, PR Docket No. 93-35, *Memorandum*

constructing multi-transmitter systems meeting certain minimum criteria.²⁶ Incumbent 929 MHz systems that met the new criteria were granted immediate exclusivity.²⁷ Applications for the exclusive PCP channels were to be submitted to a frequency coordinator and processed on a first-come, first-served basis.²⁸

9. Notice of Proposed Rulemaking. In the *Notice*, we explained that in other CMRS services, such as cellular, PCS, and Specialized Mobile Radio (SMR), we recognized that licensing based on pre-defined service areas has significant advantages over site-by-site licensing because of the greater flexibility it gives licensees and the greater ease of administration.²⁹ We tentatively concluded that the public interest would be served by converting to geographic area licensing for exclusive, non-nationwide paging channels.³⁰ We also observed that geographic area licensing may be advantageous in the paging industry because paging has evolved from single-site systems toward multi-site systems, regulatory symmetry between paging and narrowband PCS would be enhanced, and inefficiencies in the paging licensing process would be eliminated.³¹ We proposed that incumbent systems would be entitled to continue to operate under current authorizations with full protection from co-channel interference.³² Parties were invited to comment on our geographic licensing proposals. We asked the commenters to address whether geographic licensing would be practicable on all bands, and the appropriate geographic area for such licensing.

2. Geographic Area Licensing for Exclusive 929 MHz and 931 MHz Bands

10. Comments. The commenters, including the Personal Communications Industry Association (PCIA) and the Federal Trade Commission (FTC), generally support the proposal to

Opinion and Order, 11 FCC Rcd 3091 (1996) (*PCP Exclusivity Reconsideration Order*).

²⁶ *PCP Exclusivity Order*, 8 FCC Rcd at 8321-23, ¶¶ 9-15.

²⁷ *Id.* at 8329, ¶ 31.

²⁸ *Id.* at 8326, ¶ 23.

²⁹ *Notice*, 11 FCC Rcd at 3113, ¶ 19. For example, in the *CMRS Third Report and Order*, we stated that geographic area licensing should be used for 800 MHz SMR service because it will be easier to administer, will provide licensees and the public with greater certainty about what area is covered by each authorization, and will make it easier to resolve conflicts between applicants seeking to provide service to a common area. *CMRS Third Report and Order*, 9 FCC at 8044, ¶ 98.

³⁰ *Notice*, 11 FCC Rcd at 3113-15, ¶¶ 19-32.

³¹ *Id.* at 3113, ¶ 19.

³² *Id.*

convert to geographic area licensing for 931 MHz and 929 MHz exclusive channels.³³ AT&T Wireless, MTel, PageNet, and Source One observe that the regulatory flexibility afforded by geographic area licensing will enable paging operators to react quickly to modify their systems to meet the demands of customers, and will facilitate further build-out of wide-area paging systems.³⁴ PCIA contends that geographic area licensing for 931 MHz systems would provide greater flexibility for the paging operators in these frequencies, reduce the number of license filings, minimize processing delays, provide greater parity with narrowband PCS licensees, and strengthen the carriers' ability to obtain capital.³⁵ PCIA states that it reluctantly supports transitioning to geographic licensing for the exclusive frequencies in the 929 MHz band.³⁶

11. The FTC supports geographic area licensing to combat paging license application fraud.³⁷ According to the FTC, this fraud is of two types: (1) application mills that sell application preparation services for a fee of several thousand dollars per license; and (2) build-out schemes in which investors are sold interests in limited liability companies or partnerships that claim they will acquire licenses and build and operate telecommunications systems.³⁸ These schemes are carried out by deceiving consumers about the profitability of the paging licenses.³⁹ The FTC notes that geographic licensing, combined with the use of auctions to select licensees, will reduce the volume of applications on which application mills depend and will make it more difficult for speculators to deceive unsophisticated investors with offers of "free" (*i.e.*, unauctioned) licenses.

³³ See, e.g., AT&T Wireless Comments at 4; AirTouch Comments at 7; Arch Comments at 3; API Comments at 3; A+ Communications Comments at 2; MTel Comments at 5; Metrocall Comments at 5; Huffman Comments at 1; Diamond Comments at 1-2; FTC Comments at 2 (supporting geographic area licensing through competitive bidding in general); PCIA Comments at 9; ProNet Comments at 3; Priority Comments at 3; Paging Partners Comments at 2-3; PageNet Comments at 5-6; Pacific Comments at 2; Source One Comments at 2; TeleBEEPER Comments at 1.

³⁴ AT&T Wireless Comments at 4; MTel Comments at 5; PageNet Comments at 5-6; Source One Comments at 2.

³⁵ PCIA Comments at 9.

³⁶ PCIA Comments at 10-11 (contending that although the adoption of geographic area licensing for exclusive 929 MHz channels would be highly disruptive, the expeditious resolving of the licensing rules and policies will best serve the public interest).

³⁷ FTC Comments at 1.

³⁸ FTC Comments at 4.

³⁹ FTC Comments at 4-5.

12. Not all the commenters support geographic area licensing for the exclusive 929 MHz and 931 MHz channels.⁴⁰ Ameritech argues that the FTC's concern -- consumer fraud -- does not justify disrupting a multi-billion dollar industry.⁴¹ Ameritel and Ameritech contend that the competitive bidding process will not stop consumer fraud.⁴² Word argues that geographic area licensing would be disruptive to existing licensees, as well as to the public, without promising any overriding benefit.⁴³

13. PCIA and several of the larger paging companies support the use of MTAs for geographic area licensing.⁴⁴ These commenters contend that geographic licensing of paging systems using MTAs would offer substantial administrative benefits to both the Commission and the paging licensees, as well as service benefits to customers.⁴⁵ Some commenters, however, disagree with the proposal to use MTAs, and offer other suggestions for appropriate geographic areas for these channels, such as BTAs or EAs.⁴⁶

14. Discussion. In the *Notice* we stated that geographic licensing may be particularly appropriate for exclusive 929 MHz and 931 MHz paging channels because of the large number of

⁴⁰ See, e.g., Ameritech Comments at 7-9; Ameritel Comments at 2-3; Balkenhol Comments at 1; Coles Comments at 1; Duncan Comments at 1; Elliot Comments at 1; MobileMedia Comments at 8-12; Muzzio Comments at 1; Neal Comments at 1; PagePrompt Comments at 2; Radiofone Comments at 1; Sarraf Comments at 1; Von Duerring Comments at 1; Word Comments at 3.

⁴¹ Ameritech Reply Comments at 4-5.

⁴² Ameritel Reply Comments at 5-6; Ameritech Reply Comments at 4 (observing that the application mills would probably not have difficulty adjusting to the auction format by pooling the resources of consumers).

⁴³ Word Comments at 6.

⁴⁴ See, e.g., AT&T Wireless Comments at 5; AirTouch Comments at 15; Arch Comments at 6; API Comments at 3; A+ Communications Comments at 3; MTel Comments at 6; PCIA Comments at 18; Pacific Comments at 2; ProNet Comments at 6-7; PageNet Comments at 7; TeleBEEPER Comments at 1 (suggesting licensing on an MTA or state-wide basis).

⁴⁵ See, e.g., Pacific Comments at 2; AT&T Wireless Comments at 5; AirTouch Comments at 15; MTel Comments at 6.

⁴⁶ See, e.g., Ameritech Comments at 11 (contending that incumbent licensees should define their own geographic area license by submitting a map of the area in which they are entitled to exclusive use of a frequency because of their existing sites and applications); Ameritel Comments at 9 (suggesting state boundaries for 929 MHz and 931 MHz bands); Caraway Comments at 5 (suggesting using both BTAs and MTAs); Huffinan Comments at 2 (suggesting EAs); Metrocall Comments at 5-7 (suggesting BTAs); MobileMedia Comments at 19-20 (suggesting BTAs); Paging Partners Comments at 3 (suggesting MSA/RSAs or BTAs); Source One Comments at 2 (suggesting BTAs). Metrocall observes that the vast majority of paging operators disagree with the Commission's premise that MTAs would form the most appropriate geographic area boundaries for paging systems. Metrocall Reply Comments at 2.

wide-area systems in these bands.⁴⁷ We noted that the two services are virtually identical, and that the differences in regulatory treatment are due to the pre-1993 Budget Act dichotomy between common carrier and private paging services.⁴⁸ Our recent revisions to the rules for 929 MHz and 931 MHz channels, in the *PCP Exclusivity Order* and the *Part 22 Rewrite Order*,⁴⁹ recognized that paging in these bands has evolved from single-site to multi-site systems.

15. The commenters contend, and we agree, 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 act quickly to meet the needs of their customers. We find, therefore, that converting the 931 MHz channels and the exclusive 929 MHz channels to geographic area licensing will further our goal to give carriers offering substantially similar services more flexibility to compete, and will enhance regulatory symmetry between paging and narrowband PCS. Exclusive 929 MHz and 931 MHz licensees will be extended the same flexibility as narrowband PCS licensees in terms of the location, design, construction, and modification of their facilities throughout their geographic areas.

16. In the *Notice* we stated that the geographic definition should correspond as much as possible to the geographic area that paging licensees seek to serve, and we proposed using MTAs as the market areas.⁵⁰ We conclude that MTAs form an appropriate geographic area for most of the paging systems because they are economically-defined regions that appear to best mirror the size and development of existing paging systems. We are implementing geographic area licensing in lieu of the current site-by-site licensing, with MTAs as the geographic area for the 931 MHz and exclusive 929 MHz channels. We are licensing these channels using 51 MTA geographic areas. In addition to the 47 Rand McNally MTAs, we are adding three MTAs for the U.S. territories of (1) Guam and the Northern Mariana Islands, (2) Puerto Rico and the U.S. Virgin Islands, and (3) American Samoa. We are also licensing Alaska as a single area separate from the Seattle MTA. The concerns raised by Ameritech, Ameritel, Metrocall, Source One, and other commenters that MTAs are not the appropriate size for geographic area licensing, can be alleviated by geographic partitioning.⁵¹

17. Geographic area licensees will have the flexibility to construct transmitters at any place within their license area, subject to the co-channel interference rules discussed in Section E, and will

⁴⁷ *Notice*, 11 FCC Rcd at 3113-14, ¶ 24.

⁴⁸ *Id.*

⁴⁹ Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services, CC Docket No. 92-115, *Report and Order*, 9 FCC Rcd 6513 (1994) (*Part 22 Rewrite Order*).

⁵⁰ *Notice*, 11 FCC Rcd at 3115-16, ¶ 33.

⁵¹ See Section IV.I(4)(f) for a discussion of geographic partitioning; see also Section V, *Further Notice of Proposed Rulemaking*.

not be required to file applications with the Commission for additional sites or modifications.⁵² Geographic area licensees will be able to act quickly to add sites or make modifications of existing sites to meet the needs of their customers. Due to the prevalence of wide-area paging systems on these channels and the flexibility geographic area licensing will afford paging licensees, we believe that geographic area licensing for exclusive 929 MHz and 931 MHz channels, with MTAs as the geographic area, is consistent with the public interest, convenience and necessity, and the purposes of the Communications Act of 1934, as amended (Communications Act). We believe that our rules for geographic area licensing for exclusive 929 MHz and 931 MHz channels, with MTAs as the geographic area, fulfill the objectives of Section 309(j)(4)(C) because a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women may have an opportunity to successfully compete against larger, well-financed bidders for MTAs through the use of bidding credits⁵³ and installment payments.⁵⁴

18. We conclude that spectrum within a geographic area recovered by the Commission will revert automatically to the geographic area licensee. We will consider transfers and assignments between a geographic area licensee and incumbents operating in the geographic area presumptively to be in the public interest. We conclude that granting these rights to geographic area licensees will 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.⁵⁵ We also eliminate finders' preferences immediately for paging services. All pending finders' preference requests are dismissed, and we will no longer accept finders' preference requests following the adoption of this *Second Report and Order*.

19. Mutually exclusive applications for geographic area licenses will be processed pursuant to the competitive bidding rules set forth below in Section IV.I. The incumbent (non-geographic) paging licensees will continue to operate under their existing authorizations with full protection from co-channel interference, and will not be required to file applications for additional internal sites. Incumbents will not be permitted to expand their composite interference contours unless the incumbent and the geographic licensee have reached agreement on such modifications.

⁵² In general, geographic area licensees may add or modify sites within the geographic area without filing site specific applications consistent with this *Order*; however, geographic area licensees must file applications with the Commission if such filing is required by Sections 22.369, 90.177, or 1.1301 *et seq.*

⁵³ See paragraphs 174-181.

⁵⁴ See paragraphs 182-187.

⁵⁵ *CMRS Third Report and Order*, 9 FCC Rcd at 8162, ¶ 398.

3. Geographic Area Licensing for Common Carrier Paging Services in the 35-36 MHz, 43-44 MHz, 152-159 MHz, and 454-460 MHz Bands

a. Common carrier paging services in the 35-36 MHz, 43-44 MHz, 152-159 MHz, and 454-460 MHz bands

20. Comments. Many commenters, including the smaller and medium-sized paging companies, the Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO), and Small Business in Telecommunications (SBT), are generally opposed to geographic area licensing for the 35-36 MHz, 43-44 MHz, 152-159 MHz, and 454-460 MHz paging channels and contend that geographic area licensing will prevent the continued growth of small paging businesses presently using these channels.⁵⁶ These commenters state that the Commission has not shown that geographic licensing is needed, that regulatory symmetry among CMRS is necessary or practical, or that our proposals, if adopted, would provide such regulatory symmetry.⁵⁷ Commenters observe that once the geographic license is auctioned, an incumbent (non-geographic) licensee will not be able to expand the range of its paging system beyond the existing interference contour.⁵⁸ Commenters note that the paging spectrum is heavily licensed, and that while sites are needed for fill-in purposes, much of the application processing has already been accomplished so that the administrative savings will be minimal.⁵⁹ Commenters contend that geographic area licensing may make sense for a new service, but in paging it would impede rather than facilitate service in the industry.⁶⁰

⁵⁶ See, e.g., Ace Comments at 2; ATS Comments at 4; Ameritel Comments at 5-6; Benkelman Comments at 4; Baldwin Comments at 4; Baker Comments at 4; Chequamegon Comments at 4; CSS Comments at 4; CCMS Comments at 4-5; Datafon Comments at 2; Fine Comments at 1; HEI Comments at 4; Hiort Comments at 4; Huffman Comments at 2; Mashell Comments at 4; Metamora Comments at 4; Mihm Comments at 1; Mobilfone Comments at 4; Neal Comments at 1; Olympic Radio Comments at 1; OPASTCO Comments at 2; Pass Word Comments at 4-7; PAI Comments at 4; Perry Comments at 1; Pigeon Comments at 4; Porter Comments at 4; Rinker Comments at 4; Radiofone Comments at 2; Reaves Comments at 1; Rule Comments at 6 (contending that rural paging or two-way mobile radio operators will not be able to bid for an entire MTA, and that rural companies are the only companies that will bring service to rural towns); SBT Comments at 11; Shelly Comments at 1; SMR Comments at 2 (contending that the geographic licensing proposal will shut out the small carriers); Supercom Comments at 4; Teletouch Comments at 1; Total Tele-Page Comments at 1-2; Wenski Comments at 1; Wilkinson Comments at 4; Western Radio Services Comments at 2.

⁵⁷ See, e.g., Ameritech Comments at 7 (contending that the costs associated with geographic area licensing will outweigh the benefits); SBT Comments at 4.

⁵⁸ See, e.g., OPASTCO Comments at 4; Ace Comments at 2 (contending that the Commission should not let the small carriers get crushed by the large carriers by allowing auctions on the existing channels currently in use in a geographic area).

⁵⁹ See, e.g., Ameritel Comments at 2-3; Datafon Comments at 2; Western Radio Comments at 2.

⁶⁰ See, e.g., Datafon Comments at 2-3; Rule Comments at 6 (stating that it is too late now to convert to geographic licensing for 150 and 450 MHz bands); Total Tele-Page Comments at 1 (contending that competitive bidding will wipe out the small paging companies).

21. Some commenters, however, support geographic area licensing for these bands.⁶¹ PCIA states that it previously opposed implementation of geographic licensing in these bands because overlaying a geographic area licensing scheme on existing operations would be highly complex and would have reduced regulatory benefits for licensees, the Commission, and the public.⁶² PCIA now endorses the Commission's proposal to transition these paging bands to geographic area licensing because it has determined that the industry is better served by a quick resolution of this rulemaking proceeding, permitting licensees to understand new processing policies and resuming the filing of applications for necessary authorizations.⁶³

22. Several commenters suggest that if geographic area licensing is implemented, the Commission should use BTAs or EAs for the VHF and UHF bands⁶⁴ instead of MTAs.⁶⁵ Sunbelt suggests that incumbent licensees should be able to aggregate their licenses into one license that covers the entire geographic area, and should be allowed to expand on a transmitter-by-transmitter basis.⁶⁶ PCIA, however, contends that MTAs should apply to all of the paging bands where the Commission decides to implement geographic licensing.⁶⁷

23. Discussion. We believe that the advantages of geographic licensing -- flexibility, enhanced regulatory symmetry with other CMRS, and eliminating the inefficiencies in the licensing process -- are applicable to these channels, particularly for regional and wide-area paging services. One of our goals in this proceeding is to revise the paging rules so that substantially similar mobile services receive comparable regulatory treatment, to the extent feasible, in a manner consistent with the public interest, convenience, necessity, and the purposes of the Communications Act. We note that paging providers on these CCP channels generally have smaller paging systems than the 931 MHz band paging services, and therefore smaller market areas would be more appropriate than MTAs for these bands. Most commenters addressing this issue contend that MTAs do not mirror their geographic areas, primarily because MTAs are too large for the numerous small- and medium-

⁶¹ See, e.g., ProNet Comments at 3; PCIA Comments at 13; TeleBEEPER Comments at 1.

⁶² PCIA Comments at 13.

⁶³ PCIA Comments at 13. Ameritel observes that PCIA does not represent the industry consensus on the issue of geographic area licensing. Ameritel Reply Comments at 2-3.

⁶⁴ The VHF band is 30 MHz to 300 MHz and the UHF band is 300 MHz to 3000 MHz.

⁶⁵ See, e.g., Ameritel Comments at 9 (suggesting BTAs); CCMS Comments at 8-9 (suggesting BTAs); Pass Word Comments at 7 (suggesting EAs); Rule Comments at 13-14 (suggesting county-by-county geographic area licensing); SBT Comments at 16 (suggesting EAs or BTAs).

⁶⁶ Sunbelt Comments at 3.

⁶⁷ PCIA Comments at 18.

sized paging systems on these bands. The United States is organized into 487 BTAs, some of which are smaller than counties, and we believe that BTAs, suggested by several commenters, would be too small for most paging systems. EAs, which are larger than BTAs, would be an appropriate size for geographic licensing on these bands. The Bureau of Economic Analysis of the Department of Commerce has divided the United States into 172 EAs.⁶⁸ Each EA consists of metropolitan areas or similar areas that serve as centers of economic activity -- and the surrounding counties that are economically related to the nodes. Allowing licensees to operate over EAs, instead of smaller BTAs, will enhance their ability to construct wide-area systems. Consequently, we adopt EAs as the geographic area for these paging bands, a suggestion offered by commenters.⁶⁹

24. We agree with the commenters that the geographical definition used should correspond as much as possible to the geographic area that the paging licensees seek to serve. EAs, which are smaller than MTAs, will facilitate the ability of paging operators of smaller systems to participate in geographic area licensing. Geographic area licensees will have the flexibility to construct transmitters at any place within their EA, subject to the co-channel interference rules discussed in Section IV.E.⁷⁰ Our rules for geographic area licensing for these channels, with EAs as the geographic area, will fulfill the objectives of Section 309(j)(4)(C) because a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women may have an opportunity to successfully compete against larger, well-financed bidders for EAs through the use of bidding credits⁷¹ and installment payments.⁷² These smaller market areas will also provide more opportunities for the entry of new applicants into the paging market.

25. The EA geographic area licenses will be assigned pursuant to the competitive bidding rules set forth below in Section IV.I. Incumbent (non-geographic) paging licensees will continue to operate under their existing authorizations with full protection from co-channel interference, and will

⁶⁸ See Final Redefinition of the BEA Economic Areas, Department of Commerce, Docket No. 950-3020-64-5064-01, 60 Fed. Reg. 13,114 (Mar. 10, 1995).

⁶⁹ See Pass Word Comments at 7; SBT Comments at 16. See also Huffman Comments at 2 (suggesting EAs for the 929 MHz and 931 MHz bands). We have also proposed to use EAs for the assignment of 60 channels in the 220 MHz band. 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, *Second Memorandum Opinion and Order and Third Notice of Proposed Rulemaking*, PR Docket No. 89-552, 11 FCC Rcd 188, 219-224, ¶¶ 59-69 (1995) (*220 MHz Second Memorandum Opinion and Order*).

⁷⁰ In general, geographic area licensees may add or modify sites within the geographic area without filing site specific applications consistent with this *Order*; however, geographic area licensees must file applications with the Commission if such filing is necessary for coordination with Mexico or Canada, or is required by Sections 22.369, 90.177, or 1.1301 *et seq.*

⁷¹ See paragraphs 174-181.

⁷² See paragraphs 182-187.

not be required to file applications for additional internal sites.⁷³ Incumbents will not be permitted to expand their composite interference contour, as suggested by Sunbelt, unless the incumbents and the geographic licensee have reached agreement on such modifications.

b. Other services in the 152-159 MHz and 454-460 MHz bands

26. Background. Rural Radiotelephone Service and two-way mobile telephone service also use the paired channels allocated to paging services. BETRS, licensed under the Rural Radiotelephone Service,⁷⁴ is a fixed service and by definition is not CMRS.⁷⁵ BETRS uses these channels to provide basic exchange telephone service to rural areas where it would be impractical to provide wireline telephone service.⁷⁶ Only local exchange carriers (LECs) that have been state certified to provide basic exchange telephone service, or others having state approval to provide such service, are eligible to hold authorizations for BETRS. Conventional Rural Radiotelephone Service is provided on the channels listed in Section 22.725. These channels are also allocated for assignment for paging services. In the *Notice*, we stated that it is important to ensure that any changes to our paging rules do not prevent BETRS from providing service to areas that otherwise would lack basic telephone service.⁷⁷ We noted that new wireless services, such as PCS, may eventually provide telecommunications service to remote areas.⁷⁸

27. Comments. Commenters disagree with our observation that new mobile technologies such as PCS may be widely available in the near future to serve sparsely populated or remote areas.⁷⁹

⁷³ Licensees will be required to file applications if such filing is necessary for coordination with Mexico or Canada, or required under Sections 22.369, 90.177, or 1.1301 *et seq.*

⁷⁴ *See* 47 C.F.R. §§ 22.757, 22.759.

⁷⁵ *See* Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, *Second Report and Order*, GN Docket No. 93-252, 9 FCC Rcd 1411, 1455, ¶ 102 (1994) (*CMRS Second Report and Order*). In the *First Report and Order*, we stated that BETRS and Rural Radiotelephone Service applications were not subject to the interim freeze. *First Report and Order* at ¶ 38.

⁷⁶ We note that under Section 90.621(h) certain channels in the 800 MHz band are available on a co-primary basis to BETRS. Due to the limited amount of BETRS licensing on these channels, the Commission is no longer accepting BETRS applications for those frequencies. *See* Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, *First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rulemaking*, 11 FCC Rcd 1463, 1588, ¶¶ 287-288 (1995).

⁷⁷ *Notice*, 11 FCC Rcd at 3115, ¶ 30.

⁷⁸ *Id.*

⁷⁹ *See, e.g.*, Border Comments at 4-5; Nucla-Naturita Comments at 6-7; Pacific Comments at 3; SBT Comments at 7-8.

Rule contends that there is substantial demand for two-way mobile telephone service in rural America and in the western United States.⁸⁰ Rule notes that the carriers providing two-way mobile telephone service are unlike paging operators in that they do not license a common frequency over a wide area; instead they operate on numerous radio channels within a frequency band.⁸¹ Rule recommends that we continue licensing on a site-by-site basis, but suggests that the paired channels be licensed on a county-by-county basis if geographic area licensing is imposed.⁸²

28. The United States Telephone Association (USTA) and other commenters argue that it is not in the public interest to use competitive bidding to select between applications for BETRS and paging, as this may leave some rural areas without any local exchange service.⁸³ Commenters observe that requiring LECs to bid for BETRS spectrum would defy the 1996 Telecommunications Act's⁸⁴ requirements for universal service and jeopardize the Commission's goal to increase subscriber penetration.⁸⁵

29. In *ex parte* comments filed on July 24, 1996, Puerto Rico Telephone contends that if BETRS channels are subject to competitive bidding, BETRS will no longer be a cost-effective means for providing rural service.⁸⁶ Puerto Rico Telephone argues that an auction would result in additional costs imposed on the BETRS operator.⁸⁷ Additionally, access to spectrum needed for BETRS expansion could be blocked by the geographic area license winner.⁸⁸ Puerto Rico Telephone contends that the practical result of this would be to deny basic telephone service to rural areas.⁸⁹ Puerto Rico

⁸⁰ Rule Interim Comments at 4-5.

⁸¹ Rule Interim Comments at 6.

⁸² Rule Comments at 14.

⁸³ See, e.g., Border Comments at 2-4; InterDigital Comments at 3; OPASTCO Comments at 2-3; SBT Comments at 7; USTA Comments at 2; Puerto Rico Telephone Comments at 9; Rule Comments at 24; Emery Telephone Reply Comments at 2.

⁸⁴ Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996) (1996 Act), amending the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, *et seq.*

⁸⁵ See, e.g., Border Comments at 3-4; Nucla-Naturita Comments at 4; OPASTCO Comments at 7-8; Pacific Comments at 3; Puerto Rico Telephone Comments at 7; USTA Comments at 3; Emery Telephone Reply Comments at 4.

⁸⁶ Puerto Rico Telephone July 24, 1996 *ex parte* Comments at 2. According to Puerto Rico Telephone, the telephone service penetration rate in Puerto Rico is below 75 percent, and due to the mountainous terrain in Puerto Rico it is cost prohibitive to provide wireline service in most areas. *Id.*

⁸⁷ *Id.* at 3.

⁸⁸ *Id.*

⁸⁹ *Id.* at 4.

Telephone argues that under Section 307(b) of the Communications Act⁹⁰ the Commission must take into the account the needs of rural communities, like those in Puerto Rico.⁹¹ Puerto Rico Telephone suggests that instead of requiring BETRS operators to bid at auction for a geographic area license, the Commission should allow BETRS operators to apply for additional licenses on a site-by-site basis; additionally (1) BETRS operators would have preferential treatment over paging operators for mutually exclusive applications (on a site-by-site basis), and (2) the Commission should designate a frequency block from reallocated frequencies solely for BETRS use.⁹² According to Puerto Rico Telephone, this proposal will preserve the status of BETRS licensees and provide for the future opportunity for telecommunications carriers to expand service in rural areas.⁹³

30. In *ex parte* comments filed on September 6, 1996, Puerto Rico Telephone observes that BETRS technology is a cost-effective means to provide basic telephone service to rural areas.⁹⁴ Puerto Rico Telephone explains that on the island of Puerto Rico, BETRS and paging sites that serve different constituencies are located in the same geographic licensing area, and may even have adjacent interference contours.⁹⁵ Puerto Rico Telephone contends that a geographic area licensee should not be able to charge a fee to the BETRS operator if it is necessary to expand the existing interference contour to extend telephone service.⁹⁶ Puerto Rico Telephone proposes that consent from the geographic area licensee should not be required to permit changes in the BETRS licensee's interference contour if (1) the BETRS provider can demonstrate that change in its service area will enable the provision of basic telephone service to an unserved area, or (2) the geographic area licensee has not met its build-out requirement.⁹⁷

31. In reply to the comments filed by the parties, Arch and AirTouch contend that there is no need to provide special considerations for BETRS operators, and that alternatives exist for providing telephone service to remote areas, such as PCS, cellular, and mobile satellite services.⁹⁸

⁹⁰ 47 U.S.C. § 307(b).

⁹¹ Puerto Rico Telephone July 24, 1996 *ex parte* Comments at 4.

⁹² *Id.* at 4-7.

⁹³ *Id.* at 7.

⁹⁴ Puerto Rico Telephone September 6, 1996 *ex parte* Comments at 2.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 2-3.

⁹⁸ Arch Reply Comments at 16; AirTouch Reply Comments at 17-18.

SBT charges that the commenters fail to explain with particularity how the Commission could reasonably continue to offer BETRS while auctioning wide-area UHF licenses.⁹⁹

32. Discussion. In order to discuss the implementation of geographic area licensing for paging systems on these channels, we must define the rights of BETRS and Rural Radiotelephone Service operators to obtain spectrum within each area. In the *Competitive Bidding Second Report and Order*, we stated that we would not conduct auctions to resolve mutual exclusivity between initial BETRS or rural radiotelephone applications and common carrier mobile service applications.¹⁰⁰ We noted that it would not serve the public interest for the Commission to establish services such as BETRS as a potential less costly alternative to wireline service, and then require the BETRS applicant to bid against a radio common carrier applicant for those frequencies.¹⁰¹ Since the release of the *Competitive Bidding Second Report and Order* we have expanded our rules to allow CMRS licensees the flexibility to provide fixed or mobile services, or a combination of the two, over spectrum allocated for CMRS services.¹⁰² In the *CMRS Flex Report and Order* we observed that fixed wireless services could be used to provide wireless local loop as an alternative to end-to-end wiring by the carrier from the switch to the end user in rural areas.¹⁰³ Thus the local exchange service currently offered by BETRS could be offered by wireless or wireline providers in the future. In such a potentially competitive environment, it may not be logical to continue to exempt BETRS from geographic area licensing and auctions.

33. BETRS operators argue that they should be exempted from the geographic licensing process and from competitive bidding so that they will be able to obtain authorizations to use these channels regardless of whether a paging operator has acquired the geographic area license. Two paging operators, Arch and AirTouch, disagree and argue that BETRS operators should be required to obtain licenses under the same rules and procedures applicable to paging licensees.

34. We conclude that BETRS and Rural Radiotelephone Service licensees can participate in the geographic area licensing framework we are adopting for paging, but we will also allow them to obtain site licenses on a secondary basis. We do not believe it is necessary to exempt BETRS from geographic area licensing or adopt the plan proposed by Puerto Rico Telephone. In terms of auctionability, we see no basis for distinguishing BETRS from other services that use radio spectrum to provide commercial communications service to subscribers and are therefore auctionable under

⁹⁹ SBT Reply Comments at 8.

¹⁰⁰ *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2356, ¶ 46.

¹⁰¹ *Id.*

¹⁰² See Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services, WT Docket No. 96-6, *First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 8965, 8977, ¶ 24 (1996) (*CMRS Flex Report and Order*).

¹⁰³ *CMRS Flex Report and Order*, 11 FCC Rcd at 8974, ¶ 19.

Section 309(j) of the Communications Act. We are aware that BETRS primarily serves rural, mountainous, and sparsely populated areas that might not otherwise receive basic telephone service. Our decision to apply geographic licensing to BETRS will not deprive rural areas of local exchange service or result in higher costs to BETRS customers. All existing BETRS systems will remain in place and will be fully protected from interference by geographic area licensees. We also note that there has been only limited demand for expansion by BETRS into new areas in recent years.¹⁰⁴ Thus, it does not appear that geographic licensing of paging systems will significantly preempt growth of BETRS.

35. To the extent that demand for expanded Rural Radiotelephone Service or BETRS exists or arises in the future, our geographic area licensing and partitioning rules are tailored to accommodate any potential expansion. The channels for which BETRS is eligible will be licensed using EAs rather than MTAs, creating more opportunities for licensing of smaller markets to BETRS. In addition, our partitioning rules allow BETRS licensees to enter into partitioning agreements with geographic area licensees both before and after geographic licensing occurs. Finally, we will allow the Rural Radiotelephone Service or BETRS licensee to obtain site licenses and operate facilities on a secondary basis. If any geographic area licensee subsequently notifies the Rural Radiotelephone or 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 Rural Radiotelephone or BETRS licensee must discontinue use of the particular channel at that site no later than six months after such notice.

36. With respect to mobile telephone service on the two-way channels under Section 22.561, we do not believe these licensees should be exempt from the geographic area licensing process and competitive bidding. Two-way service primarily serves rural areas in the western part of the country, and typically does not conflict geographically with paging service. It would not be feasible to license the service on a county-by-county basis, as one commenter suggested, instead of EAs. It would be difficult to license two-way mobile radiotelephone service by counties and paging services by EAs, when both services use the same channels. Additionally, counties are too small in many states to be a practical geographic area for paging services which precludes using counties instead of EAs as the geographic area for all services on these channels. Therefore, two-way mobile telephone operators on these channels will be subject to geographic area licensing on the same basis as paging operators.

4. Shared PCP Channels

37. Background. In the *Notice* we tentatively concluded that if we were to convert to exclusive licensing of shared paging channels, a geographic licensing approach would be

¹⁰⁴ According to our records, there are currently approximately 315 Rural Radiotelephone licensees. The Commission receives approximately 40 applications each year from Rural Radiotelephone licensees; most of the applications are for additional channels. BETRS licensees use two to twenty channel pairs, depending on the community served.

appropriate.¹⁰⁵ We asked for comment on whether we should (1) convert lower band shared 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*.¹⁰⁶

38. Comments. Most of the commenters addressing this issue are opposed to geographic area licensing for the shared channels and request that the Commission maintain the present licensing process.¹⁰⁷ Commenters contend that the Commission lacks authority to impose competitive bidding for these channels because mutual exclusivity, *i.e.*, the grant of one application that would preclude the grant of another, cannot occur.¹⁰⁸ OPASTCO opposes geographic area licensing for shared channels and contends that geographic area licensing for these channels would have a crippling effect on taxi cabs and ambulances and the communities they serve if they are "frozen" and cannot expand beyond the existing interference contour.¹⁰⁹ Teletouch contends that the policy considerations set forth in the *Notice* -- such as enhancing symmetry between paging and narrowband PCS -- do not apply to the shared PCP channels because one-way paging is fundamentally different from narrowband PCS.¹¹⁰ Teletouch explains that narrowband PCS users can use the service for two-way response paging as well as sending e-mail, data, and documents, whereas shared-use paging licensees generally provide only a simple, low cost paging service.¹¹¹ In addition, Teletouch, along with Page Hawaii, observe that auctioning the shared channels to combat speculation and consumer fraud is

¹⁰⁵ *Notice*, 11 FCC Rcd at 3115, ¶ 31.

¹⁰⁶ *Id.* at 3115, ¶ 32.

¹⁰⁷ *See, e.g.*, A+ Network Comments at 15; Page Hawaii Comments at 1-2; Pass Word Comments at 9; PCIA Comments at 14; ProNet Comments at 3 (ProNet also contends that geographic area licensing is not appropriate for Special Emergency Radio Services (SERS)); OPASTCO Comments at 5; SBT Comments at 8-10; Teletouch Comments at 2; Total Tele-Page Comments at 1-2; Teletouch December 6, 1996 *ex parte* Comments at 3; Advanced Electronics December 31, 1996 *ex parte* Comments at 2.

¹⁰⁸ *See, e.g.*, PCIA Comments at 14; Page Hawaii Comments at 5; Teletouch December 6, 1996 *ex parte* Comments at 4. Motorola contends that the private, internal use paging systems operating on the shared channels are not mutually exclusive systems and cannot be licensed through competitive bidding rules, and therefore these licensees should not be included in the paging application freeze. Motorola August 13, 1996 *ex parte* Comments.

¹⁰⁹ OPASTCO Comments at 5.

¹¹⁰ Teletouch Comments at 5-6. Teletouch observes that the incumbent carriers are not protected by specific interference contours and therefore the market area licensee could exert its power to make the shared channel unusable by the incumbent licensees. Teletouch December 6, 1996 *ex parte* Comments at 6-7.

¹¹¹ Teletouch Comments at 6.

unwarranted because the harm from consumer fraud pales in comparison with the harm to the industry and its customers that will result from geographic area licensing.¹¹²

39. Several commenters suggest that certain shared channels with extensive regional coverage should be subject to exclusivity and geographic area licensing.¹¹³ A+ Network states that if auctions are adopted for the exclusive channels, there will be a "stampede" to the shared channels, and urges the Commission to protect the commercial incumbents with some form of exclusivity.¹¹⁴ PNI suggests that the Commission impose a cap on the number of licensees which may operate on a shared channel in a geographic area.¹¹⁵ ProNet, on the other hand, opposes such a licensing cap, and argues that the shared channels should continue to be licensed under current procedures.¹¹⁶

40. Discussion. While it is theoretically possible to convert shared channels to exclusive channels and to license them using competitive bidding, we conclude that the cost and disruption that would be entailed by such a transition outweighs any benefits that would be achieved. Only a relatively small amount of paging spectrum -- approximately 10 percent -- is licensed on a shared basis. The comments indicate that these channels are heavily used by incumbent systems, many of whom have entered into time-sharing or interconnection arrangements to avoid interference with one another. Most of these systems provide service on a local, rather than a regional or nationwide basis. In addition, many of the systems on these channels are licensed to businesses, hospitals, and other entities for private, internal use rather than for provision of service to commercial subscribers. For example, SERS, a limited eligibility service restricted to emergency service providers,¹¹⁷ may be

¹¹² Page Hawaii Reply Comments at 8; Teletouch Reply Comments at 7 (suggesting that less drastic steps, such as public service announcements and warnings on applications regarding construction requirements and prohibitions against trafficking, should be taken).

¹¹³ See, e.g., AirTouch Comments at 13 (advocating that 152.480 MHz should be converted to exclusive use); A+ Network Comments at 11-15; PCIA Comments at 15 (suggesting that the Commission adopt rules allowing earned exclusivity for 152.480 MHz, 157.740 MHz, and seven of the channels on the 460 MHz band); SBT Comments at 10-11; PNI Comments at 6; TeleBEEPER Comments at 2 (suggesting that PCP channels be converted to exclusive use, and incumbent operators prior to 1993 should be given the first opportunity for exclusive use on these channels).

¹¹⁴ A+ Network Reply Comments at 3-4. See also AirTouch Reply Comments at 19-20.

¹¹⁵ PNI Comments at 9-10. See also Page Hawaii Reply Comments at 5; Teletouch Reply Comments at 5.

¹¹⁶ ProNet Comments at 5.

¹¹⁷ See 47 C.F.R. §§ 90.33 - 90.55. SERS covers the licensing of the radio communications of medical services, rescue organizations, veterinarians, handicapped persons, disaster relief organizations, school buses, beach patrols, establishments in isolated places, communications standby facilities, and emergency repair of public communication facilities. 47 C.F.R. § 90.33. Other entities may be licensed in the SERS to provide service to SERS eligibles on the frequencies listed in Section 90.53.

offered on shared channels in bands listed in Section 90.53¹¹⁸ and also may be offered on the PCP channels. The SERS operators provide essential life-saving services in localized areas, and sharing of the SERS channels and PCP channels is working effectively.

41. We believe that it is unlikely that creating geographic overlay licenses on these channels would significantly improve efficiency of spectrum use. Because of the heavy existing use of the channels on a shared basis, granting "exclusive" rights to a geographic licensee would have little practical value: the geographic licensee would either have to share the channel with incumbents throughout most of its licensed area, or it would have to buy out all existing incumbents in order to use the channel on an exclusive basis. The conversion process would also be highly disruptive to existing incumbents, many of whom operate small, private systems and have no need for or interest in obtaining geographic area licenses. As several commenters point out, these 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.¹¹⁹ Thus, the primary impact on incumbents would be to preclude them from adding to or modifying their systems even though such additions or modifications would have been allowed in a shared-use environment.¹²⁰

42. We also decline to adopt a "cap" on licensing of shared channels, or to convert some but not all shared channels to exclusive licensing. The difficulty with a licensing cap, as noted by several commenters, is that it is the amount of time a paging channel is used and the transmission equipment and protocol used, not the number of licensees, that determine the capacity limits of a paging channel. Thus, closing off licensing of a channel after a particular number of licenses have been granted would not necessarily ensure efficient spectrum use. We are also concerned that picking certain shared channels to be designated as exclusive would only cause greater pressure on the remaining shared channels and could limit opportunities for entry by smaller systems.

¹¹⁸ These SERS channels were not listed in the *Notice* as part of our proposals for geographic area licensing.

¹¹⁹ We also note that each licensee would have to provide the Commission with the exact station parameters in order to determine the interference contours, which could be an expensive and time consuming process. *See* Advanced Electronics December 31, 1996 *ex parte* Comments at 3.

¹²⁰ We note that in the *Refarming FNPRM*, which addresses rechannelization of private land mobile spectrum, we have proposed to replace shared use of channels with market-based incentives such as exclusivity with the right of resale, spectrum fees, and competitive bidding. Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them, PR Docket No. 92-235, *Report and Order and Further Notice of Proposed Rulemaking*, 10 FCC Rcd 10076 (1995) (*Refarming FNPRM*). For several reasons, however, we do not believe our decision in this proceeding to retain shared licensing on the shared Part 90 paging channels is inconsistent with the proposals in the *Refarming FNPRM*. The *Refarming FNPRM* is directed towards rechannelization of spectrum used primarily for private two-way services. In paging we are not rechannelizing any of the bands used for paging service. Additionally, the *Refarming FNPRM* is geared toward consolidating 20 private radio services containing over 500,000 licensees and over 12 million mobile units, whereas there are only 18 shared paging channels addressed in this proceeding.

43. While we conclude that the existing shared paging channels should continue to be licensed on a shared basis, we are concerned about the consumer fraud and license application speculation issues raised in the comments filed by the FTC. Therefore, in order to ensure that these channels are not susceptible to speculative applications, we seek comment in our *Further Notice* on changes in our license application and frequency coordination procedures. Pending resolution of the issues raised in the *Further Notice*, we will retain our interim licensing rules for these channels, which limit applications to incumbent licensees seeking to expand their current systems. We will, however, eliminate the 40-mile requirement for new sites; thus incumbents may file for new sites at any location. Additionally, we will allow new applicants to file applications for private, internal-use systems.¹²¹ We do not believe that granting private licensees' applications for sites will encourage speculative applications, because these systems cannot be operated on a commercial basis. SERS providers will also remain exempt from the licensing freeze and may continue to file applications on shared channels under the existing rules.¹²²

5. Exempting certain incumbents from competitive bidding

44. Comments. Commenters contend that the Commission should adopt a procedure whereby channels already extensively used by an existing carrier be exempted from the auction procedure. For example, several commenters suggest that the Commission should award geographic area licenses without competitive bidding to any incumbent providing coverage to 70 percent or more of the population in the license area.¹²³ Other commenters suggest that the Commission award geographic area licenses without competitive bidding if the incumbent covers two-thirds of the population of the geographic area.¹²⁴ SBT contends that if a designated entity provides service to one-third or greater of the population, or one-half or greater of the geographic area, it should be awarded a dispositive preference for the wide-area license.¹²⁵ Priority states that auctions are unnecessary where incumbents already provide substantial service in their markets and that

¹²¹ We will not grant applications proposing to modify such authorizations to convert them to commercial use.

¹²² The *First Report and Order* exempted SERS from the interim paging freeze. *First Report and Order* at ¶ 36.

¹²³ See, e.g., AirTouch Comments at 40 (suggesting that the Commission allow licensees to certify that 70 percent of the population within an MTA is encompassed within applicable service area contours); Ameritech Comments at 13 (suggesting exemption from competitive bidding if 70 percent of the population within the licensee's interference contours); Arch Comments at 20-21; A+ Communications Comments at 8; MobileMedia Comments at 21; PCIA Comments at 28; Paging Partners Comments at 3; Source One Comments at 3.

¹²⁴ See, e.g., Ameritel Comments at 8 (suggesting that incumbent licensees should be exempt from competitive bidding if two-thirds of the population is within their interference contours); Metrocall Comments at 8-9; Pacific Comments at 5; PageNet Comments at 40.

¹²⁵ SBT Comments at 16 (suggesting that if more than one designated entity qualified, only those designated entities should be eligible to participate in the auction).

geographic area licenses should be issued to incumbents providing substantial service.¹²⁶ Pass Word contends that auctions should not be held where, in the geographic area involved, the relevant channel is serving at least 50 percent of that area or the population therein.¹²⁷

45. Discussion. We are not persuaded by the commenters that channels already extensively used by an incumbent should be exempt from the competitive bidding procedures or that eligibility should be restricted to incumbent licensees. We believe that all otherwise qualified paging applicants should be eligible to bid for any geographic area license. We note 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. Nevertheless, we believe that the market, not regulation, should determine participation in competitive bidding for geographic area licenses. We believe that open eligibility for paging licenses will result in a more competitive auction and potentially will result in further wide-area coverage of paging services.

B. Geographic Area Licensing for Nationwide Channels

46. Background. Three 931 MHz channels, 931.8875, 931.9125, and 931.9375, ("CCP nationwide channels") were allocated for nationwide network paging, and have been assigned to licensees on a nationwide basis.¹²⁸ The three CCP nationwide channels have been exclusively allocated for nationwide network paging for over ten years. We have recently allowed 929 MHz licensees to earn nationwide exclusivity under Section 90.495 by constructing networks of at least 300 transmitters that meet certain criteria for coverage of major markets and regional areas.¹²⁹ In the *Notice*, we proposed to grant nationwide geographic area licenses, without competitive bidding, for the three CCP nationwide channels and the PCP channels for which licensees had met the construction requirements for nationwide exclusivity as of February 8, 1996.¹³⁰ We also asked for comment on MTel's request to have its 931.4375 MHz channel designated a nationwide channel.¹³¹

47. Comments. Some commenters contend that our proposal would be anti-competitive because nationwide licensees offer local and regional service on the nationwide channels as well as

¹²⁶ Priority Comments at 4. *See also* Ace Comments at 3 (contending that incumbents should automatically receive the geographic area license where they provide service).

¹²⁷ Pass Word Comments at 8. *See also* ProNet Reply Comments at 7-8.

¹²⁸ *See* 47 C.F.R. §§ 22.531(b), 22.551.

¹²⁹ 47 C.F.R. § 90.495.

¹³⁰ *Notice*, 11 FCC Rcd at 3114, ¶ 26.

¹³¹ *Id.* at 3114, ¶ 27.

nationwide service and directly compete with licensees that will be subject to competitive bidding.¹³² PCIA, PageNet, Arch, and MTel, on the other hand, contend that channels already authorized on a nationwide basis should be awarded nationwide geographic area licenses and excluded from competitive bidding.¹³³ Several commenters argue that licensees who had obtained sufficient authorizations to be eligible for conditional nationwide exclusivity prior to the *Notice* should also receive nationwide geographic area licenses and be exempt from competitive bidding.¹³⁴ TSR argues the Commission's only justification for including the conditional nationwide channels in geographic area licensing is to increase revenues from auctions, which is in violation of Section 309(j)(7)(A) of the Communications Act.¹³⁵ SBT contends that if the Commission exempts nationwide channels from competitive bidding it would be consistent to exempt all local paging systems that serve a substantial portion of an MTA from competitive bidding for that MTA.¹³⁶

48. MTel contends that 931.4375 MHz is operated by SkyTel, in concert with 931.9375 MHz, to provide nationwide paging service.¹³⁷ MTel argues that 931.4375 MHz should be redesignated on a nationwide basis to promote the Commission's goal of creating regulatory parity among CCP and PCP providers, and notes that no other party is licensed on 931.4375 MHz.¹³⁸ MTel argues that if the Commission does not designate this as a nationwide channel, SkyTel would be at a disadvantage compared to its PCP competitors.¹³⁹

49. MobileMedia contends that it also operates *de facto* nationwide channels, 931.8125 and 931.8625 MHz, that have more transmitters than MTel's channel and that its channels therefore should also be awarded nationwide geographic licenses and be exempt from geographic licensing.¹⁴⁰

¹³² See, e.g., Ameritech Comments at 13; Ameritel Comments at 9-10; Radiofone Comments at 6.

¹³³ PCIA Comments at 11; Arch Comments at 4; PageNet Comments at 8; MTel Comments at 5.

¹³⁴ AirTouch Comments at 16 and TSR Comments at 2 (PCP licensees who have not yet completed construction of the authorized systems as of February 8, 1996 should receive nationwide geographic area licenses). See also PCIA Comments at 12-13 (929 MHz channels with time remaining to construct their systems under Section 90.495 should be permitted to construct pursuant to their authorizations, and retain nationwide exclusivity), United Paging Resources Comments at 3.

¹³⁵ TSR Comments at 20-21.

¹³⁶ SBT Comments at 6-7.

¹³⁷ MTel Comments at 9.

¹³⁸ MTel Comments at 9-10.

¹³⁹ MTel Comments at 11.

¹⁴⁰ MobileMedia Comments at 21-22.

PageNet opposes the treatment of MTel's second channel as a nationwide channel and states that unless the Commission is willing to consider other substantially constructed 931 MHz local channels as eligible for nationwide geographic area licenses, it should not grant 931.4375 MHz a nationwide geographic area license.¹⁴¹ TeleBEEPER contends that 931.4375 MHz should not be designated a nationwide channel, and states that MTel has only constructed on this channel in urban areas.¹⁴²

50. Discussion. At the time the *Notice* was adopted, licensees on three 931 MHz channels and on eighteen 929 MHz channels had constructed sufficient stations to obtain nationwide exclusivity under our prior rules.¹⁴³ As we proposed in the *Notice*, we will award nationwide licenses for these channels and exclude them from competitive bidding adopted for non-nationwide channels. In our view, it would not serve the public interest or be fair to take away exclusivity rights that these licensees earned before the commencement of this proceeding. The record indicates that they have developed successful and efficient nationwide networks under the pre-existing rules -- in fact, in most cases they have substantially exceeded the construction thresholds required to earn nationwide exclusivity under those rules. Thus, we do not believe imposition of competitive bidding is needed to further the goal of developing competitive nationwide paging networks on these channels.

51. We also grant nationwide geographic area licenses, without competitive bidding, to those 929 MHz paging licensees with sufficient authorizations as of February 8, 1996 to qualify for nationwide exclusivity on a conditional basis. Our records indicate that four licensees -- Tri-State Radio Co., Inc. (929.2125 MHz), AirTouch (929.4875 MHz), PageMart II, Inc. (929.7625), and Communications Innovations Corp. (929.8125 MHz) -- had conditionally qualified for nationwide exclusivity under our rules, although they had not completed construction at the time the *Notice* was adopted. All of these licensees have since met this condition by constructing the required number of transmitters to earn permanent nationwide exclusivity. We agree with the commenters that licensees who had obtained sufficient authorizations to be eligible for conditional nationwide exclusivity prior to the *Notice*, and have since constructed nationwide systems, should also receive nationwide geographic area licenses and be exempt from competitive bidding. These licensees have sufficient operating sites to now qualify for nationwide exclusivity, and we see no reason to treat them differently than the licensees who had built out as of February 8, 1996.

52. We are also granting the request of Nationwide 929.8875 LLC ("Nationwide") for nationwide exclusivity on the frequency 929.8875 MHz. Nationwide is jointly owned and controlled by AirTouch and Arch who are in the process of securing Commission consent to assign their respective exclusive regional system licenses to Nationwide. AirTouch and Arch have regional

¹⁴¹ PageNet Comments at 52-53.

¹⁴² TeleBEEPER Comments at 1

¹⁴³ The Part 22 nationwide channels are: 931.8875, 931.9125, and 931.9375 MHz. See 47 C.F.R. §§ 22.531(b), 22.551.

exclusivity under Section 90.495(a)(2) on 929.8875 MHz for four regional systems. AirTouch and Arch are parties to an agreement to operate their 929.8875 MHz facilities on an integrated basis to provide nationwide service. On November 22, 1995, prior to the adoption of the *Notice*, AirTouch and Arch requested nationwide exclusivity on 929.8875 MHz for their combined systems. AirTouch and Arch certify that they had more than 300 transmitters in over 40 states as of February 8, 1996 for the combined systems to meet the nationwide exclusivity criteria under Section 90.495(a)(3).¹⁴⁴ We find that the public interest is served by granting a nationwide geographic area license to Nationwide.

53. We decline to extend nationwide exclusivity rights to MTel's 931.4375 MHz channel. Although MTel has been extensively licensed on this channel for some time, we did not recognize it as having nationwide exclusive rights at the time this proceeding commenced. Thus, granting MTel exclusivity would confer benefits that it did not expect or earn under the old rules, and that it would not be otherwise eligible for under our geographic licensing rules. For the same reasons, we decline to confer nationwide exclusivity on MobileMedia's 931 MHz channels. We recognize that many paging carriers, including MTel and MobileMedia, have built out extensively on channels that are not specifically designated as nationwide channels. We decline to award presumptive nationwide exclusivity on this basis, however, because these licensees had no expectation that nationwide exclusivity would result from their build-out.

54. With respect to licensees who are granted nationwide geographic area licenses by virtue of this order, we will issue single nationwide licenses for each channel. In addition, while we conclude that nationwide licenses should not be subject to competitive bidding, we believe that the long-term rules governing development of nationwide paging systems warrant further notice and comment. Our existing Part 90 and Part 22 requirements for construction of nationwide systems are not consistent, and both sets of requirements differ from the construction and coverage requirements applicable to nationwide narrowband PCS licensees. Therefore, we seek comment in our *Further Notice* below on possible changes to our rules governing nationwide paging channels.¹⁴⁵

C. Protection for Incumbents

55. Background. In the *Notice*, we tentatively concluded that the public interest would be served by allowing all incumbent paging licensees to either continue operating under existing authorizations, or trade in their site-specific licenses for a single system-wide license, demarcated by the aggregate of the service contours around each of the incumbents' contiguous sites operating on

¹⁴⁴ AirTouch Paging and Arch Communications, Inc., Amendment to Request for Nationwide Exclusivity, file d November 19, 1996.

¹⁴⁵ See Section V, *infra*.

the same channel.¹⁴⁶ We also tentatively concluded that the incumbent licensees would be able to continue to operate, and the geographic licensee would be required to provide protection to all co-channel systems operating within their service areas.¹⁴⁷ The incumbent licensees would not, however, be allowed to expand beyond their existing interfering contours without the consent of the geographic licensee.¹⁴⁸

56. Comments. Several commenters agree that incumbent licensees should not be permitted to expand beyond their interference contours without the consent of the geographic licensee.¹⁴⁹ Other commenters contend that if wide-area licensing is adopted it would be contrary to the public interest to lock in non-geographic licensee incumbents within their present interference contour, and that paging carriers must be able to add to or modify their systems in response to the customers' needs.¹⁵⁰ CCMS contends that the geographic licensee could interfere with the incumbent's signal, and drive the incumbent's customers away.¹⁵¹ CCMS offers two proposals: (1) incumbents should be allowed to move into unserved areas after having given the geographic licensee fair opportunity to provide service; and (2) the Commission should declare all contiguous unserved areas to be immediately and continually available to the incumbent.¹⁵² Western Radio Services suggests that incumbents should be permitted to add stations so long as 50 percent or more of the proposed coverage of the new facility overlapped the coverage provided by the existing station.¹⁵³ Ameritech proposes that incumbent (non-geographic) licensees be allowed to expand their systems after the auction under the following criteria: (1) each additional site is located within 40 miles of one of the incumbent's

¹⁴⁶ Notice, 11 FCC Rcd at 3116, ¶ 37.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ See, e.g., Pacific Comments at 4; PCIA Comments at 19-20; AirTouch Comments at 16-17; Priority Comments at 3; PageNet Comments at 9-11.

¹⁵⁰ See, e.g., PagePrompt Comments at 2; Western Radio Comments at 3; CCMS Comments at 9; Metrocall Comments at 11; Rule Comments at 17.

¹⁵¹ CCMS Comments at 6.

¹⁵² CCMS Comments at 10. See also ProNet Comments at 11 (contending that incumbents should be able to expand when necessitated by unanticipated events and should be able to complete build-out in areas where the geographic licensee would be unable to provide coverage); Caraway Comments at 3 (contending that an existing licensee must be permitted to expand the interference contour as a matter of right to the extent it can demonstrate that no other licensee can provide service to 130 square kilometers (50 square miles) of area which is already served by the other licensee or which is unserved; to the extent that an auction winner does not provide coverage throughout a market, adjacent incumbent licensees should have the right to provide such expanded service).

¹⁵³ Western Radio Services Comments at 3-4.

previously authorized transmitter sites; or (2) the area to be served by the additional site is surrounded by the incumbent's authorized co-channel transmitters within 70 miles, forming a pocket around the proposed site.¹⁵⁴

57. Discussion. In the *CMRS Third Report and Order* we discussed co-channel interference protection for incumbents and stated that incumbent 900 MHz SMR systems are entitled to full co-channel interference protection for existing facilities, but are not allowed to expand beyond existing service areas unless they obtain the MTA license for the relevant channels.¹⁵⁵ In the *900 MHz Second Report and Order* we explained that our objective is to allow 900 MHz SMR 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 on the MTA licensee's operations.¹⁵⁶ We believe that in paging services the public interest would be served by allowing incumbent (non-geographic) paging licensees to continue to operate under their existing authorizations with full protection from co-channel interference, and similarly protecting the geographic area licensees from co-channel interference from the incumbent licensees. Therefore, consistent with our rules for 900 MHz SMR, we will not allow incumbent (non-geographic) licensees to expand beyond their composite interference contour unless the incumbents and the geographic licensee have reached agreement on such modifications.

58. We believe that the public interest would be served by allowing all incumbent paging licensees to either continue operating under existing authorizations or trade in their site-specific licenses for a single system-wide license demarcated by the aggregate of the interference contours around each of the incumbents' contiguous sites operating on the same channel. The incumbent (non-geographic) licensees may add or modify sites without filing site specific applications;¹⁵⁷ however, they cannot expand their existing interfering contours without the consent of the geographic licensee.

¹⁵⁴ Ameritech Comments at 17-18. *See also* Ameritel Comments at 20-21; ProNet Reply Comments at 19.

¹⁵⁵ *CMRS Third Report and Order*, 9 FCC Rcd at 8052, ¶ 118. *See also* 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, PR Docket No. 89-553, *Second Report and Order and Second Further Notice of Proposed Rulemaking*, 10 FCC Rcd 6884, 6900 ¶ 45 (1995) (*900 MHz Second Report and Order*).

¹⁵⁶ *900 MHz Second Report and Order*, 10 FCC Rcd at 6901, ¶ 47.

¹⁵⁷ In general, licensees may add or modify sites without filing site specific applications consistent with this *Order* and Commission rules and policies; however, licensees must file applications with the Commission if such filing is necessary for coordination with Mexico or Canada, or is required by Sections 22.369, 90.177, or 1.1301 *et seq.*

D. Coverage Requirements

59. Background. In the *Notice*, we requested comment on whether geographic paging licensees should be subject to minimum coverage requirements as a condition of licensing.¹⁵⁸ We observed that we have imposed coverage requirements on licensees in other services to ensure that spectrum is used effectively and service is implemented promptly. We tentatively concluded that the geographic area licensees should be required to provide coverage to one-third of the population within their licensing areas within three years of the license grant, and to two-thirds of the population within five years, or that in the alternative, they provide substantial service to the geographic license area within five years of the license grant.¹⁵⁹

60. Comments. Several commenters agree with the coverage requirements proposed in the *Notice*.¹⁶⁰ Most commenters, however, contend that more stringent coverage requirements are needed to deter speculation while promoting prompt service to the public. For example, some commenters suggest that we should require licensees to construct facilities covering ten percent of the population of the geographic area within one year of the license grant.¹⁶¹ TeleBEEPER proposes that geographic licensees be required to cover 75 percent of the geographic area covered by the license in the first five years.¹⁶² Rule suggests that licensees be required to place at least one transmitter in operation within six months, that at least 25 percent of the unserved population should receive service within the first year, and that 50 percent of the population should receive service within the second year.¹⁶³ AT&T Wireless proposes that geographic licensees cover one-third of the population within one year of licensing, rather than three years.¹⁶⁴ Several commenters oppose allowing a geographic licensee to meet its construction requirement by showing it provided

¹⁵⁸ *Notice*, 11 FCC Rcd at 3118, ¶ 40.

¹⁵⁹ *Id.* at 3118, ¶ 41.

¹⁶⁰ *See, e.g.*, Pacific Comments at 5; ProNet Comments at 6-7; MTel Comments at 7.

¹⁶¹ *See, e.g.*, PageNet Comments at 32; AirTouch Comments at 18; Arch Comments at 7-8; API Comments at 3-4; PCIA Comments at 22.

¹⁶² TeleBEEPER Comments at 1.

¹⁶³ Rule Comments at 21. *See also* Metrocall Comments at 14 (suggesting that the geographic licensee must have one transmitter operating in the license area within one year); A+ Communications Comments at 5 (suggesting that the geographic licensee initiate service within one year).

¹⁶⁴ AT&T Wireless Comments at 8.

substantial service to the area, contending that this standard is too vague and would allow geographic area licensees to block expansion of competitors' systems.¹⁶⁵

61. Commenters propose that if a geographic licensee fails to meet the coverage requirements, the cancellation of the geographic license should be automatic, without public notice or correspondence from the Commission.¹⁶⁶ Additionally, ProNet suggests that the Commission reinstate all operational sites held prior to auction and those constructed pursuant to the geographic area license.¹⁶⁷ PageNet proposes that if an incumbent licensee acquires a geographic license and fails to meet its coverage requirements, it should be allowed to retain constructed sites licensed prior to the auction on a site-specific basis. PageNet further suggests that additional facilities constructed under the geographic license would be converted to secondary status pending relicensing of the geographic area.¹⁶⁸

62. Discussion. Section 309(j)(3) of the Communications Act states in part that, when designing competitive bidding systems, "the Commission shall include safeguards to protect the public interest in the use of the spectrum"¹⁶⁹ In addition, Section 309(j)(4)(B) states that the Commission shall include performance requirements, such as appropriate deadlines and penalties for performance failures, to ensure prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services.¹⁷⁰

63. We agree with the commenters that coverage requirements are needed as performance requirements to deter speculation while promoting prompt service to the public. Coverage requirements are also necessary to prevent warehousing, promote rapid deployment of new technologies and services, and promote service to rural areas. We believe that the coverage requirements proposed in the *Notice* will be sufficient performance requirements: for each MTA or EA, the geographic area licensee must 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.

¹⁶⁵ See, e.g., AT&T Wireless Comments at 8; AirTouch Comments at 18-19; Ameritech Comments at 19; Arch Comments at 8; PCIA Comments at 22; PageNet Comments at 33; ProNet Reply Comments at 11-12; Puerto Rico Telephone Comments at 7 (contending that the proposed build-out requirements would allow the auction winner to skew the service offering to more populated areas).

¹⁶⁶ See, e.g., A+ Communications Comments at 5; AirTouch Comments at 21-22; PCIA Comments at 22-23.

¹⁶⁷ ProNet Comments at 9.

¹⁶⁸ PageNet Comments at 33.

¹⁶⁹ 47 U.S.C. § 309(j)(3).

¹⁷⁰ 47 U.S.C. § 309(j)(4)(B).

In the alternative, the MTA or EA licensee may provide substantial service to the geographic license area within five years of license grant. Substantial service is defined as service that is sound, favorable, and substantially above a level of mediocre service, which would barely warrant renewal.¹⁷¹

64. The failure to meet these coverage requirements will result in automatic termination of the geographic area license. This is consistent with our rules for broadband PCS,¹⁷² 900 MHz SMR services,¹⁷³ and Multipoint Distribution Services (MDS).¹⁷⁴ We will reinstate any licenses that were authorized, constructed, and operating at the time of termination of the geographic area license.

65. We also note that paging licensees remain subject to performance standards elsewhere in our rules. In the *CMRS Third Report and Order*, we adopted a uniform ten-year license term and renewal expectancy for all CMRS providers, including paging providers.¹⁷⁵ Under this provision, 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 rules and policies, and the Communications Act.¹⁷⁶ This renewal expectancy standard provides additional incentive for licensees to provide service, thereby promoting investment in and rapid deployment of new technologies and services in compliance with Section 309(j)(4)(B) of the Communications Act.

E. Co-Channel Interference Protection

1. Co-Channel Interference Protection -- Incumbent Licensees

66. Background. Under our current rules, 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/or the field strength of the licensee's

¹⁷¹ See *CMRS Third Report and Order*, 9 FCC Rcd at 8157 n.712.

¹⁷² See Amendment of the Commission's Rules to Establish New Personal Communications Service, GEN Docket No. 90-314, *Second Report and Order*, 8 FCC Rcd 7700, 7754, ¶ 134 (1993).

¹⁷³ See *900 MHz Second Report and Order*, 10 FCC Rcd at 6899, ¶ 43.

¹⁷⁴ See Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service, MM Docket No. 94-131, *Report and Order*, 10 FCC Rcd 9589, 9613, ¶ 43 (1995) (*MDS Report and Order*).

¹⁷⁵ See *CMRS Third Report and Order*, 9 FCC Rcd at 8157, ¶ 386.

¹⁷⁶ *Id.*

service and interfering signals.¹⁷⁷ The purpose of the co-channel interference rules is to protect the service of each licensee's facilities from interference caused by the operation of co-channel facilities of other licensees.¹⁷⁸ We believe that it is necessary to have a uniform methodology to determine the service and interference contours of incumbent licensees to allow them to make minor modifications without exceeding the interference contour and causing interference to the geographic licensee. We also need a uniform methodology to determine the service and interference contours of the geographic area licensee to allow the geographic licensee to construct a paging system without causing interference to an incumbent licensee.

67. For the CCP channels below 931 MHz, we currently use formulas to determine the distance from each transmitting antenna site to its service and interference contours along the eight cardinal radials from the transmitter site. We proposed in the *Notice* that we would continue to use these formulas for interference protection purposes if we adopted geographic area licensing for these bands.¹⁷⁹ For the 931 MHz channels, the rules contain two tables of fixed radii, Tables E-1 and E-2, rather than formulas, to establish the distance to the service and interference contours.¹⁸⁰ For the 929 MHz exclusive channels, assignments are made using geographic separation rules that agree with the separations which result from the application of the fixed radii for 931 MHz.¹⁸¹ In the *Notice*, we proposed to adopt formulas to determine the service and interference contours for the exclusive 929 MHz and the 931 MHz channels similar to the formulas used in the lower bands.¹⁸²

68. Comments. Commenters addressing this issue strenuously object to the proposal to change the method by which service and interference contours are determined for the exclusive 929 MHz and 931 MHz facilities, and state that the proposed method of computing these contours could require incumbents to reduce coverage or be required to accept interference from geographic licensees.¹⁸³ Ameritech notes that adoption of the formulas, and subsequent degradation of existing service, could threaten public safety because many of Ameritech's customers are medical, police, and

¹⁷⁷ *Notice*, 11 FCC Rcd at 3119, ¶ 46.

¹⁷⁸ *See CMRS Third Report and Order*, 9 FCC Rcd at 8060, ¶ 139.

¹⁷⁹ *Id.* at 3119, ¶ 48.

¹⁸⁰ *See* 47 C.F.R. § 22.537.

¹⁸¹ *See* 47 C.F.R. § 90.495(b)(2).

¹⁸² *Notice*, 11 FCC Rcd at 3119-20, ¶¶ 49-50.

¹⁸³ *See, e.g.*, AT&T Wireless Comments at 10; Ameritech Comments at 3; Comp Comm Comments at 1 (contending that the required signal strengths in the proposed formula are flawed); Liberty Comments at 4; PCIA Comments at 25; ProNet Comments at 15; Priority Comments at 7; PageAmerica Comments at 1; PageMart Comments at 2; PageNet Comments at 11; Radiofone Comments at 7-8; Word Comments at 12-15.

fire personnel.¹⁸⁴ PCIA, and other commenters, suggest that the Commission use the Tables E-1 and E-2 in Section 22.537 for both 929 MHz and 931 MHz because these standards generally provide appropriate levels of interference protection.¹⁸⁵ Several commenters suggest that we should consider all exclusive 929 MHz and 931 MHz as having a circular service contour radius of 20 miles and a circular interference contour radius of 50 miles.¹⁸⁶

69. Discussion. We proposed using the specified formulas in the *Notice* for the 929 MHz and 931 MHz channels because we believed that these formulas would produce service and interference contours that would better reflect actual coverage. The formulas would be a function of the technical parameters actually used rather than of the maximum technical parameters that could be used for a given set of radii. Additionally, using these formulas would provide licensees with flexibility to establish transmitter sites nearer the periphery of their systems by adjusting the effective antenna height and transmitting power, instead of having to obtain written consent from co-channel licensees. After review of the record, however, we are persuaded that the advantages of adopting the proposed formulas are outweighed by the disadvantages noted by the commenters. As the commenters observed, changing from Tables E-1 and E-2 to the proposed 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. Additionally, the proposed formulas may underestimate the actual reliable coverage of the paging systems. Using the fixed distances in Tables E-1 and E-2 in Section 22.537 for the 929 MHz and 931 MHz channels would maintain the *status quo* for 931 MHz channels and conform 929 MHz channels to the current procedure for 931 MHz. Therefore, we are adopting the fixed distances in Tables E-1 and E-2 in Section 22.537 for the exclusive 929 MHz and 931 MHz channels. Geographic area licensees must provide co-channel protection to all incumbent licensees, including incumbents on the nationwide channels and incumbents in other geographic areas. We will allow geographic and incumbent licensees to use short-spaced locations pursuant to mutual written consent.¹⁸⁷ As we proposed in the *Notice*, we will continue to use the current formulas for the CCP channels below 931 MHz.

2. Co-Channel Interference Protection -- Adjacent Geographic Licensees

¹⁸⁴ Ameritech Comments at 4.

¹⁸⁵ See, e.g., AirTouch Comments at 26; Arch Comments at 13-14; Metrocall Comments at 10; PCIA Comments at 25; ProNet Comments at 15; Pacific Comments at 4; Source One Comments at 3-4.

¹⁸⁶ See, e.g., MTel Comments at 9; PageNet Comments at 3; API Reply Comments at 1-2.

¹⁸⁷ Current rules provide that short-spaced locations (*i.e.*, locations where the interfering contour of one licensee overlaps the service contour of another licensee) may be used if the service contour licensee agrees to accept any interference that may result in the overlap area. Because contours for the 929 and 931 MHz channels will be based on fixed radii, any short-spacing of transmitters on those channels would require the acceptance of interference by both parties. See 47 C.F.R. §§ 22.537, 22.567.

70. Background. In the *Notice* we discussed the interference obligations of geographic licensees with respect to neighboring geographic licensees, and proposed that interference protection should be provided by (1) reducing the signal level at the service area boundary or (2) negotiating a mutually acceptable agreement with the neighboring geographic licensees.¹⁸⁸

71. Comments. Pacific contends that licensees should have the option of providing interference protection either by reducing the signal strength or negotiating some other agreement with those affected.¹⁸⁹ Ameritech and Ameritel contend that the Commission should require the geographic licensee to give advance notice to co-channel incumbents before activating transmitters that are located less than 70 miles from existing facilities, and should comply with a request by the incumbent for interference testing prior to operation.¹⁹⁰ PCIA supports the proposal that geographic licensees should provide interference protection either by reducing the signal level at the service area boundary by positioning directional antennas, or some other mutually acceptable agreement.¹⁹¹

72. PageNet contends that paging licensees should have the flexibility to reach the best solution for the carrier's business goals and for service to the public, and that licensees should be given wide latitude in permissible sharing and other arrangements geared toward eliminating harmful interference in the border areas.¹⁹² PageNet suggests that in the absence of an agreement with the adjacent co-channel licensees, the geographic licensee should employ technical solutions, such as directional antennas, to reduce the signal level at the service area boundary.¹⁹³ PageNet contends that the Commission should only entertain complaints regarding border area transmitters in this situation if the complaining geographic licensee is able to demonstrate actual harmful interference to its operations.¹⁹⁴

73. Discussion. We note that the co-channel interference protection discussed above requires incumbents and geographic licensees to provide interference protection to each other, but does not apply to interference between geographic licensees. Geographic licensees generally are not required to file applications with the Commission, therefore it is possible that a geographic licensee with a

¹⁸⁸ *Notice*, 11 FCC Rcd at 3121, ¶ 62.

¹⁸⁹ Pacific Comments at 6.

¹⁹⁰ Ameritech Comments at 17; Ameritel Comments at 19-20.

¹⁹¹ PCIA Comments at 26. In "Supplemental Reply Comments" filed on May 31, 1996, PCIA recommends that in the absence of negotiated provisions, the Commission limit the signal strength at MTA borders to no more than 33 dBµV/m.

¹⁹² PageNet Comments at 35.

¹⁹³ PageNet Comments at 36.

¹⁹⁴ PageNet Comments at 36.

transmitter at or close to the border of the MTA or EA could unknowingly cause interference to a neighboring geographic licensee. It is in the interest of the geographic licensees to find mutually beneficial ways to accommodate their needs in providing service within their respective MTAs and EAs. Instead of specifying a minimum distance a geographic licensee's transmission site must be from the geographic border, which may result in unserved areas, we are allowing geographic licensees to negotiate mutually acceptable agreements with all adjacent geographic area licensees if the interfering contour of one geographic area licensee will extend into the adjacent geographic area or areas. Adjacent geographic area licensees have a duty to negotiate with each other in good faith regarding co-channel interference protection. We believe that informal negotiations between parties in determining mutually agreeable arrangements between adjacent MTAs and EAs will achieve the most expeditious and effective resolution of co-channel interference. The lack of adequate service to the public due to failure to negotiate reasonable solutions to co-channel interference problems with adjacent geographic area licensees could reflect negatively on licensees seeking renewal.

3. Maximum Power and Height-Power Limit

74. Background. Under our existing rules, the maximum effective radiated power (ERP) limit for 931 MHz, nationwide 929 MHz, and narrowband PCS facilities is 3500 Watts ERP.¹⁹⁵ In the *Part 22 Rewrite Order*, we concluded that a maximum power limit of 3500 Watts ERP is appropriate for paging facilities in the 931 MHz band, because it allows for the use of high power facilities where needed, yet provides sufficient protection from intermodulation interference and receiver desensitization.¹⁹⁶ For example, high power facilities might be needed in areas where shadowing or building penetration is a problem, for high speed data transmission, or where the use of several smaller facilities would not be economical. In the *PCP Exclusivity Order*, we established the ERP limit of 1000 Watts for local and regional 929 MHz systems, and 3500 Watts for nationwide systems.¹⁹⁷ In the *PCP Exclusivity Reconsideration* we allowed non-nationwide 929 MHz PCP systems to operate sites within their existing service area at up to 3500 Watts ERP, provided that

¹⁹⁵ See 47 C.F.R. §§ 22.535(a), 24.132(c), and 90.494(g).

¹⁹⁶ See *Part 22 Rewrite Order*, 9 FCC Rcd at 6513, ¶¶ 72-82. Intermodulation interference can occur where a number of base stations (transmitters and receivers) operate in close proximity to each other, *i.e.*, on the same or immediately adjacent roof tops, mountain peaks, etc. Under such conditions, strong signals from adjacent transmitters may interact with each other in the receiver of a neighboring base station to produce interfering signals on other frequencies, including that of the mobile station being received. See Frequency Allocations, Docket No. 13847, *Further Notice of Proposed Rule Making*, 10 FCC 2d 885, 886-87, ¶ 4 (1967). Receiver desensitization occurs where a strong signal causes a receiver to not detect other low level signals. See, *e.g.*, Amendment of Part 87 of the Commission's Rules, PR Docket No. 93-199, *Notice of Proposed Rule Making*, 8 FCC Rcd 4763, 4763 n.4 (1993).

¹⁹⁷ See 47 C.F.R. § 90.494(f), (g).

such operation would not increase the minimum geographical separation applicable to co-channel systems under Section 90.495(b)(2).¹⁹⁸

75. In the *Notice*, we tentatively concluded that the maximum ERP limit for non-nationwide 929 MHz PCP systems should be raised to a maximum of 3500 Watts in order to bring the rules governing non-nationwide 929 MHz facilities into conformity with those for 931 MHz, nationwide 929 MHz, and narrowband PCS facilities.¹⁹⁹ We observed that this would provide 929 MHz licensees with the benefits of higher power operation without unduly increasing the risk of interference.²⁰⁰ We proposed to retain the current maximum ERP limits for the various CCP lower band paging channels.²⁰¹ These limits were increased in 1989 after careful consideration, and we believe that the limits adopted in that proceeding remain appropriate.²⁰²

76. Height-power limits serve to limit the service and interfering range of a facility to a constant distance. If a facility is modified to raise the antenna height, the power must be lowered so that the service and interfering ranges remain essentially unchanged. Height-power limits are useful when co-channel assignments are made on a site-by-site basis using a single fixed minimum geographical separation distance requirement, because they allow licensees flexibility to employ various combinations of antenna height and transmitting power while maintaining the validity of the fixed separation method.²⁰³ Height-power limits are also useful for limiting the area that can be covered by a single facility. In the 931 MHz band, we eliminated the height-power limit, because most systems in that band are multi-transmitter wide-area systems covering large areas. We concluded that it is more cost-effective for licensees to cover a large area with a high power facility than with numerous smaller facilities.²⁰⁴ In the *Notice*, we proposed to eliminate the height-power limit for 929 MHz licensees, because many of the paging systems in the 929 MHz band are also multi-

¹⁹⁸ *PCP Exclusivity Reconsideration*, 11 FCC Rcd at 3094, ¶ 21.

¹⁹⁹ *Notice*, 11 FCC Rcd at 3121, ¶ 57.

²⁰⁰ *Id.*

²⁰¹ *See* 47 C.F.R §§ 22.535, 22.565.

²⁰² *See* Height and Power Increases in the Public Mobile Service, CC Docket No. 88-135, *Report and Order*, 4 FCC Rcd 5303 (1989), *modified*, *Order on Reconsideration*, 5 FCC Rcd 4604 (1990).

²⁰³ Both 929 MHz and 931 MHz paging facilities originally were licensed on a single minimum geographical separation distance of 70 miles between transmitters.

²⁰⁴ *See Part 22 Rewrite Order*, 9 FCC Rcd at 6528, ¶ 74.

transmitter wide-area systems. We proposed to maintain the current height-power limits for the lower band CCP channels because most of these channels are occupied by smaller systems.²⁰⁵

77. Comments. Pacific agrees with our proposal to eliminate the height-power limit for 929 MHz systems, and argues that we should also eliminate the height-power requirement for the lower band channels.²⁰⁶ Rule contends that the existing height/power requirements for 150 and 450 MHz should be changed, and observes that the Part 90 licensees do not have such requirements.²⁰⁷ AirTouch agrees that the Commission should retain the current maximum ERP limit for the lower bands, and should conform the 929 MHz height-power and power rules to those for the 931 MHz band.²⁰⁸ PCIA, PageMart, and Caraway support the Commission's proposal to increase the maximum power for 929 MHz non-nationwide facilities to 3500 watts, and to eliminate the height-power limit for 929 MHz.²⁰⁹ PageNet and TeleBEEPER contend that the non-nationwide 929 MHz carriers should be able to operate their facilities at up to 3500 watts effective radiated power.²¹⁰

78. Discussion. One of our goals in this proceeding is to promote technical parity within the paging industry, when feasible. Paging systems operating on the 929 MHz band are virtually identical to those operating on the 931 MHz band and should be subject to the same power and height-power rules. We also note that conforming these rules will allow paging operators to design their systems in the most economical manner, particularly when integrating two systems where one operates in the 931 MHz band and the other operates in the 929 MHz band. Most of the commenters addressing this issue contend that the Commission should eliminate the disparity between the rules governing the 931 and those governing the 929 MHz channels, and conform the ERP limit and the height-power limit in these two bands. We agree with these commenters that carriers operating on 929 MHz and 931 MHz should operate with the same power and height-power rules. Therefore, we are eliminating the height-power limit for 929 MHz systems, to conform them to the 931 MHz systems. We are also increasing the maximum permitted ERP for all 929 MHz systems to 3500 Watts, to conform these systems with the nationwide 929 MHz systems and the 931 MHz systems.

79. With respect to the CCP bands below 931 MHz, we proposed to retain the current maximum ERP limits for these channels. In CC Docket No. 88-135, we completed a comprehensive

²⁰⁵ See, e.g., 47 C.F.R. § 22.535(c).

²⁰⁶ Pacific Comments at 2.

²⁰⁷ Rule Comments at 22.

²⁰⁸ AirTouch Comments at 27.

²⁰⁹ PCIA Comments at 25-26; PageMart Comments at 7-8; Caraway Comments at 2.

²¹⁰ PageNet Comments at 34; TeleBEEPER Comments at 3.

evaluation of our power and height-power rules governing these channels.²¹¹ In that proceeding, we developed an extensive record and considered many technical factors, including co-channel and adjacent channel interference potential, interference to TV reception, accuracy limitations of propagation prediction tools, blanketing interference and service area gains. As a result of our evaluation in that proceeding, we increased the power limits for certain frequency bands, declined to increase them for other frequency bands, adopted certain geographic separations to protect adjacent channel Public Safety and other private radio operations, and provided for averaged height-power limits instead of radial-by-radial limits. These power limits and other rules were incorporated without substantial change into the power limit and technical channel assignment criteria rules we adopted subsequently in the *Part 22 Rewrite Order*. There have been no substantial technological changes to the systems operating on these channels since the existing power limits were adopted. Accordingly, we believe that the carefully considered power and height-power limits adopted in the aforementioned proceedings remain appropriate. Discarding the results of our previous analysis and increasing the maximum ERP limits again for the sake of sameness, without a more detailed record analyzing the possible consequences, could pose an unacceptable increased risk of interference to other CMRS, public safety and private radio systems and television reception. Therefore, we are maintaining the current power and height-power limits for the CCP bands below 931 MHz.

F. Licensing in Mexican and Canadian Border Areas

80. Background. In the Mexican and Canadian border areas, paging channel availability may be restricted by international agreement, and there may be limitations on ERP and antenna height.²¹² In other services where we have converted to geographic area licensing, we have decided not to distinguish between border areas and non-border areas for licensing purposes.²¹³ In the *Notice*, we proposed that geographic licensees be entitled to use any available border-area channels, subject to the relevant rules regarding international assignment and coordination of such channels.²¹⁴

81. Comments. Commenters agree that border areas should be treated like any other geographic area for licensing purposes.²¹⁵ Ameritech observes that the lower CCP bands still require

²¹¹ See Height and Power Increases in the Public Mobile Service, 4 FCC Rcd 5303 (1989), *modified* 5 FCC Rcd 4604 (1990).

²¹² See 47 C.F.R. §§ 1.955, 22.169, 90.175(e). We have a December 19, 1995 Letter of Understanding with Mexico related to the temporary use of 929-932 MHz channels for paging services within 120 kilometers (75 miles) of the common border.

²¹³ See, e.g., *900 MHz Second Report and Order*, 10 FCC Rcd at 6908, ¶¶ 62-63.

²¹⁴ *Notice*, 11 FCC Rcd at 3122, ¶ 64.

²¹⁵ See, e.g., Pacific Comments at 6; AirTouch Comments at 28; PageNet Comments at 36-37.

site-by-site coordination with Canada.²¹⁶ PageNet contends that the Commission should continue the practice of allowing the placement of transmitters by the U.S. geographic licensee on the U.S. side of the border if the U.S. licensee has consent from the foreign licensee and the appropriate foreign regulatory authority.²¹⁷ PageNet states that this cooperation is vital to the development of international roaming service offerings and will serve the public interest.²¹⁸

82. Discussion. Commenters agree with our proposal that border areas should be treated like any other area for licensing purposes and carriers can determine whether spectrum is usable in border areas under applicable treaties and protocols. Therefore, we will not distinguish between border and non-border areas in geographic licensing. We note that the geographic licensees will be responsible for advising the Commission of any transmitter site changes or additions if site-by-site coordination is required by Canada or Mexico.

G. Eligibility to Participate in Competitive Bidding

83. Background. In the *Notice* we tentatively concluded that both incumbents and new entrants could apply for geographic area licenses, without restrictions on eligibility, and that the marketplace should determine the level of demand for licenses.²¹⁹

84. Comments. PageNet and AirTouch contend that eligibility should not be restricted.²²⁰ AT&T Wireless suggests that short form applications should be filed only by entities that already provide coverage to 70 percent of the geographic area.²²¹ Ameritel contends that the Commission should restrict eligibility to existing carriers or entities with applications pending as of February 8, 1996, the date of the *Notice*.²²² Priority suggests that eligibility to bid on 931 MHz spectrum should

²¹⁶ Ameritech Comments at 19-20.

²¹⁷ PageNet Comments at 37.

²¹⁸ PageNet Comments at 37.

²¹⁹ *Notice*, 11 FCC Rcd at 3122, ¶ 66. We note that open eligibility requirements were also adopted in the 800 MHz SMR service. See Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, *First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rulemaking*, 11 FCC Rcd 1463, 1531, ¶ 126 (1995) (*800 MHz First Report and Order*).

²²⁰ PageNet Comments at 36; ProNet Comments at 10; AirTouch Comments at 29-30 (contends that licensees who meet very high current construction thresholds should not be subjected to competing applications on their fully developed channels).

²²¹ AT&T Wireless Comments at 7 n.5.

²²² Ameritel Comments at 10.

be limited to incumbents already providing service on the particular channel to ensure that the high bidder is a serious applicant intending to provide paging service to the public.²²³

85. Discussion. We believe that it is important to allow all parties to participate in the competitive bidding process for geographic area licenses, and accordingly, apart from foreign ownership limitations, we will not restrict eligibility.²²⁴ We believe that non-incumbents should be allowed to bid for available spectrum, or to enter into joint ventures with incumbents for purposes of bidding in a geographic area. The competitive bidding process itself should deter speculation by those not genuinely interested in providing service to the public. In addition, we believe that the open eligibility for the geographic area licenses will be pro-competitive and potentially will result in a diverse group of entities providing paging services to the public.

H. Channel Aggregation Limit

86. Background. In the *Notice*, we requested comment on whether a channel aggregation limit would be appropriate for the paging channels, and if so, what the limit should be.²²⁵ We noted that significant aggregation of paging channels has not occurred.²²⁶

87. Comments. The commenters addressing this issue generally argue that we should not impose a channel aggregation limit or spectrum cap for paging channels.²²⁷ Ameritech notes that incumbents should not be limited in the number of paging channels they hold because they have already developed existing paging operations and may have to bid at auction to defend the integrity of such systems.²²⁸ PageNet observes that broadband carriers have a spectrum cap of 45 MHz, and a paging channel is 25 kHz, which is 1/40 of 1 MHz.²²⁹ AirTouch contends that no carrier is remotely close to having the channel position or market power to dominate the paging industry, therefore

²²³ Priority Comments at 6.

²²⁴ Foreign ownership in common carrier paging licensees is subject to certain restrictions in Section 310 of the Communications Act. 47 U.S.C. § 310.

²²⁵ *Notice*, 11 FCC Rcd at 3123, ¶ 69.

²²⁶ *Id.*

²²⁷ *See, e.g.*, Ameritech Comments at 15; Arch Comments at 15; API Comments at 5; AirTouch Comments at 30; Ameritel Comments at 17; Metrocall Comments at 18; MobileMedia Comments at 23; PageNet Comments at 39; ProNet Comments at 10-11; PCIA Comments at 27.

²²⁸ Ameritech Comments at 15.

²²⁹ PageNet Comments at 38.

channel aggregation limits would not be in the public interest.²³⁰ Additionally, notes AirTouch, cellular and PCS licensees are allowed to and do provide paging services, and it would be unfair to arbitrarily limit paging carriers when they are competing against broadband licensees.²³¹ TeleBEEPER supports aggregation limits insofar as an applicant would not be permitted to have a 929 MHz and a 931 MHz license in the same geographic area.²³²

88. Discussion. In the *CMRS Third Report and Order*, we imposed a spectrum aggregation cap of 45 MHz as the total amount of combined PCS, cellular, and SMR spectrum classified as CMRS in which an entity may have an attributable interest in any geographic area at any point in time.²³³ We declined to include narrowband radio services in the spectrum cap, noting that it is highly unlikely that one entity could ever accumulate as much as 5 MHz in any given geographic market.²³⁴ For similar reasons, we conclude that a channel aggregation limit is unnecessary for paging. The record indicates that the paging market is highly competitive and diversified, making it unlikely that any one licensee could accumulate sufficient spectrum to dominate the paging market, much less the CMRS market as a whole. There are between 500 and 600 paging carriers in the United States today.²³⁵ Fifteen large companies account for approximately sixty percent of the paging customers.²³⁶ In most markets, paging service is provided by several competing carriers, and large metropolitan areas typically have twelve or more carriers.²³⁷ There has been some merger activity among large paging carriers in recent years, but these mergers have been geographic market extension mergers for the most part, and no showing has been made that these mergers have increased horizontal concentration to levels that are significant for purposes of competitive analysis. Therefore, we do not find any evidence that excessive channel aggregation has occurred in the paging industry; to the contrary, paging channel use is highly dispersed among numerous competing licensees. Additionally,

²³⁰ AirTouch Comments at 30.

²³¹ AirTouch Comments at 30.

²³² TeleBEEPER Comments at 2.

²³³ *CMRS Third Report and Order*, 9 FCC Rcd at 8109, ¶ 263. See also Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, WT Docket No. 96-59, *Report and Order*, 11 FCC Rcd 7824, 7869, ¶¶ 94-95 (1996) (*D, E, and F Block Report and Order*) (the 45 MHz CMRS spectrum cap is necessary to promote competition and prevent anti-competitive horizontal concentration in the CMRS business).

²³⁴ *CMRS Third Report and Order*, 9 FCC Rcd at 8111, ¶ 267.

²³⁵ Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993, *First Report*, 10 FCC Rcd 8844, 8854, ¶ 30 (1995) (*Annual Report*).

²³⁶ *Annual Report*, 10 FCC Rcd at 8854, ¶ 30.

²³⁷ *Id.*

we anticipate that many applicants for geographic area paging licenses will be incumbents seeking to obtain geographic area licenses where their existing facilities reside. Thus, we do not believe that geographic area licensing is likely to increase market concentration in the paging industry. Finally, we believe that a cap could arbitrarily limit a carrier's capacity to provide services that may require multiple channels. Therefore, we are not imposing a spectrum or channel aggregation cap on paging licenses at this time.

I. Competitive Bidding Issues

1. Competitive Bidding Design

a. Bidding methodology

89. Background. In the *Notice* we sought comment on which auction methodology should be used to award paging licenses. We noted that we had conducted simultaneous multiple round auctions for broadband and narrowband PCS, 900 MHz SMR, and Multipoint Distribution Service (MDS), observing that this is the preferred auction design where licenses have strong value interdependencies.²³⁸ We also noted, however, that a large number of paging licenses might be auctioned. Given this large number, we sought comment on whether simultaneous multiple round bidding might be too burdensome administratively, and whether another bidding design would be more appropriate for auctioning paging licenses.²³⁹

90. Comments. A number of commenters support the use of a simultaneous multiple round auction design for paging licenses.²⁴⁰ ProNet, for example, asserts that this design will give bidders maximum information about license values and result in bids that reflect licenses' true value.²⁴¹

91. A number of commenters suggest other approaches to competitive bidding for paging licenses. For instance, A+ Communications proposes that each available market or frequency be auctioned separately.²⁴² Other commenters propose that auctions be held only after competing applications are filed. Thus, when two or more parties seek a particular license, an auction would be

²³⁸ *Notice*, 11 FCC Rcd at 3124, ¶ 76.

²³⁹ *Id.* at ¶ 77.

²⁴⁰ API Comments at 5; Pacific Comments at 6; PageNet Comments at 41; ProNet Comments at 17-18; AirTouch Comments at 31-32 and *ex parte* at 2; Arch Comments at 16. *See also* AT&T Wireless Comments at 10 (suggesting series of service-specific simultaneous multiple round auctions); Ameritech Comments at 14 (supporting multiple round auctions).

²⁴¹ ProNet Comments at 17-18.

²⁴² A+ Communications Comments at 9.

held, limited to these interested parties.²⁴³ An open outcry auction or a sealed bid auction would, these commenters contend, be most appropriate to then resolve mutual exclusivity among applicants.²⁴⁴ Ameritel disagrees with the use of sealed bidding, contending that it would force small businesses to overbid or risk losing the license to speculators.²⁴⁵ Instead, Ameritel supports a sequential multiple round auction on a frequency-by-frequency basis.

92. Discussion. Based on the record in this proceeding and our successful experience conducting simultaneous multiple round auctions for other CMRS services and MDS, we believe this type of auction is most appropriate for paging licenses. We believe that, for certain bidders, these licenses will be significantly interdependent because of the desirability of aggregation across spectrum blocks and geographic areas and because some licenses are likely to be substitutes. Given such interdependence, simultaneous multiple round bidding generates more information about license values during the course of the auction and provides bidders with more flexibility to pursue back-up strategies than if the licenses were auctioned separately or through sealed bidding. We likewise expect the value of these licenses to be sufficiently high to warrant simultaneous multiple round bidding. Our experience in running simultaneous multiple round auctions shows that they can be run very efficiently and the aggregate value of the large number of licenses is likely to justify the use of this system. We will retain the discretion, however, to use a different methodology if that proves to be more efficient administratively. Prior to the auction, we will provide information about the bidding design to be used.

b. License grouping

93. Background. In the *Notice*, we sought comment on how paging licenses should be grouped for competitive bidding purposes.²⁴⁶ We sought comment on the benefits of various possible license groupings, including, but not limited to the grouping of all paging licenses together for a single simultaneous multiple round auction and the grouping of licenses on a channel-by-channel basis by geographic license area.²⁴⁷

²⁴³ Metrocall Comments at 20; Supercom Comments at 6 n.8. *See also* Wilkinson Comments at 6 n.8; Baldwin Comments at 6-7 n.8; ATS Comments at 6 n.8; Chequamegon Comments at 6 n.8; Benkelman Comments at 6-7 n.8; CSS Comments at 6 n.8; Baker Comments at 6 n.8, and 10; Hiort Comments at 6 n.8; HEI Comments at 6 n.8; Metamor e Comments at 6-7 n.8; Mashell Comments at 4 n.5; Pigeon Comments at 6 n.7; Porter Comments at 6-7 n.8; Mobilfon e Comments at 6-7 n.8; PAI Comments at 6 n.8; Rinker Comments at 6-7 n.8.

²⁴⁴ *See, e.g.*, Pigeon Comments at 6 n.7 (sealed bid); Metrocall Comments at 20 (oral outcry).

²⁴⁵ Ameritel Comments at 17 and Reply Comments at 11.

²⁴⁶ *Notice*, 11 FCC Rcd at 3125, ¶¶ 78-79.

²⁴⁷ *Id.* at ¶ 79.

94. Comments. Most commenters support grouping licenses by frequency bands. For example, API, AirTouch, Arch, and PageNet propose that the licenses in the 929 and 931 MHz bands be auctioned together, followed by auctions, if appropriate, of the lower band paging frequencies.²⁴⁸

The best method for striking the balance between making substitutable channels available simultaneously while avoiding auctioning too many licenses at the same time, these commenters contend, is achieved by grouping the 929 and 931 MHz licenses together in a single auction. They also state that auctioning the 900 MHz licenses together would ensure that technically similar services would be auctioned at the same time and those licenses most in demand would be auctioned first.²⁴⁹

95. ProNet proposes a single simultaneous multiple round auction for all paging licenses with no license grouping. Under this framework, ProNet contends, participants will have access to the maximum amount of information available concerning the paging market. In the event this approach proves unwieldy, ProNet prefers auctioning by band.²⁵⁰ API states that should auctioning of the 900 MHz licenses as a group prove administratively burdensome, licenses should be grouped, to the maximum extent feasible, based upon frequency or channel blocks.²⁵¹ Metrocall expresses the concern that license grouping would favor bidders for one service over bidders for other services.²⁵²

96. A+ Communications proposes a separate auction for each frequency by license areas.²⁵³ Rule argues against auctioning the smaller markets last, noting that such a license grouping may encourage speculators, unsuccessful in prior auctions, to bid prices up in order to have something to promote investor sales.²⁵⁴

97. Discussion. Although it may be desirable to hold a single simultaneous multiple round auction for all paging licenses, such an auction is not currently feasible from an operational standpoint because there will be more than 15,000 paging licenses available for auction. We agree with API, AirTouch, Arch, and PageNet that there is significant interdependence among licenses in the 929 and 931 MHz services, and similar interdependency among the licenses of the lower band paging services. We also think that grouping interdependent licenses and putting them up for bid at the same time

²⁴⁸ API Comments at 5; AirTouch Comments at 32-34 and *ex parte* Comments of August 15, 1996 at 2; Arch Comments at 16-17; PageNet Comments at 41; PageNet Reply Comments at 13-14.1.

²⁴⁹ AirTouch Comments at 32-34; Arch Comments at 16-17.

²⁵⁰ ProNet Comments at 17-18.

²⁵¹ API Comments at 5.

²⁵² Metrocall Comments at 21.

²⁵³ A+ Communications Comments at 9.

²⁵⁴ Rule Comments at 25.

promotes awarding licenses to bidders who value them most highly by providing bidders with information about the prices of complementary and substitutable licenses during the course of an auction and by facilitating back up strategies. We therefore will award the paging licenses in a series of simultaneous multiple round auctions, grouping them based on interdependency and operational feasibility. We reserve the discretion to decide on specific license groupings as administrative circumstances dictate.

c. Bidding procedures

i. Bid increments and tie bids

98. Background. In a multiple round auction the bid increment is the amount or percentage by which the bid must be raised above the previous round's high bid in order to be accepted as a valid bid in the current bidding round.²⁵⁵ The application of a minimum bid increment speeds the progress of the auction and, along with activity and stopping rules, helps to ensure that the auction comes to closure within a reasonable period of time.²⁵⁶ In the *Notice*, we sought comment on appropriate minimum bid increments for paging auctions.²⁵⁷ We proposed to adopt a minimum bid increment of five percent of the high bid for the previous round, or \$0.01 per activity unit, whichever was greater.²⁵⁸ In addition, we proposed to retain the discretion to vary the minimum bid increments for individual licenses or groups of licenses at any time before or during the course of the auction, based on the number of bidders, bidding activity, and the aggregate high bid amounts.²⁵⁹

99. Comments. Commenters generally support the use of a minimum bid increment for paging licenses. AirTouch agrees that a minimum bid increment of five percent of the high bid in the previous round or \$0.01 per activity unit, whichever is greater, is the appropriate formula for paging license auctions, and also believes that the Commission should have the discretion to vary the

²⁵⁵ See, e.g., *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2369, ¶ 124.

²⁵⁶ *Id.*

²⁵⁷ *Notice*, 11 FCC Rcd at 3125, ¶ 81.

²⁵⁸ For an explanation of activity units, see *infra* note 287.

²⁵⁹ *Notice*, 11 FCC Rcd at 3125, ¶ 82.

minimum bid increment.²⁶⁰ PageNet proposes an increment of 10 percent of the high bid, with no minimum bid for the first round.²⁶¹ Rule asserts there should be no minimum bid amount.²⁶²

100. Discussion. The Commission will announce, by Public Notice prior to the auction, general guidelines for minimum bid increments. Minimum bid increments for individual paging licenses or groups of licenses may vary over the course of the auction and will be announced before or during the auction. In the case of a tie bid, the high bidder will be determined by the order in which the bids are received by the Commission.²⁶³

ii. Stopping rules

101. Background. In the *Notice*, we indicated that if a simultaneous multiple round auction design is used for the paging licenses, we believed a market-by-market stopping rule would be most appropriate.²⁶⁴ We noted that a market-by-market stopping rule would be the least complex approach from an administrative perspective. We also sought comment on whether a stopping rule is needed should the Commission elect not to use a simultaneous multiple round auction design. We further proposed to retain the discretion to declare when the auction would end.²⁶⁵

102. Comments. The majority of commenters agree that a market-by-market, frequency-by-frequency or license-by-license stopping rule is most appropriate for the paging services because such a rule would avoid prolonging the auction, and thus facilitate more expeditious service to the public.²⁶⁶ Second, they argue that such a rule would bring an earlier end to the auction by reducing the complexity of the auction and permitting the earlier close of uncontested markets.²⁶⁷ Commenters also assert that a market-by-market stopping rule will reduce the likelihood that

²⁶⁰ AirTouch Comments at 34.

²⁶¹ PageNet Comments at 44-45.

²⁶² Rule Comments at 25.

²⁶³ *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2369, ¶ 125.

²⁶⁴ *Notice*, 11 FCC Rcd at 3125-26, ¶ 83.

²⁶⁵ *Id.*

²⁶⁶ API Comments at 5; PageNet Comments at 43; Arch Comments at 17-18; AirTouch Comments at 34-35; AirTouch *Ex parte* Comments of August 15, 1996 at 3, 9; MobileMedia Comments at 27. *See also* A+ Communications Comments at 9-10.

²⁶⁷ AirTouch *Ex parte* Comments of August 15, 1996 at 9.

speculators will bid on all markets indiscriminately²⁶⁸ and will permit bidders interested in applying for only a limited number of licenses to more easily manage their participation in the auction.²⁶⁹ Several commenters suggest that bidding on a market or a license close after a specified number of rounds pass without any acceptable bids. The suggested number of rounds ranged from two to ten.²⁷⁰ They contend that such a rule would provide bidders with a last clear opportunity to bid for a license and a safety valve to avoid inadvertent failure to bid.²⁷¹ AirTouch also noted that a license-by-license stopping rule might be implemented only in Stages II or III of the auction to preserve more of the simultaneous quality of the auction. They also argued that back up strategies are likely to be far less important in this auction than for PCS because pagers are tuned to specific channels and because highly encumbered licenses may have little value except to incumbents.²⁷² ProNet, on the other hand, strongly prefers use of a simultaneous stopping rule.²⁷³ MobileMedia, however, states that the use of a simultaneous stopping rule encourages "bid parking" (*i.e.*, placing bids solely for the purpose of maintaining bidding eligibility) and leads to prolonged auctions.²⁷⁴

103. Discussion. With more than ten times the largest number of licenses the Commission has ever auctioned simultaneously, there is an increased risk of an excessively prolonged auction if a significant proportion of the licenses are auctioned simultaneously using a simultaneous stopping rule. To reduce this risk and to promote expeditious service to the public, while at the same time preserving most of the efficiency benefits of a simultaneous stopping rule, we adopt a hybrid simultaneous/license-by-license stopping rule. The hybrid rule has three phases. During Phase I, which lasts one month, or 100 rounds, whichever comes later, we will employ our standard simultaneous stopping rule whereby bidding will remain open on all licenses until bidding stops on every license. The auction will close after one round passes in which no new valid bids or proactive

²⁶⁸ A+ Communications Comments at 9-10; Ameritech Reply Comments at 13; Ameritel Reply Comments at 11; Arch Reply Comments at 15; AirTouch Reply Comments at 16-17.

²⁶⁹ Arch Comments at 18.

²⁷⁰ Ameritech Reply Comments at 13; AirTouch Comments at 35-36; Arch Comments at 18-19; PageNet Comments at 43 and Reply Comments at 14. AirTouch, in an *ex parte* presentation on September 13, 1996, suggested a license close after 5-10 rounds without activity.

²⁷¹ Arch Comments at 18-19 and n.45; AirTouch Comments at 35-36.

²⁷² AirTouch *ex parte* presentation, September 13, 1996 (oral remarks by Preston McAfee, consultant to AirTouch).

²⁷³ ProNet Comments at 18.

²⁷⁴ MobileMedia Comments at 27.

activity rule waivers are submitted.²⁷⁵ This provides bidders some protection against the risk that bidding on a license will be closed before they have sufficient information to start bidding on it as a back up strategy. In Phase II, the Wireless Telecommunications Bureau will assess the extent to which bidders are pursuing back up strategies and implement a license-by-license stopping rule if the Bureau determines that the use of back up strategies is minimal. Under the license-by-license stopping rule, bidding on a license will close whenever 10 consecutive rounds pass with no new valid bids for that license. The remaining licenses will close according to the standard simultaneous stopping rule -- when a round passes with no new valid bids on any license. Phase III begins after two months and 100 rounds have passed.²⁷⁶ If the auction has not closed by then, the Commission intends to implement the license-by-license stopping rule that is discretionary in the second phase. 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. We reserve the discretion not to employ this hybrid stopping rule in future paging auctions based on our experience in this auction and depending on the circumstances in future auctions with respect to factors such as the number of licenses and degree that licenses are encumbered.

104. We further retain the discretion, in Phase III, to declare after 200 rounds that the auction will end after some specified number of additional rounds. If we choose to employ this method, bids will be accepted only on licenses where the high bid has increased in the last three rounds.²⁷⁷ This will provide the Commission with a mechanism to end the auction in the unlikely event that a small number of bidders are continuing to bid on a few low value licenses solely to delay the closing of the auction. It also will enable the Commission to end the auction when it determines that the benefits of terminating the auction and issuing licenses exceed the likely benefits of continuing to allow bidding. The disadvantage of declaring an imminent end to an auction, however, is that the procedure may result in a far less efficient allocation of licenses than if the auction closed under either the hybrid or the simultaneous stopping rule.²⁷⁸ Therefore, we will declare the imminent end of the auction only in the case of extremely dilatory bidding.

²⁷⁵ See paragraph 112. In any event, we retain discretion to keep an auction open even if no new acceptable bids and no proactive waivers are submitted in a single round. In the event that we exercise this discretion, the effect will be the same as if a bidder has submitted a proactive waiver.

²⁷⁶ There would be no second phase if it takes more than two months to complete 100 rounds. In that case, we would move directly to the third phase in which there would be a strong presumption to use a license-by-license closing rule.

²⁷⁷ Implementation of Section 309(j) of the Communications Act--Competitive Bidding, *Fifth Report and Order*, PP Docket No. 93-253, 9 FCC Rcd 5532, 5551-5552, ¶ 48 (1994) (*Competitive Bidding Fifth Report and Order*).

²⁷⁸ Implementation of Section 309(j) of the Communications Act--Competitive Bidding, *Fourth Memorandum Opinion and Order*, PP Docket No. 93-253, 9 FCC Rcd 6858, 6862, ¶ 20 (1994) (*Competitive Bidding Fourth Memorandum Opinion and Order*).

iii. Revealing bidders' identities

105. In the *Competitive Bidding Second Memorandum Opinion and Order*, because of the advantages of providing more information to bidders, and the difficulties involved in ensuring that bidder identities remain confidential, the Commission determined that it generally would release the identities of bidders before each auction.²⁷⁹ However, we retained the flexibility to conceal bidder identities if further experience showed that it would be feasible and desirable to do so. Consequently, we reserved the option to withhold bidder identities on an auction-by-auction basis.²⁸⁰

106. In the case of the upcoming paging auctions, we have determined that the advantages of limiting information disclosed to the bidders outweigh the disadvantages of this approach. Given the large number of licenses involved, we believe that shielding certain information from the bidders will help to speed the bidding along since there will be less of an opportunity for strategic gaming practices to occur. We will announce by Public Notice prior to the auction the precise information that will be revealed to bidders during the auction. This information may be limited to the high bids (no identities of bidders) and may also include the total number of bids on each license. We note also that limiting information is likely to speed the pace of the auction by reducing the time the Commission needs to report round results, and reducing the time that bidders need to analyze the data. The loss of efficiency from denying bidders the identities of likely winners of adjacent licenses should be minimal because, in contrast to broadband PCS, for paging there is no roaming and little uncertainty about technologies (*i.e.*, GSM versus CDMA technology).

iv. Activity rule

107. Background. In the *Notice*, we tentatively concluded that it would not be necessary to adopt an activity rule for paging auctions because of our proposal to use a market-by-market stopping rule. We sought comment on this tentative conclusion, and also asked commenters to address what activity rules, if any, would be appropriate if an alternative stopping rule was adopted.²⁸¹

108. Comments. Most commenters agree that there is no need for an activity rule if a market-by-market stopping rule is used.²⁸² API, however, disagrees, proposing that an activity rule still be used in order to guard against opportunistic bidders seeking to prolong the auction.²⁸³ API

²⁷⁹ See *Competitive Bidding Second Memorandum Opinion and Order*, 9 FCC Rcd at 7252, ¶ 42.

²⁸⁰ *Id.*

²⁸¹ *Notice*, 11 FCC Rcd at 3126, ¶ 84.

²⁸² See, e.g., AirTouch Comments at 37; Arch Comments at 18 n.42; PageNet Comments at 43.

²⁸³ API Comments at 5-6.

proposes the use of the Milgrom-Wilson activity rule with percentages of 60 percent for Stage I, 80 percent for Stage II, and 95 percent for Stage III.²⁸⁴ Having supported use of a simultaneous stopping rule, ProNet urges adoption of the Milgrom-Wilson activity rule to prevent a protracted auction.²⁸⁵ A+ Communications proposes that the Commission severely limit the number of waivers an applicant may utilize in each auction.²⁸⁶

109. Discussion. We will employ the Milgrom-Wilson activity rules for the paging auctions. These rules discourage delay by bidders and expedite simultaneous multiple round auctions in which a simultaneous stopping rule is used. Under the Milgrom-Wilson rules, the auction is divided into three stages and the minimum required activity level, measured as a fraction of the bidder's eligibility in the current round, will increase during the course of the auction. We establish the following minimum required activity levels for each stage of the auction:

- In each round of Stage One, a bidder that wishes to maintain its current eligibility is required to be active on licenses encompassing at least 60 percent of the activity units for which it is currently eligible. Failure to maintain the requisite activity level will result in a reduction in the amount of activity units upon which a bidder will be eligible to bid in the next round of bidding (unless an activity rule waiver, as defined in paragraphs 111-113, is used). During Stage One, if bidding activity is below the required minimum level, eligibility in the next round will be calculated by multiplying the current round activity by five-thirds (5/3). Eligibility for each applicant at the start of the auction is determined by the amount of the upfront payment received and the licenses identified in its auction application.²⁸⁷
- In each round of Stage Two, a bidder that wishes to maintain its current eligibility is required to be active on at least 80 percent of the activity units for which it is eligible in the current round. During Stage Two, if activity is below the required minimum level, eligibility in the next round will be calculated by multiplying the current round activity by five-fourths (5/4).
- In each round of Stage Three, a bidder that wishes to maintain its current eligibility must be active on licenses encompassing at least 98 percent of the activity units for which it is eligible in the current round. In Stage Three, if activity in the current round is below 98 percent of

²⁸⁴ *Id.* at 6.

²⁸⁵ ProNet Comments at 18.

²⁸⁶ A+ Communications Comments at 10 n.17.

²⁸⁷ The number of activity units for a given license in the paging auction is calculated by multiplying the amount of spectrum (in MHz) by the population of the market. A bidder's eligibility is determined by multiplying the activity units by a specified monetary figure. See discussion beginning at paragraph 134.

current eligibility, eligibility in the next round will be calculated by multiplying the current round activity by fifty forty-ninths (50/49). We believe that starting at this level in Stage Three, a higher activity level for this stage than that used in previous auctions, will encourage bidders to bid more of their eligibility in each round and thus make the auction more efficient.

- We reserve the discretion to set and, by announcement before or during the auction, vary the requisite minimum activity levels (and associated eligibility calculations) for each auction stage. Retaining this flexibility will improve the Commission's ability to control the pace of the auction and help ensure that the auction is completed within a reasonable period of time.

110. For paging auctions, we will use the following general transition guidelines. The auction will start in Stage One and typically will move to Stage Two when the auction activity level is below ten percent for three consecutive rounds in Stage One. In general, the auction will move from Stage Two to Stage Three when the auction activity level is below ten percent for three consecutive rounds in Stage Two. In no case can the auction revert to an earlier stage. However, we retain the discretion to determine and announce during the course of an auction when, and if, to move from one auction stage to the next. These determinations will be based on a variety of measures of bidder activity including, but not limited to, the auction activity level defined above, the percentage of licenses (measured in terms of activity units) on which there are new bids, the number of new bids, and the percentage increase in revenue.

111. To avoid the consequences of clerical errors and to compensate for unusual circumstances that might delay a bidder's bid preparation or submission in a particular round, we will provide bidders with five activity rule waivers that may be used in any round during the course of the auction. If a bidder's activity level is below the required activity level, a waiver automatically will be applied. That is, if a bidder fails to submit a bid in a round, and its activity level from any standing high bids (high bids at the end of the bid withdrawal period in the previous round) falls below its required activity level, a waiver automatically will be applied. A waiver will preserve current eligibility in the next round, but cannot be used to correct an error in the amount bid. An activity rule waiver applies to an entire round of bidding and not to a particular service area.

112. Bidders will be afforded an opportunity to override the automatic waiver mechanism when they place a bid, if they wish to reduce their bidding eligibility and do not want to use a waiver to retain their eligibility at its current level.²⁸⁸ If a bidder overrides the automatic waiver mechanism, its eligibility permanently will be reduced (according to the formulas specified above), and it will not be permitted to regain its bidding eligibility from a previous round. An automatic waiver invoked in a round in which there are no valid bids will not keep the auction open. Bidders will have the option

²⁸⁸ *Competitive Bidding Fourth Memorandum Opinion and Order*, 9 FCC Rcd at 6861, ¶ 15.

to proactively enter an activity rule waiver during the bid submission period. If a bidder submits a proactive waiver in a round in which no other bidding activity occurs, the auction will remain open.²⁸⁹

113. We retain the discretion to issue additional waivers during the course of an auction for circumstances beyond a bidder's control. We also retain the flexibility to adjust, by Public Notice prior to an auction, the number of waivers permitted, or to institute a rule that allows one waiver during a specified number of bidding rounds or during specified stages of the auction.²⁹⁰

v. Duration of bidding rounds

114. Background. In the *Notice*, we proposed to retain the discretion to vary the duration of bidding rounds or the interval at which bids are accepted (*e.g.*, run two or more rounds per day rather than one), in order to move the auction toward closure more quickly.²⁹¹

115. Comments. Commenters support our proposal to retain the discretion to vary the duration of bidding rounds and the interval between rounds.²⁹² AirTouch and Arch suggest that we permit bidding on an every-other-day basis during the first week or so of the auction, with the expectation of running one or two rounds a day relatively soon after the auction commences.²⁹³ PageNet suggests that we conduct one round a day for the first few rounds, noting that, if other commenters prefer, it would accept bidding on an every-other-day basis. After two weeks of Monday, Wednesday and Friday bidding, PageNet continues, we should implement one round per day and then assess whether more than one round a day would be more appropriate for the remaining licenses.²⁹⁴ PCIA urges us to ensure that bidders have adequate time between rounds for review of bids, verification of bid accuracy, and decision making about bidding strategy.²⁹⁵

116. Discussion. We retain the discretion to vary the duration of the bidding rounds or the interval at which bids are accepted in order to move the auction to closure more quickly. The

²⁸⁹ A proactive waiver is a waiver submitted by a bidder during the bid submission period and acts as a bid for purposes of keeping the auction open.

²⁹⁰ *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2373, ¶ 145.

²⁹¹ *Notice*, 11 FCC Rcd at 3126-27, ¶ 87.

²⁹² AirTouch Comments at 36 n.86; Arch Comments at 18 n.43.

²⁹³ *Id.*

²⁹⁴ PageNet Comments at 44-45.

²⁹⁵ PCIA Comments at 32-33.

duration of and intervals between bidding rounds will be announced either by Public Notice prior to the auction or by announcement during the auction.

2. Procedural and Payment Issues

a. Pre-auction application procedures

117. Background. In the *Notice*, we proposed to follow the procedural and payment rules established in the *Competitive Bidding Second Report and Order*, with certain minor modifications designed to address the particular characteristics of the paging services.²⁹⁶

118. Comments. PCIA, for the most part, supports imposition of the competitive bidding rules that have been generally applied in the context of a number of other services.²⁹⁷ The FTC suggests, however, that our application and competitive bidding procedures should require that bidding agents and application preparers disclose material information about paging license regulations to their customers -- potential licensees and real parties-in-interest. A fundamental problem in FCC license-related fraud cases, the FTC contends, has been that the consumer licensees do not have adequate information about FCC licenses when they make an investment decision.²⁹⁸

119. Discussion. We will use the pre-auction application procedures established in the *Competitive Bidding Second Report and Order* for the paging services.²⁹⁹ A Public Notice announcing the auction will specify the licenses to be auctioned and the time and place of the auction in the event that mutually exclusive applications are filed. The Public Notice will also specify, *inter alia*, the short-form filing deadline.

120. We will adopt the same general bidding procedures used for the PCS, 900 MHz SMR, and MDS auctions. Under these procedures, bidders will be able to submit bids remotely, either electronically or by telephone. We have established a schedule of fees that participants in the competitive bidding process will be assessed for certain on-line computer services, bidding software, and Bidder Information Packages.³⁰⁰ However, bidders will be permitted to bid electronically only

²⁹⁶ *Notice*, 11 FCC Rcd at 3128, ¶ 95.

²⁹⁷ PCIA Comments at 29.

²⁹⁸ FTC Comments at 14.

²⁹⁹ *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2376, ¶¶ 164-165; 47 C.F.R. § 1.2105(a)(1).

³⁰⁰ *See* Assessment and Collection of Charges for FCC Proprietary Remote Software Packages, On-Line Communications Services Charges, and Bidder's Information Packages in Connection With Auctionable Services, *Report and Order*, WT Docket No. 95-69, 10 FCC Rcd 10769 (1995).

if they have filed a short-form application electronically. Bidders who file their short-form applications manually may bid only telephonically.

121. Like the FTC, we are greatly concerned about reports of consumer fraud in connection with the acquisition of FCC licenses. Indeed, the Commission has taken a number of initiatives to combat fraud. For example, in 1995 the Commission released a Consumer Alert warning consumers about the existence of scams and providing information to enable them to evaluate investment proposals.³⁰¹ In addition, FCC staff operating call centers have been trained to answer consumer investment inquiries and provide information about specific investment proposals to the FTC, SEC, and the National Fraud Information Center.³⁰² We also now include a warning about the seriousness of false certifications in applications and signs of fraudulent business opportunities in public notices announcing auctions.³⁰³ Finally, our auction bidder packages include strong language alerting potential bidders in the auctions to guard against unscrupulous fraudulent conduct in connection with the acquisition of licenses.³⁰⁴ We believe the foregoing safeguards will serve to greatly reduce the likelihood of deceptive conduct in the paging license auction process. We will also take the FTC's suggestions under advisement and will consider implementing stricter safeguards in conjunction with our Further Notice of Proposed Rule Making, which seeks comment on revising our application procedures to help reduce fraud.

b. Short-form applications

122. Background. In the *Competitive Bidding Second Report and Order*, we determined that we should require only a short-form application (FCC Form 175) prior to an auction, and that only winning bidders should be required to submit a long-form license application (FCC Form 600) after

³⁰¹ In October 1996, this Consumer Alert, entitled "Warning to Potential Investors in Telecommunications Services," was updated and posted on the Wireless Telecommunications Bureau's web page on the Internet.

³⁰² Since 1994, the Commission has maintained a liaison with the SEC, FTC, and other state and federal regulatory and enforcement agencies to assist them in bringing appropriate actions against entities attempting to perpetrate telecommunications investment fraud. The Commission also works with groups such as the American Association of Retired Persons and the Consumer Federation of America to provide Commission staff and resources in public outreach activities designed to alert and educate the public to protect them against telecommunications fraud. In addition, the Commission has assisted the FTC in the preparation of a series of consumer alerts designed to advise the general public of various forms of fraud in connection with license acquisition. The "Alert for SMR and Paging Licensees," jointly written and published by the FCC and the FTC, alerted consumers who had obtained SMR and paging licenses of fraudulent proposals by unscrupulous businesses and individuals.

³⁰³ See Public Notice, FCC Issues Procedures, Terms and Conditions for January 13, 1997 Auction of Cellular Unserved Phase I and Phase II Service Areas, DA 96-1850 (released November 8, 1996) at 4.

³⁰⁴ See, e.g., Bidder Information Package, Broadband PCS (DEF Blocks), August 26, 1996, p. 34.

the auction.³⁰⁵ In the *Notice*, we proposed to require applicants for paging licenses to file an initial short-form application in order to qualify for competitive bidding.³⁰⁶

123. Comments. Several commenters suggest that we require bidders to identify all of the licenses for which they intend to bid on the short-form application.³⁰⁷ Otherwise, these commenters assert, bidders will apply for all markets, including markets they are not interested in acquiring.³⁰⁸ In this connection, they argue that permitting "blanket" applications will artificially create mutual exclusivities where none actually exist,³⁰⁹ will delay carriers' good faith efforts to expand,³¹⁰ and will allow speculators to "gridlock" or "game" the system.³¹¹ PageNet also argues that blanket bidding produces "bid jumping," a technique that may have had utility when the spectrum was fungible, but is inappropriate in the highly encumbered paging spectrum.³¹² Certain commenters propose that applicants make separate upfront payments and maintain separate eligibility for each license.³¹³

124. The FTC suggests that applicants should be required to disclose the real party-in-interest on the short-form application, such as the general partners, and whether the company is a limited partnership or limited liability corporation. The FTC likewise suggests that applicants certify before the auction that they will comply with transfer rules and performance requirements for paging licenses.³¹⁴

125. Discussion. Section 309(j)(5) of the Communications Act provides that no person may participate in an auction unless such bidder "submits such information and assurances as the

³⁰⁵ *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2376, ¶ 165.

³⁰⁶ *Notice*, 11 FCC Rcd at 3128, ¶ 98.

³⁰⁷ PCIA Comments at 30; Arch Comments at 22-24; PageNet Comments at 41-42 and Reply Comments at 14; A+ Communications Comments at 9-10; AirTouch *Ex parte* Comments of August 15, 1996 at 2.

³⁰⁸ PCIA Comments at 30; A+ Communications Comments at 9-10 (applicants should not be able to bid for all licenses without matching upfront payment for each license area); Ameritech Reply Comments at 13.

³⁰⁹ PCIA Comments at 30; Arch Comments at 22-24.

³¹⁰ Arch Comments at 23; PageNet Comments at 42.

³¹¹ Ameritech Reply Comments at 13.

³¹² PageNet Comments at 42. Bid jumping refers to the technique of maintaining eligibility in the later stages of an auction by shifting bids from markets of primary interest to inactive markets.

³¹³ Arch Comments at 23-24; PageNet Comments at 43 and Reply Comments at 14; A+ Communications Comments at 9-10.

³¹⁴ FTC Comments at 13.

Commission may require to demonstrate that such bidder's application is acceptable for filing."³¹⁵ Moreover, "[n]o license shall be granted to an applicant selected pursuant to this subsection unless the Commission determines that the applicant is qualified pursuant to [Section 309(a)] and Sections 308(b) and 310" of the Communications Act.³¹⁶ The legislative history also explains that the Commission may require that bidders' applications contain all information and documentation sufficient to demonstrate that the application is not in violation of Commission rules and that applications not meeting those requirements may be dismissed prior to the competitive bidding.³¹⁷ We will, therefore, dismiss applications not meeting the requirements of our rules prior to the auction.³¹⁸

126. We disagree with commenters who state that we should no longer permit bidders to apply for all market areas by checking the "all" markets box on their FCC Form 175. While a party may not intend to bid for every license offered, we believe bidders should have the flexibility to pursue back-up strategies if they are unable to obtain their first choice of licenses. Indeed, without flexibility, we believe the true value of individual licenses may not be reflected in the ultimate bid price. Moreover, any potential problems associated with so-called blanket bidding will be cured through our eligibility rules and the submission of a corresponding upfront payment. We have seen no evidence that "bid jumping" or other "gaming" has had an adverse impact upon previous auctions. Finally, because we have permitted incumbents to expand their systems pending the commencement of the auction, as described in the interim Orders,³¹⁹ we believe current application rules will have no impact on planned expansions by incumbents. We therefore see no reason to change our current application procedures at this time.

127. If we receive only one application that is acceptable for filing for a particular market, and thus there is no mutual exclusivity, we will issue a Public Notice cancelling the auction for that license and establish a date for the filing of a long-form application, the acceptance of which will trigger the procedures permitting petitions to deny, as discussed below.³²⁰

128. Finally, we agree with the FTC's concerns about ensuring that bidders in our auctions are serious about providing service to the public. As discussed above, we have taken steps to educate bidders and the public about fraudulent practices in connection with acquiring FCC licenses, and we

³¹⁵ 47 U.S.C. § 309(j)(5).

³¹⁶ *Id.*

³¹⁷ *See* H. R. Rep. No. 103-111 at 258 (1993).

³¹⁸ *See Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2377, ¶ 167.

³¹⁹ *See First Report and Order*, 11 FCC Rcd at 16583-16585, ¶¶ 25-29; *Recon Order*, 11 FCC Rcd at 7420, ¶ 4.

³²⁰ *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2376, ¶ 165.

will consider taking other anti-fraud measures in the context of our Further Notice of Proposed Rule Making. We therefore decline at this time to add further requirements to our short-form applications.

c. Amendments and modifications

129. Background. In the *Notice*, to encourage maximum bidder participation, we proposed to provide applicants for paging auctions with an opportunity to correct minor defects in their short-form applications prior to the auction.³²¹

130. Comments. The comments received support the approach outlined in the *Notice*.³²² AirTouch notes that the public interest is served by the proposal to give applicants a reasonable chance to correct their short-form applications before the auction. The harsh results experienced by applicants for cellular licenses, AirTouch contends, should not be repeated.³²³

131. Discussion. We will adopt the procedures proposed in the *Notice* for amendments to and modifications of short-form applications in the paging services. Upon reviewing the short-form applications, we will issue a Public Notice listing all defective applications. Applicants with minor defects in their applications will be given an opportunity to cure them and resubmit a corrected version.

d. Upfront payments

132. Background. In the *Notice*, we proposed to require paging license auction participants to tender in advance a substantial upfront payment. Specifically, we proposed to require an upfront payment of \$2,500.00 or \$0.02 per MHz-pop, whichever is greater, for the largest combination of MHz-pops on which a bidder anticipates bidding in any round, as a condition of bidding. We tentatively concluded that, regardless of bidding methodology, a minimum upfront payment of \$2,500.00 should be required.³²⁴

133. Comments. Commenters unanimously agree that a minimum upfront payment amount should be established for participation in paging license auctions. A number of commenters suggest an upfront payment for each license in order to ensure that bidders are sincere, deter speculation and,

³²¹ *Notice*, 11 FCC Rcd at 3129, ¶ 102.

³²² PCIA Comments at 29; AirTouch Comments at 43.

³²³ AirTouch Comments at 43.

³²⁴ *Notice*, 11 FCC Rcd at 3129-30, ¶ 104.

to some extent, ensure that bidders are qualified.³²⁵ With respect to amount, PageNet proposes that applicants for the top ten markets pay \$10,000, and that applicants for markets 11 through 51 pay \$5,000. Because an applicant would have specifically identified each license it intends to bid on, and would have paid a specific upfront payment for each license, PageNet contends, the application of activity units to determine eligibility for bidding is unnecessary.³²⁶ API proposes a \$10,000 upfront payment amount for the top ten markets and \$5,000 for all other markets.³²⁷ AirTouch and Arch contend that the upfront payment amount should be \$10,000 for the top ten markets, \$5,000 for markets 11 to 30, and \$2,500 for all other markets.³²⁸ PCIA notes that the upfront payment level should be set high enough to ensure that all participants are serious about constructing and operating a paging system, but, at the same time, not so high as to prevent smaller paging operators from participating in the auction and bidding for the license areas in which they currently have facilities.³²⁹ AirTouch notes that a separate upfront payment for each license would avoid phantom mutual exclusivity.³³⁰

134. Discussion. We believe the upfront payment should bear a relation to the value of the licenses to be awarded. We likewise agree with commenters that a specific upfront payment amount should be established for each license upon which bids are to be made. We further believe it is important, as commenters point out, to deter speculation and ensure, to the greatest extent practicable, that only sincere bidders participate in the auction.

135. Accordingly, we delegate to the Bureau the authority and discretion to determine an appropriate upfront payment for each license being auctioned, taking into account such factors as the population and the approximate amount of unencumbered spectrum in each geographic license area. We expect that the Bureau will follow the guidelines laid out in the *Competitive Bidding Second Report and Order* and establish upfront payments equal to approximately five percent of the expected amounts of winning bids for the various licenses.³³¹ In no event will the upfront payment for any

³²⁵ API Comments at 6-7; Arch Comments at 22-24 and Reply Comments at 15; AirTouch Comments at 43-45, Reply Comments at 16, and *Ex parte* Comments of May 15, 1996 at 10; PCIA Comments at 30-31 (an upfront payment would help to ensure only legitimate bidders participate in auction); A+ Communications Comments at 9-10.

³²⁶ PageNet Comments at 43.

³²⁷ API Reply Comments at 2.

³²⁸ AirTouch Reply Comments at 16 n.52, and *Ex parte* Comments of May 15, 1996 at 9; Arch Reply Comments at 15 n.48.

³²⁹ PCIA Comments at 30-31.

³³⁰ AirTouch *Ex parte* Comments at 9.

³³¹ *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2378-2379, ¶¶ 171-177.

license be less than \$2,500, the minimum suggested in the *Competitive Bidding Second Report and Order*, and the Bureau will retain the flexibility to modify this minimum if experience demonstrates that a higher amount would better deter speculative filings.

136. Prior to a paging license auction, the Bureau will issue a Public Notice listing the upfront payment amounts corresponding to the licenses to be auctioned. The number of activity units determines the amount of the upfront payment for a license.³³² A prospective bidder must submit an upfront payment equal to the largest combination of activity units on which the bidder anticipates being active in any single round. Although a bidder may file applications for every license being auctioned, the total upfront payment submitted by each applicant will determine the combinations on which the applicant will actually be permitted to be active in any single round of bidding. Upfront payments will be due by a date specified by Public Notice, but generally no later than 14 days before the scheduled auction.

e. Down payments

137. Background. In the *Notice*, we proposed to require the winning bidders for paging licenses (with the exception of winners that are small businesses, as discussed below) to supplement their upfront payments with a down payment sufficient to bring their total deposit up to 20 percent of their winning bid. As proposed in the *Notice*, such a down payment would be due within five business days of the Public Notice announcing winning bidders.

138. Comments. Commenters support the requirement of a down payment from winning bidders.³³³ PageNet suggests that winning bidders have 45 days to pay the remainder of their winning bid.³³⁴ Diamond urges a down payment requirement of only five percent, with 95 percent of the winning bid deferred and amortized over a ten-year period at the applicable U.S. Treasury instrument rate, plus one percent.³³⁵

139. Discussion. We conclude that winning bidders (including winners that are small businesses, as discussed below) must supplement their upfront payments with a down payment sufficient to bring their total deposits up to 20 percent of their winning bid(s). If the upfront payment amount on deposit is greater than 20 percent of the winning bid amount after deducting any bid withdrawal and default payments due, the additional monies will be refunded. If a bidder has withdrawn a bid or defaulted, but the amount of the withdrawal or default payment cannot yet be

³³² For an explanation of the term "activity units," *see supra* note 287.

³³³ *See, e.g.*, FTC Comments at 8; MobileMedia Reply Comments at 13-14.

³³⁴ PageNet Comments at 43-44.

³³⁵ Diamond Comments at 4.

determined, the bidder will be required to make a deposit of up to 20 percent on the amount bid on such licenses.³³⁶ When it becomes possible to calculate and assess the payment, any excess deposit will be refunded. Monies on account will be applied to bid withdrawal and default payments due before being applied toward the bidder's down payment on licenses the bidder has won and seeks to acquire.³³⁷

140. We will require winning bidders, except small businesses, to submit the required down payment by cashier's check or by wire transfer to our lock-box bank within 10 business days following release of a Public Notice announcing the close of bidding. All auction winners, except those that qualify for installment payments, will be required to make full payment of the balance of their winning bids within 10 business days following Public Notice that licenses are ready for grant.³³⁸

f. Bid withdrawal, default, and disqualification

141. Background. In the *Notice*, we proposed to adopt bid withdrawal, default, and disqualification rules for the paging services, based on the procedures established in our general competitive bidding rules.³³⁹

142. Comments. Commenters support our proposal to adopt rules regarding the withdrawal of bids, defaults, and disqualifications.³⁴⁰ A+ Communications urges us to adopt severe penalties both for any high bid withdrawal and for default on a winning bid. These procedures, A+ Communications concludes, will discourage indiscriminate speculation in bidding and require bidders to determine the viability of their business plans for each license area in advance.³⁴¹ However, Ameritel states that without the ability to correct obvious typographical bidding errors, bidders are potentially liable for huge withdrawal or default payments as the result of minor keying mistakes.³⁴²

³³⁶ See *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5563 and 5564, ¶ 73, n.51, and ¶ 76; *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2382-2383, ¶ 197.

³³⁷ See 47 C.F.R. § 1.2104(g).

³³⁸ See *infra* paragraph 187 regarding payment deadlines for small businesses.

³³⁹ *Notice*, 11 FCC Rcd at 3130, ¶ 107.

³⁴⁰ AirTouch Comments at 45; PCIA Comments at 29.

³⁴¹ A+ Communications Comments at 10.

³⁴² Ameritel Comments at 19.

143. Discussion. We will apply our general bid withdrawal, default, and disqualification rules in paging license auctions.³⁴³ If a license is re-offered by auction, the "winning bid" refers to the high bid in the auction in which the license is re-offered. If a license is re-offered in the same auction, the "winning bid" refers to the high bid amount made subsequent to the withdrawal in that auction. If a license which is the subject of withdrawal or default is offered to the highest losing bidders in the initial auction, as opposed to being re-auctioned, the "winning bid" refers to the bid of the highest bidder who accepts the offer. In the unlikely event that there is more than one bid withdrawal on the same license, we will hold each withdrawing bidder responsible for the difference between its withdrawn bid and the amount of the winning bid the next time the licenses are offered for auction.

144. If a license winner defaults or is otherwise disqualified after an auction is closed, the Commission must exercise its discretion to hold a new auction or offer the license to the second highest bidder. In exercising our discretion, we will evaluate the particular facts and circumstances of the particular case.³⁴⁴ For example, in the context of paging licenses it may be that defaults or disqualifications occur on only a very small number of relatively low value licenses. In such a case, we might choose to offer the license(s) to the highest losing bidder(s) because the cost of conducting an auction might exceed the benefits of an auction. On the other hand, there may be countervailing reasons for choosing to re-auction such licenses.

145. If a default or disqualification involves gross misconduct, misrepresentation or bad faith by an applicant, the Commission may declare the applicant and its principals ineligible to bid in future auctions, and may take any other action that it deems necessary, including institution of proceedings to revoke any existing licenses held by the applicant.

146. We agree with Ameritel that further steps are necessary to reduce the possibility of mistaken bids. The Bureau has recently instituted an additional procedure that warns bidders of the possibility of a mistaken bid, and this procedure will be utilized in the paging license auctions.³⁴⁵

³⁴³ 47 C.F.R. §§ 1.2104(g) and 1.2109.

³⁴⁴ *Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2962, ¶¶ 51-52.

³⁴⁵ We also recently addressed the issue of how our bid withdrawal payment provisions apply to bids that are mistakenly placed and withdrawn in a decision involving the 900 MHz SMR and the broadband PCS C block auctions. *See Atlanta Trunking Associates, Inc. and MAP Wireless L.L.C. Request to Waive Bid Withdrawal Payment Provisions*, FCC 96-203, *Order* (released May 3, 1996) (summarized in 61 Fed. Reg. 25,807 (May 23, 1996)), *recon. pending*.

g. Long-form applications

147. Background. In the *Competitive Bidding Second Report and Order*, we established rules requiring winning bidders to submit a long-form application.³⁴⁶ In the *Notice*, we proposed to apply these rules to paging auctions.³⁴⁷

148. Comments. All responsive comments support our proposal.³⁴⁸

149. Discussion. We will follow these procedures, which are set forth in § 1.2107 of our rules, if the winning bidder makes the down payment in a timely manner.³⁴⁹

h. Petitions to deny and limitations on settlements

150. As we indicated in the *Notice*, the petition to deny procedures in Sections 22.130 and 90.163 of our rules will apply to the paging services. A party filing a petition to deny against a paging license application will be required to demonstrate standing and meet all other applicable filing requirements. Sections 90.162 and 22.129 of our rules prevent the filing of speculative applications and pleadings for purposes of extracting money from paging applicants.³⁵⁰ Thus, we will limit the consideration that an individual or entity is permitted to receive for agreeing to withdraw an application or petition to deny to the legitimate and prudent expenses of the withdrawing applicant or petitioner. In the *Notice*, we proposed to amend Section 22.129 to prohibit settlements between applicants after the deadline for filing short-form applications.³⁵¹ We believe that, to the extent Sections 22.129 and 90.162 conflict with Section 1.2105 of our rules, these provisions should not apply to paging licenses awarded through competitive bidding. Therefore, we will amend these provisions to prohibit agreements to withdraw mutually exclusive applications, or pleadings filed by one applicant against another applicant for a license in the same geographic area, after the deadline for filing short-form applications.

³⁴⁶ *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2383, ¶ 199.

³⁴⁷ *Notice*, 11 FCC Rcd at 3130, ¶ 108.

³⁴⁸ AirTouch Comments at 45-46; PCIA Comments at 29.

³⁴⁹ 47 C.F.R. § 1.2107.

³⁵⁰ *Notice*, 11 FCC Rcd at 3130, ¶ 109.

³⁵¹ *Id.* at 3127, ¶ 89.

3. Regulatory Safeguards

a. Anti-collusion rules

151. Background. In the *Competitive Bidding Second Report and Order*, as modified by the *Competitive Bidding Reconsideration Order*, we adopted special rules prohibiting collusive conduct in the context of competitive bidding.³⁵² In the *Notice*, we proposed to apply these rules to paging license auctions.³⁵³

152. Comments. Commenters generally support the adoption of anti-collusion rules for paging license auctions.³⁵⁴ However, PageNet contends that, given the large number of incumbents, the Commission should fully consider whether an absolute prohibition on discussing the auction with other auction participants would serve a legitimate purpose.³⁵⁵ Several commenters request that we establish rules that do not have a chilling effect on publicly beneficial business acquisitions. Under the current rules, they contend, discussions between bidders for the same license area regarding a business merger or acquisition may be construed as discussions of bidding or bidding strategy -- thus violating the anti-collusion rules. They propose that we grant a safe harbor for such situations, permitting mergers and acquisitions to proceed during the period in which the anti-collusion rules are applicable.³⁵⁶ AirTouch and Arch propose a system in which respective paging company personnel certify that they are not discussing bidding strategy or otherwise divulging bidder information to each other in violation of the anti-collusion rules. They contend that, absent a showing that a certification is false, merger-acquisition discussions should be permitted during the course of the auction.³⁵⁷ They argue that a failure to so modify the anti-collusion rules that were used in previous auctions will substantially injure the paging industry -- an industry that is mature and is currently experiencing a period of consolidation.³⁵⁸

³⁵² *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2386-88, ¶¶ 221-26; Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Second Memorandum Opinion and Order*, PP Docket No. 93-253, 9 FCC Rcd 7245, 7253-54, ¶¶ 48-53 (*Competitive Bidding Reconsideration Order*), *Erratum*, PP Docket No. 93-253 (released October 19, 1994).

³⁵³ *Notice*, 11 FCC Rcd at 3127-3128, ¶¶ 89-94.

³⁵⁴ AirTouch Comments at 37-40 (need safeguards against collusion); Arch Comments at 19-20 (safeguards are necessary against collusion); PageNet Comments at 53.

³⁵⁵ PageNet Reply Comments at 16-17.

³⁵⁶ AirTouch Comments at 37-40; Arch Comments at 19-20. *See also* MobileMedia Comments at 26; Metrocall Comments at 21-22.

³⁵⁷ AirTouch Comments at 39; Arch Comments at 20.

³⁵⁸ Arch Comments at 19; AirTouch Comments at 37-38; MobileMedia Comments at 26.

153. Several commenters request that we establish a safe harbor for discussions between adjacent paging operators, or co-channel licensees, who have entered into so-called intercarrier arrangements. Co-channel licensees with such cooperative arrangements, they assert, must communicate regularly in order to provide service to the public. They argue that the anti-collusion rules should not prohibit discussion in connection with these agreements so that intercarrier arrangements may continue in the ordinary course of business.³⁵⁹

154. PageNet requests that the Commission clarify that the term "applicant" does not include incumbents who are not participating in the auction.³⁶⁰ PageNet also proposes that the anti-collusion rules not apply to applicants once they have withdrawn from the auction.³⁶¹ Finally, PageNet suggests that all consortia and all other applicants should be required to disclose on their short-form application whether they are incumbents.³⁶²

155. Discussion. We will require paging licensees to meet the reporting requirements and rules prohibiting collusion embodied in Sections 1.2105 and 1.2107 of the Commission's rules.³⁶³ Thus, after the FCC Form 175 filing deadline, applicants may not discuss the substance of their bids or bidding strategies with other applicants, other than those identified on their short-form applications, that are bidding in the same license areas,³⁶⁴ even if they are not bidding for the same spectrum blocks.³⁶⁵

156. We decline to amend the anti-collusion rules to create a safe harbor for discussions of business mergers or acquisitions, or intercarrier agreements, during periods in which the anti-collusion rules are in effect. We do not believe that we have a sufficient record at this time to make such a decision. We intend to conduct a general review of our auction rules in the near future, and we will then have an opportunity to thoroughly examine this issue.

157. We continue to believe that, even when an applicant has withdrawn its application after the short-form filing deadline, it should not be allowed to enter into a bidding agreement with another

³⁵⁹ Ameritech Comments at 16; AirTouch Comments at 39-40; Arch Comments at 20 n.46.

³⁶⁰ PageNet Comments at 54.

³⁶¹ *Id.*

³⁶² *Id.*

³⁶³ 47 C.F.R. §§ 1.2105 and 1.2107.

³⁶⁴ 47 C.F.R. § 1.2105(c)(1).

³⁶⁵ *Competitive Bidding Fourth Memorandum Opinion and Order*, 9 FCC Rcd at 6868, ¶ 55, n.128.

applicant bidding on licenses in the geographic area(s) from which it withdrew.³⁶⁶ We therefore decline to exclude a withdrawn bidder from the definition of applicant for purposes of the anti-collusion rules as recommended by PageNet. We believe application of the anti-collusion rules to withdrawn applicants is necessary in order to safeguard the integrity of the auction process by preventing the sharing of information and other collusive conduct among bidders for the same geographic licenses. A withdrawn bidder, as a former participant in the auction process, would otherwise be able to share valuable insights regarding its bidding strategy, including the reason(s) for its cessation of bidding.

158. We further note that where specific instances of collusion in the competitive bidding process are alleged during the petition to deny process, we may conduct an investigation or refer such complaints to the United States Department of Justice for investigation. Bidders who are found to have violated the antitrust laws, in addition to any penalties they incur under the antitrust laws, or who are found to have violated the Commission's rules in connection with their participation in the auction process, may be subject to a variety of sanctions, including forfeiture of their down payment or their full bid amount, revocation of their license(s), and possible prohibition from participating in future auctions.³⁶⁷

159. Finally, we disagree with PageNet that bidders should be required to identify themselves or members of bidding consortia as incumbents. In our view, a bidder's status as an incumbent is irrelevant for purposes of the auction process. We, therefore decline to adopt PageNet's suggestion.

b. Transfer disclosure requirements

160. Background. In Section 309(j)(4)(E) of the Communications Act, Congress directed the Commission to "require such transfer disclosures, anti-trafficking restrictions and payment schedules as may be necessary to prevent unjust enrichment as a result of the methods employed to issue licenses and permits."³⁶⁸ In the *Notice*, we proposed to adopt the transfer disclosure requirements contained in Section 1.2111(a) of our rules for all paging licenses obtained through the competitive bidding process.³⁶⁹

161. Comments. The commenters differ on whether transfer disclosure rules should apply to paging licenses awarded through competitive bidding. The FTC, for example, supports application of a transfer disclosure requirement, noting it would inhibit telemarketers from winning licenses at

³⁶⁶ *Competitive Bidding Fourth Memorandum Opinion and Order*, 9 FCC Rcd at 6867, ¶ 51.

³⁶⁷ *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2388, ¶ 226.

³⁶⁸ 47 U.S.C. § 309(j)(4)(E).

³⁶⁹ *Notice*, 11 FCC Rcd at 3131, ¶ 112.

auction and then "flipping" them through transfers to unsuspecting coalitions of unqualified buyers at inflated prices.³⁷⁰ Several commenters disagree, contending such a disclosure requirement would chill legitimate transactions, and force incumbents that do not raise trafficking concerns to meet burdensome disclosure requirements.³⁷¹ Metrocall points out that incumbents who win geographic licenses are in the business of providing paging service, not speculating on future profits from reselling paging licenses.³⁷²

162. Discussion. We will apply Section 1.2111(a) to all paging licenses obtained through the competitive bidding process. While we are concerned about requiring auction winners to produce information that might increase their cost of doing business, we doubt whether any license transfer in the marketplace would occur without the preparation of the contracts and other documents enumerated in Section 1.2111(a) in the ordinary course of business. Thus, we see nothing disruptive in requiring the disclosure of this information. Moreover, we believe these disclosure requirements are necessary to the enforcement of our unjust enrichment provisions. We also agree with the FTC that speculation in connection with the acquisition of paging licenses is a major concern. By enabling us to monitor license transfers, we believe that the disclosure requirements of Section 1.2111(a), which implements § 309(j)(4)(E) of the Communications Act, will assist in eliminating the problem of speculation while providing safeguards to those who might otherwise fall victim to deceptive practices used to induce them to invest in paging licenses.

4. Treatment of Designated Entities

a. Overview and objectives

163. Section 309(j) of the Communications Act provides that, in developing competitive bidding procedures, the Commission shall fulfill various statutory objectives and consider several alternative methods for achieving them. The statute provides that in establishing eligibility criteria and bidding methodologies the Commission shall, *inter alia*, "promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women."³⁷³ Small businesses, rural telephone companies and

³⁷⁰ FTC Comments at 12-13.

³⁷¹ Arch Comments at 24-25; AirTouch Comments at 46-47; Metrocall Comments at 22-23.

³⁷² Metrocall Comments at 22.

³⁷³ 47 U.S.C. § 309(j)(3)(B).

businesses owned by minorities and/or women are collectively referred to as "designated entities."³⁷⁴ Section 309(j)(4)(A) provides that in order to promote such objectives, the Commission shall "consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, or other schedules or methods . . . and combinations of such schedules and methods."³⁷⁵ Section 309(j)(4)(D) also requires the Commission to "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services."³⁷⁶ Establishing opportunities for small businesses, minority- and women-owned businesses, and rural telephone companies is likewise consistent with Section 257 of the Communications Act, which directs the Commission to take steps to identify and to eliminate market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services.

164. To meet the statutory objective of providing opportunities for designated entities, we have employed a wide range of special provisions and eligibility criteria in other spectrum-based services. In the 900 MHz SMR service, for example, we established a two-tier bidding credit system -- a 15 percent bidding credit for small businesses with average annual gross revenues of not more than \$3 million and a 10 percent bidding credit for small businesses with average annual gross revenues of not more than \$15 million.³⁷⁷ These measures have been designed to help designated entities overcome barriers to accessing capital and increase the likelihood that designated entities who win licenses in the auctions become strong competitors in the provision of wireless services. In the *Notice*, we sought comment on the type of designated entity provisions that should be incorporated into our competitive bidding procedures for paging services.³⁷⁸

b. Small businesses

165. In the *Notice*, we asked commenters to specifically address (1) the capital requirements of the paging services in comparison with other wireless services, (2) the degree to which designated entities currently provide paging service, and (3) whether designated entities and small businesses in particular face barriers to entry into paging services based on lack of access to capital or other

³⁷⁴ *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2388, ¶ 227.

³⁷⁵ 47 U.S.C. § 309(j)(4)(A).

³⁷⁶ 47 U.S.C. § 309(j)(4)(D).

³⁷⁷ *See Competitive Bidding Seventh Report and Order*, 11 FCC Rcd at 2705-2706, ¶ 164. *See also D, E, & F Block Report and Order*, 11 FCC Rcd at 7849, ¶ 54 (entities with average gross revenues of not more than \$15 million for the past three years are eligible for a 25 percent bidding credit and entities with average gross revenues of not more than \$40 million for the past three years are eligible for a 15 percent bidding credit).

³⁷⁸ *Notice*, 11 FCC Rcd at 3132-3133, ¶¶ 117-123.

factors.³⁷⁹ We tentatively concluded that it was appropriate to establish special provisions in our paging rules for competitive bidding by small businesses.³⁸⁰

166. Comments. Commenters differ on whether special provisions for small businesses are necessary to satisfy the congressional mandate of Section 309(j). Diamond and Ameritel contend that special provisions for small businesses, while helpful, do not sufficiently ensure that such entities will be able to participate.³⁸¹ Several commenters disagree, contending that numerous designated entities and small businesses currently participate in the paging industry and, even without such preferences, will succeed in the auctions.³⁸² PageNet concurs with this view, adding that such provisions will only assist application mills to "sell chances" for entry into the paging industry.³⁸³ PageNet notes that there are no regulatory barriers to entry, and thus it would be inappropriate for the Commission to adopt designated entity provisions. To adopt such provisions, PageNet argues, would add fuel to the application mills' ability to sell chances to participate in the auction process and may create artificial incentives that will encourage designated entities to bid up the prices of spectrum and harm incumbents.³⁸⁴

167. Discussion. Congress specifically cited the needs of small businesses in enacting Section 309(j) directing the Commission to promote economic opportunities for small businesses. Thus, while we agree that a number of small businesses are successfully participating in the paging industry, we conclude that it is appropriate to establish special provisions in our paging rules for competitive bidding by small businesses. Construction of a paging system may require a significant amount of capital, and the barriers small businesses face in acquiring financing are often difficult to overcome.

168. Congress made specific findings with regard to access to capital in the Small Business Credit and Business Opportunity Enhancement Act of 1992, that "small business concerns which represent higher degrees of risk in financial markets than do large businesses, are experiencing

³⁷⁹ *Id.*

³⁸⁰ *Id.* at 3132, ¶ 118.

³⁸¹ Diamond Comments at 2-3; Ameritel at 18 (such benefits are unlikely to make meaningful difference, but that does not justify putting small businesses at further disadvantage by denying them the few meager benefits available in the auction format).

³⁸² Arch Comments at 25-26; AirTouch Comments at 47-48; PCIA Comments at 33-34.

³⁸³ PageNet Comments at 44.

³⁸⁴ PageNet Reply Comments at 14-15.

increased difficulties in obtaining credit."³⁸⁵ These findings are consistent with the comments supporting small business provisions, such as those of Diamond, which asserts that many small paging companies have difficulties raising capital.³⁸⁶ As a result of such difficulties, Congress resolved to consider carefully legislation and regulations "to ensure that small business concerns are not negatively impacted" and to give priority to passage of "legislation and regulations that enhance the viability of small business concerns."³⁸⁷ For these reasons, we believe that small businesses applying for paging licenses should be entitled to some type of bidding credit and should be allowed to pay their bids in installments. We believe that the provision of bidding credits, an installment plan, as well as geographic area partitioning will help to eliminate market entry barriers for small businesses in the paging industry pursuant to section 257 of the Communications Act.³⁸⁸

c. Minority- and women-owned businesses

169. Background. In *Adarand Constructors, Inc. v. Peña*,³⁸⁹ the Supreme Court held that "all racial classifications . . . must be analyzed by a reviewing court under strict scrutiny."³⁹⁰ As a result of the *Adarand* decision, any federal program that makes distinctions on the basis of race must serve a compelling governmental interest and must be narrowly tailored to serve that interest in order to pass constitutional muster.³⁹¹ Gender-based programs must satisfy intermediate scrutiny.³⁹² Under this standard, there must be an "exceedingly persuasive justification" for a gender-based government provision and such a provision is constitutional if it serves an important governmental objective and is substantially related to achievement of that objective.³⁹³ In the *Notice*, we emphasized that we had not concluded that race- and gender-based measures are unconstitutional or otherwise inappropriate for spectrum auctions we will hold in the future. At a minimum, however, we stated that we must

³⁸⁵ Small Business Credit and Business Opportunity Enhancement Act of 1992, Pub. L. No. 102-366, 331(a)(3), 106 Stat. 1007.

³⁸⁶ Diamond Comments at 3.

³⁸⁷ Small Business Credit and Business Opportunity Enhancement Act of 1992, Pub. L. No. 102-366, § 331(b)(2), (3), 106 Stat. 1007.

³⁸⁸ 47 U.S.C. § 257.

³⁸⁹ 115 S. Ct. 2097 (1995).

³⁹⁰ *Adarand*, 115 S. Ct. 2097, 2113.

³⁹¹ *Id.*

³⁹² *United States v. Virginia*, 116 S. Ct. 2264 (1996).

³⁹³ *Id.* at 2274-2275. See also *J.E.B. v. Alabama ex. rel T.B.*, 511 U.S. 127 (1994); *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982).

build a thorough factual record concerning the participation of minorities and women in spectrum-based services to support race- and gender-based measures. We expressed our belief that a sufficient factual record does not exist with respect to spectrum-based services generally or paging services specifically to sustain such measures under strict scrutiny.³⁹⁴ In light of these considerations, we proposed to limit designated entity provisions for paging services to small businesses.³⁹⁵

170. We requested comment, however, on the possibility that in addition to small business provisions, separate provisions for women- and minority-owned entities should be adopted for paging services. We asked commenters to discuss whether the capital requirements of paging pose a barrier to entry by minorities and women and whether assisting women and minorities to overcome such a barrier, if it exists, would constitute a compelling government interest. In particular, we sought comment on the actual cost of acquisition, construction and operation of paging systems and the proportion of existing paging businesses that are owned by women or minorities. We also sought comment on the analytical framework for establishing a history of past discrimination in the paging industry and urged parties to submit evidence (statistical, documentary, anecdotal or otherwise) about patterns or actual cases of discrimination in this and related communications services. Assuming that a compelling governmental interest is established, we sought comment on whether separate provisions for women and minorities are necessary to further this interest and whether such provisions can be narrowly tailored to satisfy the strict scrutiny standard.³⁹⁶

171. Comments. Few comments were received on these issues. SBT states that, although the Commission is fully aware that the level of participation and the ownership of telecommunications services by women and minorities has been historically low, the chance that any commenting party will have the opportunity to provide a comprehensive study of the past or present circumstances which might provide a reasoned basis for gender-based or race-based incentives for such affected parties is so slim as to be impossible. SBT notes that the burden for determining whether such incentives are required is upon the Commission in meeting its mandate under 309(j) of the Act, not on commenting parties.³⁹⁷ SBT states that the PCS and the 900 MHz SMR auctions have demonstrated an acute need for greater protection for designated entities in upcoming auctions.³⁹⁸ According to PageNet, designated entity provisions are unnecessary because there are no barriers to entering the paging industry.³⁹⁹

³⁹⁴ Notice, 11 FCC Rcd at 3132, ¶ 121.

³⁹⁵ *Id.* at 3133, ¶ 122.

³⁹⁶ *Id.* at 3133, ¶ 123.

³⁹⁷ SBT Comments at 17 n.6.

³⁹⁸ SBT Reply Comments at 3.

³⁹⁹ PageNet Reply Comments at 14-15.

172. Discussion. In the paging service, as in other auctionable services, we are committed to meeting the statutory objectives of promoting economic opportunity and competition, of avoiding excessive concentration of licenses, and of ensuring access to new and innovative technologies by disseminating licenses among a wide variety of applicants, including businesses owned by members of minority groups and women. Commenters failed to provide record evidence sufficient to support special provisions for minorities under the strict scrutiny standard. *Adarand* makes clear that only a record of discrimination against a particular racial group would support remedial measures designed to help that group. A record of discrimination against minorities in general may not be sufficient. We are also concerned that our record would not support gender-based provisions under intermediate scrutiny.⁴⁰⁰ Balancing our obligation to provide opportunities for women- and minority-owned businesses to participate in spectrum-based services against our statutory duties to facilitate the rapid delivery of new services to the American consumer and promote efficient use of the spectrum, we conclude that we should not delay the paging service auction for the amount of time it would take to adduce sufficient evidence to support race- and gender-based provisions. Moreover, we believe that most minority- and women-owned businesses will be able to take advantage of the specific provisions that we adopt for small businesses, as discussed *infra*.⁴⁰¹

173. We note too that we have initiated a separate inquiry to gather information regarding barriers to entry faced by minority- and women-owned firms as well as small businesses.⁴⁰² We will also continue to track the rate of participation in our auctions by minority- and women-based firms and evaluate this information with other data gathered with the goal of developing a record to support race- and gender-based provisions that will satisfy judicial scrutiny. If a sufficient record can be adduced, we will consider race- and gender-based provisions for future auctions. Finally, we are looking for other ways to reduce barriers to entry for women- and minority-owned businesses, such as allowing partitioning and disaggregation of licenses to entities that do not currently qualify, an adjustment to our rules that may be helpful to small businesses generally.⁴⁰³

d. Bidding credits

174. Background. In the *Notice* we proposed to establish two levels of bidding credits: a 10 percent bidding credit for all small businesses and a 15 percent credit for small businesses that meet

⁴⁰⁰ See *Telephone Electronics Corp. v. FCC*, No. 95-1015, 1995 WL 364043 (D.C. Cir.) (order granting stay); *United States v. Virginia*, 116 S. Ct. at 2275.

⁴⁰¹ See paragraphs 174-185.

⁴⁰² Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, GN Docket No. 96-113, *Notice of Inquiry*, 11 FCC Rcd 6280 (1996).

⁴⁰³ See paragraphs 188-194, 203-218.

a more restrictive gross revenue threshold. These two levels of bidding credits would not be cumulative.⁴⁰⁴

175. In conjunction with this proposal, we proposed to establish two small business definitions -- (1) an entity with not more than \$15 million in average gross revenues for the previous three years; and (2) an entity with not more than \$3 million in average gross revenues for the previous three years. We also sought comment on the degree to which the revenues of affiliates, major investors, and controlling principals should be considered in determining small business eligibility.⁴⁰⁵ We also sought comment, alternatively, on which attribution threshold should be applied to paging applicants seeking to qualify as small businesses. We asked commenters to address whether our proposed small business definitions were sufficiently restrictive to protect against businesses benefiting from special provisions when in fact they do not need them.⁴⁰⁶

176. Comments. Commenters sharply disagree on whether the Commission should adopt bidding credits for paging license auctions. AirTouch and Arch contend that bidding credits offered to only certain bidders may be pernicious, and that participants in previous auctions bid away their discounts by paying a higher price for their licenses than did those bidders without discounts.⁴⁰⁷ PCIA opposes use of bidding credits, stating they do not advance the goals of the Commission and distort the competitive bidding process, particularly if the recipient is the competitor of another bidder for the market. PCIA argues that these problems are particularly acute where the service being auctioned is encumbered, as is the case with the paging spectrum.⁴⁰⁸ PageNet likewise opposes the use of bidding credits, contending that bidding credits and installment payments would allow designated entities to bid up the prices of the licenses in the auction, thereby hurting incumbents.⁴⁰⁹

177. Ameritel, however, contends that a bidding credit for small businesses, competing head on with larger companies for the same frequency block, would be beneficial to small businesses.⁴¹⁰ Bidding credits may not always make a meaningful difference, Ameritel contends, but denying small

⁴⁰⁴ Notice, 11 FCC Rcd at 3134, ¶ 127 and n.242.

⁴⁰⁵ Notice, 11 FCC Rcd at 3134, ¶ 130.

⁴⁰⁶ *Id.* at 3134, ¶ 129.

⁴⁰⁷ AirTouch Comments at 48-49; Arch Comments at 26 n.56.

⁴⁰⁸ PCIA Comments at 34.

⁴⁰⁹ PageNet Reply Comments at 14-15.

⁴¹⁰ Ameritel Reply Comments at 12-13. Ameritel points out that the same problem occurred in the narrowband PCS auction because the preferences were available for only certain frequency blocks.

businesses their use is not justified because this would put them at a further disadvantage.⁴¹¹ SBT also supports the use of bidding credits and other special provisions, but only if some fine-tuning occurs because 10 or 15 percent bidding credits are far too small to make any meaningful difference to small businesses.⁴¹² SBT proposes (1) for entities with average revenues of less than \$10 million, a 10 percent bidding credit; (2) for entities with average revenues of less than \$5 million, a 15 percent bidding credit; (3) for entities with average revenues of less than \$3 million, a 30 percent bidding credit; (4) for entities with average revenues of less than \$1 million, a 60 percent bidding credit; and (5) if the designated entity is an incumbent operator, an additional 10 percent bidding credit.⁴¹³ These discounts, coupled with an installment payment plan, are necessary, SBT argues, to offset the advantages already enjoyed by large corporations and thus avoid overconcentration of spectrum in the hands of a few big businesses.⁴¹⁴ Diamond proposes a 25 percent discount on the winning bid.⁴¹⁵ Diamond states that raising capital remains a problem for paging service operators and urges us not to attribute the gross revenues and assets of investors who hold less than a 49 percent interest in the applicant.⁴¹⁶

178. Discussion. We believe that bidding credits are appropriate as a special provision for designated entities in the paging license auctions. While bidding credits do not guarantee the success of small businesses, we believe that they at least provide such bidders with an opportunity to successfully compete against larger, well-financed bidders. We also conclude that it is appropriate to adopt tiered bidding credits for paging auction participants based on the size of the small business. Such an approach, we believe, furthers our mandate under Section 309(j) of the Communications Act to disseminate licenses to a variety of applicants.

179. We therefore will define a small business as either (1) an entity that, together with its affiliates and controlling principals, 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 principals, has average gross revenues for the three preceding years of not more than \$15 million. We will give small businesses that, together with affiliates and controlling principals, have average gross revenues for the three preceding years of not more than \$3 million, a 15 percent bidding credit. We will give small businesses that, together with affiliates and controlling principals, have average gross revenues for the three preceding years of not more than \$15 million, a bidding credit of 10 percent. These bidding

⁴¹¹ Ameritel Comments at 18.

⁴¹² SBT Comments at 19; SBT Reply Comments at 8.

⁴¹³ SBT Comments at 20.

⁴¹⁴ SBT Comments at 21.

⁴¹⁵ Diamond Comments at 4.

⁴¹⁶ Diamond Comments at 3-4.

credits are the same as those offered to small businesses in the 900 MHz SMR auction.⁴¹⁷ As with 900 MHz SMR, we believe that these tiered bidding credits take into account the difficulties smaller businesses have in accessing capital and their differing business strategies. We also think that bidding credits at these levels achieve a reasonable compromise between the arguments of commenters advocating greater credits and those of commenters advocating no credits. We believe that to cumulate bidding credits or to create an even more graduated bidding credit structure, as proposed by SBT, would unduly complicate the competitive bidding process both for bidders and for the Commission. In sum, we believe that, as was the case in the 900 MHz SMR auction, small businesses will have a reasonable opportunity of successful participation.⁴¹⁸

180. For purposes of the definitions adopted here, we will consider the gross revenues of the small business applicant, its affiliates, and certain investors in the applicant. Specifically, we will attribute the gross revenues of all controlling principals in the small business applicant as well as the gross revenues of affiliates of the applicant. We choose not to impose specific equity requirements on the controlling principals that meet our small business definition. We will still require, however, that in order for an applicant to qualify as a small business, qualifying small business principals must maintain both *de jure* and *de facto* control of the applicant. For this purpose, we will borrow from certain Small Business Administration (SBA) rules that are used to determine when a firm should be deemed an affiliate of a small business.⁴¹⁹ Typically, *de jure* control is evidenced by ownership of 50.1 percent of an entity's voting stock. *De facto* control is determined on a case-by-case basis. An entity must demonstrate at least the following indicia of control to establish that it retains *de facto* control of the applicant: (1) the entity constitutes or appoints more than 50 percent of the board of directors or partnership management committee; (2) the entity has authority to appoint, promote, demote and fire senior executives that control the day-to-day activities of the licensee; and (3) the entity plays an integral role in all major management decisions.⁴²⁰ We caution that while we are not imposing specific equity requirements on small business principals, the absence of significant equity could raise questions about whether the applicant qualifies as a *bona fide* small business.

181. As in the broadband PCS context, we will permit eligible small businesses to form consortia and not aggregate their gross revenues.⁴²¹ Additionally, a small corporation that has dispersed voting stock ownership and no controlling affiliates will not be required to aggregate with

⁴¹⁷ *Competitive Bidding Seventh Report and Order*, 11 FCC Rcd at 2705-2706, ¶ 164 (15 and 10 percent).

⁴¹⁸ We note that 60 small businesses won a total of 263 licenses, constituting 25.78 percent of all licenses available, in the 900 MHz SMR auction.

⁴¹⁹ See 13 C.F.R. § 121.401.

⁴²⁰ See *Competitive Bidding Fifth Memorandum Opinion and Order*, 10 FCC Rcd at 403, 447, ¶ 80 (1994).

⁴²¹ See, e.g., 47 C.F.R. § 24.720(b).

its own revenues the revenues of each shareholder for purposes of small business status.⁴²² Thus, we clarify that such an applicant may qualify -- even in the absence of identifiable control being held by particular investors.

e. Installment payments and down payments

182. Background. In the *Notice*, we proposed to adopt an installment payment option for small businesses that successfully bid for paging licenses. We proposed that licensees who qualify for installment payments would be entitled to pay their winning bid amount in quarterly installments over the ten-year license term, with interest charges to be fixed at the time of licensing at a rate equal to the rate for ten-year U.S. Treasury obligations plus 2.5 percent. Under our proposal, small businesses with not more than \$3 million in average gross revenues for the preceding three years would make interest-only payments for the first five years of the license term, while small businesses with not more than \$15 million in average gross revenues for the preceding three years would make interest-only payments during the first two years.⁴²³ In addition, we tentatively concluded that small businesses eligible for installment payments may pay a reduced down payment. We likewise sought comment on the need, if any, for a reduced upfront payment for entities qualifying as a small business.⁴²⁴

183. Comments. Commenters support the use of installment payment plans for small businesses.⁴²⁵ Diamond proposes a five percent down payment, with the remaining 95 percent of the winning bid price deferred and amortized over a ten-year period at the applicable U.S. Treasury rate plus 1 percent.⁴²⁶ PageNet proposes a five business day window in which the winning bidder would be required to submit its down payment for the license.⁴²⁷

184. Discussion. We will adopt installment payments for winners in the paging license auctions. We recognize that small businesses, including those owned by women and minorities, face capital access difficulties not encountered by other firms. Thus, they require special measures to ensure their participation in the paging service. Licensees who qualify as small businesses in paging license auctions will be entitled to pay their winning bid amount in quarterly installments over the

⁴²² See, e.g., *Competitive Bidding Fifth Memorandum Opinion and Order*, 10 FCC Rcd at 444-45, ¶ 74; 24 C.F.R. § 24.720(m) (defining "publicly traded corporation with widely dispersed voting power").

⁴²³ *Notice*, 11 FCC Rcd at 3135, ¶ 132.

⁴²⁴ *Id.* at 3135, ¶ 133.

⁴²⁵ Diamond Comments at 3.

⁴²⁶ Diamond Comments at 4.

⁴²⁷ PageNet Comments at 43-44.

term of the license, with interest charges to be fixed at the time of licensing at a rate equal to the rate for ten-year U.S. Treasury obligations plus 2.5 percent. The rate for ten-year U.S. Treasury obligations will be determined by taking the coupon rate of interest on the ten-year U.S. Treasury notes most recently auctioned by the Treasury Department before licenses are conditionally granted. These licensees will be able to make interest-only payments for the first two years of the license term. Timely payment of all installments will be a condition of the license grant, and failure to make such timely payments will be grounds for revocation of the license. As we have noted previously, allowing installment payments reduces the amount of private financing needed by prospective small business licensees and therefore mitigates the effect of limited access to capital by small businesses.⁴²⁸

185. We decline to adopt a second installment payment plan with a longer interest-only period for small businesses with average gross revenues of not more than \$3 million. We believe that the two-year interest-only period in the single plan we adopt here provides small businesses with the appropriate level of financing to overcome difficulties in attracting capital.⁴²⁹ Given that we are making additional financial assistance available to very small businesses in the form of a 15 percent bidding credit, we do not think a longer interest-only period is needed.

186. We also conclude that we should provide for late payment fees in connection with our installment payment plan for paging licensees. As we stated in the *Notice*, timely payment of all installments would be a condition of the award of the license.⁴³⁰ Therefore, when licensees are more than fifteen days late in their scheduled installment payments, we will charge a late payment fee equal to 5 percent of the amount of the past due payment. For example, if a \$50,000 payment is due on June 1, then on June 16 \$2,500 is due in addition to the payment. As we explained in adopting a late payment fee provision for broadband PCS F block auction winners, without such a fee licensees may not have adequate financial incentives to make installment payments on time and may attempt to maximize their cash flow at the government's expense by paying late.⁴³¹ We note too that enhancing the fiscal accountability of entities receiving installment payment benefits is consistent with the purpose of the recently enacted Debt Collection Improvement Act of 1996.⁴³² The 5 percent payment we adopt here is an approximation of late payment fees applied in typical commercial lending transactions. Payments will be applied in the following order: late charges, interest charges, principal payments.

⁴²⁸ *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2389, ¶¶ 231-32.

⁴²⁹ *See D, E, and F Report and Order*, 11 FCC Rcd at 7845, ¶ 44.

⁴³⁰ *Notice*, 11 FCC Rcd at 3135, ¶ 132.

⁴³¹ *See D, E, and F Report and Order*, 11 FCC Rcd at 7846, ¶ 48.

⁴³² *See* Chap. 10 of the Omnibus Consolidated Rescissions and Appropriation Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321-358 (April 26, 1996).

187. We believe that small businesses should be required to pay a down payment of 20 percent, as we required in our broadband PCS F block auction. We believe that such a requirement is consistent with ensuring that winning bidders have the financial capability of building out their systems and will provide us with stronger assurance against default than a 10 percent down payment. Increasing the amount of the bidder's funds at risk in the event of default discourages insincere bidding and therefore increases the likelihood that licenses are awarded to parties who are best able to serve the public. We also believe that a 20 percent down payment should cover the required payments in the unlikely event of default. Thus, small business licensees will be required to bring their deposit up to ten percent of the winning bid within ten business days of the close of the auction. Prior to licensing, they will be required to pay an additional ten percent. Specific procedures for payment will be provided in a Public Notice issued by the Bureau. Finally, we will not adopt reduced upfront payment rules for small businesses participating in the paging license auction. We believe a uniform upfront payment provision for all bidders in the auction is necessary in order to deter speculation and to ensure that only sincere bidders participate in the auction.

f. Partitioning

188. Background. In the *Notice*, we proposed a partitioning scheme for rural telephone companies similar to the one that had been adopted for broadband PCS.⁴³³ Partitioned areas would be required to conform to established geopolitical boundaries and would include all portions of the wireline service area of the rural telephone company that lie within the service area.⁴³⁴ In addition, we sought comment on whether we should extend geographic partitioning and channel disaggregation to all licensees.⁴³⁵

189. Comments. Several commenters suggest permitting partitioning of market area paging licenses by rural telephone companies, small businesses and BETRS operators in order to expand their geographic areas.⁴³⁶ Nucla-Naturita, while opposing the auctioning of BETRS frequencies, urges us to adopt mandatory partition rights at no cost for providers of BETRS. This mandatory

⁴³³ *Notice*, 11 FCC Rcd at 3136, ¶ 137 (citing *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5597-5598, ¶ 150).

⁴³⁴ *Id.*

⁴³⁵ *Id.* at 3136, ¶ 138.

⁴³⁶ *See, e.g.*, Ameritel Comments at 21 (the Commission should allow rural telephone companies and small businesses to partition portions of an MTA in order to expand their paging service, two-way mobile radio service, and/or BETRS systems, which would further help to mitigate the harmful impact of market area licensing on small entities); Nucla-Naturita Comments at 10-12 (the Commission should provide rural telephone companies with the right to require the market area licensee to partition those portions of the market that are required to provide BETRS, at no cost; and the market area licensee should notify the BETRS licensee of any modifications, and test the facility before putting it into service); USTA Comments at 3.

right to partition would extend to the perimeters of the rural telephone company's BETRS central office station and in no event could the partitioned area exceed the rural telephone company's certificated local exchange area.⁴³⁷ USTA agrees that rural telephone companies should have partitioning rights.⁴³⁸

190. Ameritel proposes permitting rural telephone companies and small businesses to partition their geographic license areas in order to expand their paging service and improve mobile telephone service and the BETRS.⁴³⁹ Ameritel states that partitioning would also help to mitigate the harmful impact of market area licensing.⁴⁴⁰ Priority, Metrocall, and AirTouch propose partitioning for incumbents, especially when more than one incumbent is located in a particular geographic area.⁴⁴¹ Puerto Rico Telephone supports geographic partitioning, but asks us to clarify whether partitioning will be available only to rural telephone companies or, in addition, to BETRS providers.⁴⁴² Arch and ProNet support broad partitioning rights for license winners.⁴⁴³ PCIA supports broad partitioning rights and, when technically feasible, spectrum disaggregation.⁴⁴⁴ MobileMedia also supports partitioning by license winners.⁴⁴⁵

191. Border questions the practical usefulness of partitioning, asserting that license winners in the PCS auctions had little desire to negotiate geographic partitioning arrangements with small LECs that sought to serve sparsely populated remote areas.⁴⁴⁶ Ameritel, while supporting partitioning, asserts that, because negotiations are required with the auction winner, partitioning may

⁴³⁷ Nucla-Naturita Comments at 11. The only exception, Nucla-Naturita contends, would be to the extent necessary to ensure that any BETRS central office station located within the rural telephone company's certificated area would not receive or cause harmful co-channel interference.

⁴³⁸ USTA Comments at 3.

⁴³⁹ Ameritel Comments at 21.

⁴⁴⁰ *Id.*

⁴⁴¹ Priority Comments at 6; Metrocall Comments at 14-15; AirTouch Comments at 40 n.91. *But see* AirTouch *ex parte* at 7-8 (while supporting flexible partitioning, AirTouch notes it supports limiting partitioning to an existing presence in an MTA on the subject frequency and only along well recognized boundaries, *e.g.*, county lines).

⁴⁴² Puerto Rico Telephone Comments at 8.

⁴⁴³ Arch Reply Comments at 9; ProNet Comments at 8 and Reply Comments at 10-11.

⁴⁴⁴ PCIA Comments at 18 n.34.

⁴⁴⁵ MobileMedia Comments at 13-14.

⁴⁴⁶ Border Comments at 3.

not be a complete solution for problems facing rural telephone companies in paging auctions, nor will it alleviate the disruption caused by market area licensing.⁴⁴⁷ InterDigital contends that the proposal to partition and therefore require rural telephone companies to pay for BETRS spectrum runs counter to the objective of reducing the overall access cost of the network.⁴⁴⁸

192. Discussion. Based on the strong support expressed by commenters for granting broad partitioning rights to paging licensees, we will permit all MTA and EA paging licensees to partition to any party eligible to be a paging licensee.⁴⁴⁹ We have decided to take this action with respect to partitioning because of our conclusion that allowing holders of paging licenses to partition their geographic service areas will facilitate the provision of services in small markets and rural areas. Partitioning will also furnish providers of paging service with operational flexibility that will serve to promote the most efficient use of the spectrum and encourage participation by a wide variety of service providers. In the *PCS Partitioning Report and Order*, we decided to allow partitioning of broadband PCS licenses along any service area defined by the parties. We concluded that allowing the parties to define the partitioned PCS service area would allow licensees to design flexible and efficient partitioning agreements which would permit marketplace forces to determine the most suitable service areas. We also found that requiring PCS partitioning along county lines was too restrictive and might discourage partitioning. We believe that a similarly flexible approach to partitioned areas is appropriate for paging. We therefore will permit partitioning of paging licenses awarded through competitive bidding based on any license area defined by the parties.

193. However, due to the paucity of comments on the subject, and because we are uncertain whether it is technically feasible, we will not, at this time, authorize spectrum disaggregation for the paging services. Instead, we will seek information regarding the technical feasibility and appropriateness of spectrum disaggregation for the paging services in the *Further Notice of Proposed Rulemaking*.

194. Providers of paging service will be permitted to acquire partitioned licenses in either of two ways: (1) by forming bidding consortia to participate in auctions, and then partitioning the licenses won among consortium members; or (2) by acquiring partitioned licenses from other licensees through private negotiation and agreement either before or after the auction. Each member of a consortium will be required to file a long-form application, following the auction, for its respective mutually agreed-upon geographic area. With regard to partitioning by small businesses,

⁴⁴⁷ Ameritel Comments at 21 and Reply Comments at 15.

⁴⁴⁸ InterDigital Comments at 4.

⁴⁴⁹ We have previously adopted expanded partitioning rights for broadband PCS. *Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees; Implementation of Section 257 of the Communications Act--Elimination of Market Entry Barriers*, WT Docket No. 96-148, GN Docket No. 96-113, FCC 96-474, *Report and Order* (released December 20, 1996) ("*PCS Partitioning Report and Order* ").

we will seek comment in the *Further Notice of Proposed Rulemaking* regarding the treatment of bidding credits and installment payments. In the event we receive applications requesting FCC consent to partitioning transfers from small businesses to non-small businesses or to small businesses that qualify for less favorable bidding credits, action on such applications will be deferred until the adoption of rules governing the treatment of bidding credits and installment payments.

g. Unjust enrichment provisions for full transfers

195. Background. The Commission's unjust enrichment provisions are integral to the success of the special provisions for designated entities in the various auctionable services. In the *Competitive Bidding Second Report and Order*, we outlined unjust enrichment provisions applicable specifically to designated entities. We established these provisions to deter speculation and participation in the licensing process by those who do not intend to offer service to the public, or who 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 profit.⁴⁵⁰ In the *Notice*, we sought comment regarding the appropriate approach in the paging services to prevent unjust enrichment. We asked whether an approach to unjust enrichment similar to that adopted for narrowband PCS, in which bidding credits and installment payments immediately become due upon transfer to an ineligible entity, or the 900 MHz SMR service, in which a holding period was imposed, would be optimal for the paging services.⁴⁵¹

196. Comments. SBT supports restricting assignments of licenses by small businesses that receive bidding credits or qualify for installment payments until the full price has been paid for the spectrum. However, SBT states that assignments to entities that are ineligible for bidding credits should not be prohibited as long as such entities pay the Commission the value of the bidding credits.⁴⁵² Metrocall and A+ Communications, while opposing anti-trafficking provisions for incumbents,⁴⁵³ note that such provisions may be an appropriate means of deterring speculators.⁴⁵⁴

197. Discussion. We believe it is appropriate to align our unjust enrichment rules for paging with our narrowband PCS and 900 MHz SMR unjust enrichment rules as they relate to bidding credits. These rules provide that, during the initial license term, licensees utilizing bidding credits and seeking to assign or transfer control of a license to an entity that does not meet the eligibility criteria for bidding credits will be required to reimburse the government for the total value of the benefit

⁴⁵⁰ *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2394, ¶¶ 258-259; 47 C.F.R. § 1.2111.

⁴⁵¹ *Notice*, 11 FCC Rcd at 3135, ¶¶ 134-135.

⁴⁵² SBT Comments at 21.

⁴⁵³ Metrocall Comments at 22-23; A+ Communications Comments at 11.

⁴⁵⁴ Metrocall Reply Comments at 12.

conferred by the government, that is, the amount of the bidding credit, plus interest at the rate imposed for installment financing at the time the license was awarded, before the transfer will be permitted. If a licensee that utilizes 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 reimburse the government for the amount of the bidding credit, or the difference between its original bidding credit and the bidding credit for which it is eligible after the ownership change, plus interest at the rate imposed for installment financing at the time the license was awarded. The amount of this payment will be reduced over time as follows: (1) a transfer in the first two years of the license term will result in a forfeiture of 100 percent of the value of the bidding credit; (2) in year three of the license term the payment will be 75 percent; (3) in year four the payment will be 50 percent, and (4) in year five the payment will be 25 percent, after which there will be no required payment. These payments will have to be paid to the U.S. Treasury as a condition of approval of the assignment or transfer.

198. In addition, if a licensee that qualifies for installment payments seeks to assign or transfer control of its license during its term to an entity that does not meet the small business definition, we will require payment of the remaining principal and any interest accrued through the date of assignment as a condition of the license assignment or transfer. Also, if an investor subsequently purchases an interest in the business and, as a result, the gross revenues of the business exceed the applicable financial caps, these unjust enrichment provisions will apply. We will apply these payment requirements for the entire license term to ensure that small businesses look first to other small businesses when deciding to transfer their licenses. However, we will not impose a holding period or other transfer restrictions on these licensees.

h. Spectrum set-aside

199. Background. In the *Competitive Bidding Fifth Report and Order*, we established broadband PCS entrepreneurs' blocks on which only qualified entrepreneurs, including designated entities, could bid.⁴⁵⁵ In the *Notice*, we tentatively concluded that it was not necessary to adopt an entrepreneurs' block for paging license auctions.⁴⁵⁶

200. Comments. Most commenters oppose the creation of an entrepreneurs' block or other form of spectrum set-aside for paging license auctions. AirTouch and Arch contend that set asides are inherently contrary to the open eligibility concepts endorsed by the Commission, and can prevent licenses from getting into the hands of carriers who value them most highly.⁴⁵⁷ PCIA and Ameritel concur, noting that an entrepreneurs' block is not feasible for the paging frequencies because such

⁴⁵⁵ *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5580-5586, ¶¶ 113-123.

⁴⁵⁶ *Notice*, 11 FCC Rcd at 3133, ¶ 124.

⁴⁵⁷ AirTouch Comments at 48 n. 105; Arch Comments at 25 n. 54.

frequencies are highly encumbered. They further argue that setting aside certain frequencies would potentially preclude incumbents from bidding on frequencies they currently hold. They also contend that the only solution to such problems would be to relocate incumbents, which would involve expensive system modifications and otherwise unnecessary investment.⁴⁵⁸ SBT, on the other hand, asserts that a frequency set-aside for designated entities is appropriate for the paging services. Because capital costs are low enough for small businesses to be able to meet construction requirements, SBT argues, small businesses should not have to compete directly with large entities to acquire licenses.⁴⁵⁹

201. Discussion. We will not adopt an entrepreneurs' block for paging licenses. The large number of licenses of different sizes that will be available in the paging auctions should allow for extensive participation of small businesses without an entrepreneurs' block. Moreover, we believe that the special provisions for small businesses that we adopt here, including installment payments and tiered bidding credits, will give small businesses a significant opportunity to acquire paging licenses through our auctions.

V. FURTHER NOTICE OF PROPOSED RULEMAKING

A. Coverage Requirements for Nationwide Channels

202. In the *Second Report and Order*, we concluded that the three 931 MHz nationwide channels and twenty-three 929 MHz nationwide channels will not be subject to competitive bidding. We are not imposing coverage requirements based on geographic area or population for these nationwide paging licenses. MTA and EA licensees, who are not exempt from competitive bidding, are required to provide coverage to one-third of the geographic area population within three years of the license grant, and to two-thirds of the geographic area population within five years of the license grant. In the alternative, the MTA or EA licensee may provide substantial service to the geographic area within five years of license grant. We seek comment on whether we should also impose coverage requirements for nationwide paging licenses, and the appropriate coverage area. For example, should the coverage be on a per MTA basis or a nationwide basis? We also seek comment on whether the Commission should reactivate the entire nationwide license, or just a portion of the license, if the licensee fails to meet the coverage requirements.

⁴⁵⁸ PCIA Comments at 33-34; Ameritel Comments at 12.

⁴⁵⁹ SBT Comments at 18.

B. Partitioning and Disaggregation

1. Partitioning

a. In general

203. In the *Second Report and Order*, we adopted geographic partitioning⁴⁶⁰ provisions for MTA and EA geographic area paging licensees. In this *Further Notice* we seek comment on whether nationwide paging licensees should be permitted to partition their license area. Commenters should note that the three 931 MHz nationwide channels and twenty-three 929 MHz nationwide channels are not subject to competitive bidding, whereas the MTA and EA geographic area licenses are subject to competitive bidding.

204. We believe that partitioning can be an effective means of providing paging licensees with the flexibility they need to tailor their service offerings to meet market demands. Partitioning may be used to create smaller licenses and thus also facilitate greater participation by small businesses and rural telephone companies. We did not, however, seek comment in the *Notice* on the treatment of MTA and EA geographic area paging licensees that receive competitive bidding benefits, the license term of partitioned licenses, or build-out requirements. We address these issues below with respect to partitioning geographic area paging licenses.

b. Licensees with competitive bidding benefits

205. Providing licensees with the flexibility to partition their geographic service areas will create smaller areas that can be licensed to small businesses,⁴⁶¹ including those entities without the resources to participate successfully in spectrum auctions. Our competitive bidding rules for paging include provisions for installment payments and bidding credits for small businesses.⁴⁶² We also adopted rules to prevent unjust enrichment by small businesses seeking to transfer licenses obtained with installment payments or bidding credits.⁴⁶³ We seek comment on how to adjust installment payments owed by partitioning licensees. Parties are invited to comment on whether a small business partitioner should be required to repay, on an accelerated basis, a portion of the outstanding principal balance owed under an installment payment plan. We seek comment on how this payment should be

⁴⁶⁰ Partitioning is the assignment of geographic portions of the geographic area paging license along geopolitical or other boundaries. In the *Second Report and Order* we permit partitioning of geographic area paging licenses along any service area defined by the parties.

⁴⁶¹ Small business is defined in Section 22.223(b). 47 C.F.R. § 22.223(b).

⁴⁶² See 47 C.F.R. §§ 22.217, 22.219.

⁴⁶³ See 47 C.F.R. §§ 22.217(b), 22.219(c).

calculated. We seek comment on whether the partitionee should be required to guarantee payment of a portion of the partitioner's obligation.

206. We tentatively conclude that partitionees that would qualify as small businesses should be permitted to pay their *pro rata* share of the remaining government obligation through installment payments. We seek comment on this tentative conclusion. Commenters should address the mechanisms for apportioning the remaining government obligation between the parties. We propose using population as the objective measure to calculate the relative value of the partitioned area, and we seek comment on this proposal.

207. We propose applying unjust enrichment rules to small businesses that partition to non-small businesses or to small businesses qualifying for a lower bidding credit. We seek comment on this proposal. These unjust enrichment provisions would include accelerated payment of bidding credits, unpaid principal, and accrued unpaid interest. We seek comment on how such unjust enrichment amounts should be calculated. Commenters should address how to calculate unjust enrichment amounts and how to enforce unjust enrichment payments. We seek comment on whether we should consider the price paid by the partitionee in determining the percentage of the outstanding principal balance to be repaid. Commenters should address whether the unjust enrichment payments should be calculated on a proportional basis, using population of the partitioned area as the objective measure.

208. We seek comment on whether each party to a partitioning transfer should be required to guarantee all or a portion of the partitioner's original auctions-related obligation in the event of default or bankruptcy by any of the parties to the partitioning transfer. We seek comment on whether the partitioner (the original licensee) should continue to be responsible, with respect to the auctions-related obligation, for the entire initial geographic area.

c. Build-out requirements

209. In the *Second Report and Order*, we adopted coverage requirements for MTA and EA geographic area licensees.⁴⁶⁴ Specifically, we require each MTA or EA geographic area licensee to provide coverage to one-third of the geographic area population within three years of the license grant, and to two-thirds of the geographic area population within five years of the license grant. In the alternative, the MTA or EA licensee may provide substantial service to the geographic area within five years of license grant. We tentatively conclude that both the partitioner and the partitionee should be subject to coverage requirements that ensure that both portions of the license area will receive service. We propose that a partitionee will be obligated to satisfy the same build-out requirements as the original licensee within its partitioned area, regardless of when the license was acquired. A partitionee of an MTA or EA would provide coverage to one-third of the population in

⁴⁶⁴ See 47 C.F.R. § 22.503(k).

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, the partitionee may provide substantial service to the partitioned geographic area within five years of license grant. Parties are invited to comment on this proposal. Commenters should also address build-out requirements for partitioned nationwide licenses. Commenters are also invited to address 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.

d. License term

210. A geographic area paging licensee is authorized to provide service for no more than ten years from the date of license grant.⁴⁶⁵ A licensee may submit an application to renew the license for an additional license term, and is 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 applicable Commission rules, policies, and the Communications Act.⁴⁶⁶ Substantial service is service which is sound, favorable, and substantially above a mediocre level of service which might just minimally warrant renewal.⁴⁶⁷

211. We propose 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. We tentatively conclude that this approach is reasonable because a partitioner-licensee should not be able to confer greater rights than it was awarded under the terms of its license grant. We seek comment on this tentative conclusion. We also propose that a partitionee be afforded the same renewal expectancy as a geographic area licensee. We propose to grant a partitionee a preference at a renewal proceeding if it can demonstrate that it has provided substantial service during its past license term and has substantially complied with the applicable Commission rules, policies, and the Communications Act. We seek comment on these proposals.

2. Disaggregation

a. In general

212. In the *Notice* we asked parties to comment on whether we should allow paging spectrum disaggregation.⁴⁶⁸ We did not receive sufficient comment on this issue to adopt disaggregation for paging services. We seek further comment on the feasibility of spectrum

⁴⁶⁵ See 47 C.F.R. § 22.144(a).

⁴⁶⁶ See *CMRS Third Report and Order*, 9 FCC Rcd at 8157, ¶ 386.

⁴⁶⁷ *Id.* at n.712.

⁴⁶⁸ Disaggregation is the assignment of discrete portions or "blocks" of spectrum licensed to a geographic area licensee.

disaggregation for paging. Commenters should provide technical justifications and other relevant support in responding to this issue. Commenters should address whether minimum disaggregation standards are necessary for paging services. Commenters should also address whether we should permit nationwide licensees to disaggregate spectrum.

b. Licensees with competitive bidding benefits

213. We also seek comment on what the respective obligations of the participants in a disaggregation transfer should be, and whether each party should be required to guarantee a proportionate amount of the disaggregator's original auctions-related obligation in the event of default or bankruptcy by any of the parties to the disaggregation transfer. We seek comment on whether the disaggregator (the original licensee) should have a continuing obligation with respect to the entire initial license. Alternatively, should the parties have available a choice of options, ranging from an accelerated payment based on purchase price to a guarantee for a larger payment by one party in the event another party defaults? Parties are invited to comment on whether the disaggregating parties should be able to determine which party has a continuing obligation with respect to the original license area.

214. We propose to allow all small business licensees to disaggregate to similarly qualifying parties as well as parties not eligible for small business provisions. We tentatively conclude that if we permit a qualified small business licensee to disaggregate to a non-small business entity, the disaggregating licensee should be required to repay any benefits it received from the small business special provisions on a proportional basis. This would include accelerated payment of bidding credits, unpaid principal, and accrued unpaid interest. We seek comment on how such repayment amounts should be calculated. We also seek comment on whether we should consider the price paid by the disaggregatee in determining the percentage of the outstanding principal balance to be repaid.

215. We tentatively conclude that if we permit a small business licensee to disaggregate to another qualified small business that would not qualify for the same level of bidding credit as the disaggregating licensee, the disaggregating licensee should be required to repay a portion of the benefit it received. We seek comment on how that amount should be calculated. Finally, we seek comment on what provisions, if any, we should adopt to address the situation of a small business licensee's disaggregation followed by default in payment of a winning bid at auction.

c. Build-out requirements

216. We require each MTA or EA geographic area licensee to provide coverage to one-third of the geographic area population within three years of the license grant, and to two-thirds of the geographic area population within five years of the license grant. In the alternative, the MTA or EA licensee may provide substantial service to the geographic area within five years of license grant. We propose adopting a flexible approach for construction requirements on both the disaggregator and disaggregatee for their respective spectrum portions. We propose that either the disaggregator or

the 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. In the alternative, either the disaggregator or the disaggregatee may provide substantial service to the geographic area within five years of license grant. We seek comment on this proposal. Parties should also comment on the appropriate build-out requirements for the parties to disaggregation of nationwide paging licenses. We propose that if a licensee fails to meet the construction requirements, the license reverts back to the Commission. We seek comment on this proposal.

d. License term

217. We propose a similar license term for disaggregation as we have for partitioning, *i.e.*, a disaggregatee would be authorized to hold its license for the remainder of the disaggregator's original ten-year license term. We propose that a disaggregatee would 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 applicable Commission rules, policies, and the Communications Act. We seek comment on these proposals, and on how to apply the renewal standard in cases where the disaggregatee has acquired the disaggregated license near the end of the license term.

3. Combination of Partitioning and Disaggregation

218. We tentatively conclude that, if disaggregation is feasible, we should permit combinations of partitioning and disaggregation, subject to the rules we have proposed for each. We seek comment on this proposal. Commenters should address any conflicts in the partitioning and disaggregation rules and whether we should implement the partitioning rules in such cases. Commenters should also address whether we should allow the combination of partitioning and disaggregation for nationwide paging licenses.

C. Shared Channels

219. The issue of paging license application fraud was initially raised in the comments filed by the Federal Trade Commission (FTC). According to the FTC, telecommunications investment frauds are of two basic types: (1) "application mills," where telemarketers sell application preparation services for wireless licenses for thousands of dollars to consumers, by claiming that telecommunications businesses will seek to lease or sell the licenses for many times the telemarketers' applications fees; and (2) "build-out" schemes, where 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. The FTC argued that awarding licenses on a geographic basis through competitive bidding would likely

reduce the incidence of "application mills" for paging licenses.⁴⁶⁹ The FTC explained that awarding licenses on an unlimited, shared basis is especially prone to abuse, because the constant availability of such licenses allows telemarketers to guarantee licenses to unsuspecting consumers. The transition of the exclusive paging channels to geographic area licensing might make the shared channels even more inviting to the fraudulent application mills. Therefore, we seek comment on how to eliminate or reduce this problem.

220. Specifically, we seek comment on how the current Form 600 application could be revised to provide applicants with information regarding the risks of telecommunications investment and warning signs of possible investment fraud. In addition, we seek comment on 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. Commenters are also invited to address whether PCIA should be required to implement additional procedures in the coordination process to reduce fraudulent or speculative applications.

VI. CONCLUSION

221. In this *Second Report and Order*, we adopt geographic area licensing and competitive bidding rules for paging services in the exclusive 929-930 MHz, 931-932 MHz, 35-36 MHz, 43-44 MHz, 152-159 MHz, and 454-460 MHz bands, to facilitate future development of paging systems and foster competition between paging and other CMRS in general. We are granting nationwide geographic area licenses for 26 nationwide channels, and excluding those licenses from competitive bidding. We also are adopting the fixed distances in Tables E-1 and E-2 in Section 22.537 for the exclusive 929 MHz and 931 MHz channels for determining co-channel interference protection for incumbent licensees. Additionally, in the *Further Notice of Proposed Rulemaking*, we are seeking comment on coverage requirements for nationwide geographic area licensees, geographic partitioning, spectrum disaggregation, and modifying the application process for the shared private carrier paging channels.

VII. PROCEDURAL MATTERS

A. Ordering Clauses

222. Authority for issuance of this *Further Notice of Proposed Rulemaking* is contained in Sections 4(i), 257, 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 257, 303(r), and 309(j).

⁴⁶⁹ FTC Comments at 1.

223. Accordingly, IT IS ORDERED that, pursuant to the authority of Sections 4(i), 303(g), 303(r), and 332(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(g), 303(r), and 332(a), Part 22 of the Commission's Rules, 47 C.F.R. Part 22, IS AMENDED as set forth in Appendix A below.

224. IT IS FURTHER ORDERED that, pursuant to the authority of Sections 4(i), 303(g), 303(r), and 332(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(g), 303(r), and 332(a), Part 90 of the Commission's Rules, 47 C.F.R. Part 90, IS AMENDED as set forth in Appendix A below.

225. IT IS FURTHER ORDERED that the rules adopted in this *Second Report and Order and Further Notice of Proposed Rulemaking* will be effective sixty days after the date of publication in the Federal Register.

226. IT IS FURTHER ORDERED that, pursuant to 47 U.S.C. § 155(c), the Chief, Wireless Telecommunications Bureau, IS GRANTED DELEGATED AUTHORITY to implement and modify auction procedures in the Part 22 and Part 90 paging services, including the general design and timing of an auction, the number and grouping of authorizations to be offered in any particular auction, the manner of submitting bids, the amount of minimum opening bids and bid increments, activity and stopping rules, and application and payment requirements, including the amount of upfront payments, and to announce such procedures by Public Notice.

227. IT IS FURTHER ORDERED that, pursuant to 47 U.S.C. § 155(c), the Chief, Wireless Telecommunications Bureau, IS GRANTED DELEGATED AUTHORITY to dismiss all mutually exclusive paging applications filed as of the adoption date of this *Order* and grant or dismiss all non-mutually exclusive paging applications filed as of the adoption date of this *Order*.

B. *Ex Parte* Rules -- Non-Restricted Proceeding

228. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. §§ 1.1201, 1.1203, and 1.1206(a).

C. Comment Dates

229. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments to the *Further Notice of Proposed Rulemaking* on or before **April 17, 1997**, and reply comments on or before **May 1, 1997**. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send

comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center of the Federal Communications Commission, Room 239, 1919 M Street, N.W., Washington, D.C. 20554.

D. Initial Paperwork Reduction Act of 1995 Analysis

230. This *Further Notice of Proposed Rulemaking* contains either a proposed or modified information collection. As part of its continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the information collections contained in this *Further Notice of Proposed Rulemaking*, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due at the same time as other comments on this *Further Notice of Proposed Rulemaking*; OMB comments are due 60 days after the date of publication of this *Further Notice of Proposed Rulemaking* in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

E. Regulatory Flexibility Act

231. The Final Regulatory Flexibility Analysis pursuant to the Regulatory Flexibility Act, 5 U.S.C. Section 604 is contained in Appendix C. The Initial Regulatory Flexibility Analysis pursuant to the Regulatory Flexibility Act, 5 U.S.C. § 603, is contained in Appendix D.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

I. Part 22 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

Part 22 -- PUBLIC MOBILE SERVICES

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 22.99 is revised by inserting the following definitions (in alphabetical order), and revising the definition for the term "unserved area", to read as follows:

§ 22.99 Definitions.

* * * * *

Paging geographic area authorization. An authorization conveying the exclusive right to establish and expand one or more stations throughout a paging geographic area or, in the case of a partitioned geographic area, throughout a specified portion of a paging geographic area, on a specified channel allocated for assignment in the Paging and Radiotelephone Service. These are subject to the conditions that no interference may be caused to existing co-channel stations operated by other licensees within the paging geographic area and that no interference may be caused to existing or proposed co-channel stations of other licensees in adjoining paging geographic areas.

Paging geographic areas. Standard geographic areas used by the FCC for administrative convenience in the licensing of stations to operate on channels allocated for assignment in the Paging and Radiotelephone Service. See § 22.503(b).

* * * * *

Unserved area. With regard to a channel block allocated for assignment in the Cellular Radiotelephone Service: geographic area in the District of Columbia, or any State, Territory or possession of the United States of America that is not within the CGSA of any cellular system authorized to transmit on that channel block. With regard to a channel allocated for assignment in the Paging and Radiotelephone Service: geographic area within the District of Columbia, or any State, Territory or possession of the United States of America that is not within the service contour of any base transmitter in any station authorized to transmit on that channel.

* * * * *

3. The title of Subpart B is amended to read as follows:

Subpart B-Licensing Requirements and Procedures

4. A new heading is added immediately preceding Section 22.101 to read as follows:

APPLICATIONS AND NOTIFICATIONS

5. Section 22.115 is amended by revising the introductory text of paragraph (a) to read as follows:

§ 22.115 Content of applications.

* * * * *

(a) Site-specific requirements. The following requirements apply to all Public Mobile Service applications that involve specific transmitting antenna sites.

* * * * *

6. Section 22.123 is amended by revising paragraphs (e)(1) and (e)(2), to read as follows:

§ 22.123 Classification of filings as major or minor.

* * * * *

(e) * * *

(1) Request that a paging geographic area authorization be issued to the filer on a requested channel;

(2) Request an authorization that would establish for the filer a new fixed transmission path or service area (a new station) on a requested channel, unless the new service area would be totally within a paging geographic area for which the filer holds the paging geographic area authorization for the requested channel;

* * * * *

7. Section 22.129 is amended by adding paragraph (e), to read as follows:

§ 22.129 Agreements to dismiss applications, amendments, and pleadings.

* * * * *

(e) Notwithstanding the provisions of this section, any payments made or received in exchange for withdrawing a short-form application for an FCC authorization awarded through competitive bidding shall be subject to the restrictions set forth in section § 1.2105(c) of this chapter.

8. Section 22.131 is amended by revising paragraphs (c)(4)(ii)(A) and (c)(4)(ii)(B), and by adding a new paragraph (d)(2)(v), to read as follows:

§ 22.131 Procedures for mutually exclusive applications.

* * * * *

(c) * * *

(4) * * *

(ii) * * *

(A) If all of the mutually exclusive applications in a 30-day notice and cut-off filing group are applications for initial authorization, the FCC administers competitive bidding procedures in accordance with § 22.201 through § 22.227 and Subpart Q of Part 1 of this chapter, as applicable. After such procedures, the application of the successful bidder may be granted and the other applications may be dismissed without prejudice.

(B) If any of the mutually exclusive applications in a 30-day notice and cut-off filing group is an application for modification, the Commission may attempt to resolve the mutual exclusivity by facilitating a settlement between the applicants. If a settlement is not reached within a reasonable time, the FCC may designate all applications in the filing group for comparative consideration in a hearing. In this event, the result of the hearing disposes all of the applications in the filing group.

* * * * *

(d) * * *

(2) * * *

(v) Any "short-form" application (filed on FCC Form 175) requesting a new paging geographic area authorization.

* * * * *

9. Section 22.165 is amended by revising paragraph (d)(1) to read as follows:

§ 22.165 Additional transmitters for existing systems.

* * * * *

(d) * * *

(1) The interfering contours of the additional transmitter(s) must be totally encompassed by the composite interfering contour of the existing station (or stations under common control of the applicant) on the same channel, except that this limitation does not apply to nationwide network paging stations or in-building radiation systems.

* * * * *

10. New Sections 22.201 through 22.227 are added and a new heading for these sections is added immediately preceding Section 22.201, to read as follows:

COMPETITIVE BIDDING PROCEDURES

§ 22.201 Scope of competitive bidding rules.

Sections 22.201 through 22.227, inclusive (and, unless otherwise specified in this part, the procedures set forth in Part 1, Subpart Q, of this chapter), apply only to competitive bidding ("auction") procedures for authorizations as follows:

(a) paging geographic area authorizations issued pursuant to this part or to Part 90 of this chapter.

(b) [reserved]

§ 22.203 Competitive bidding design for paging licensing.

A simultaneous multiple round auction will be used to choose from among mutually exclusive initial applications for paging geographic area authorizations, unless the FCC specifies otherwise by Public Notice prior to the competitive bidding procedure.

§ 22.205 Competitive bidding mechanisms.

(a) Sequencing. The FCC will establish and may vary the sequence in which paging geographic area authorizations are auctioned.

(b) Grouping. The FCC will determine which licenses will be auctioned simultaneously or in combination based on interdependency and administrative circumstances.

(c) Minimum Bid Increments. The FCC may, by public announcement before or during an auction, require minimum bid increments in dollar or percentage terms.

(d) Stopping Rules. The FCC may establish stopping rules before or during an auction in order to terminate the auction within a reasonable time.

(e) Activity Rules. The FCC may establish activity rules which require a minimum amount of bidding activity. In the event that the FCC establishes an activity rule in connection with a simultaneous multiple round auction, each bidder may request waivers of such rule during the auction. The FCC may, by public announcement either before or during an auction, specify or vary the number of waivers available to each bidder.

§ 22.207 Withdrawal, default, and disqualification payments.

The FCC will impose payments on bidders who withdraw high bids during the course of an auction, who default on payments due after an auction terminates, or who are disqualified. When the FCC conducts a simultaneous multiple round auction, payments will be calculated as set forth in §§ 1.2104(g) and 1.2109 of this chapter. When the amount of such a payment cannot be determined, a deposit of up to 20 percent of the amount bid on the license will be required.

§ 22.209 Bidding applications (FCC Form 175 and 175-S Short-form).

Each applicant to participate in competitive bidding for paging geographic area authorizations must submit an application (FCC Forms 175 and 175-S) pursuant to the provisions of § 1.2105 of this chapter.

§ 22.211 Submission of upfront payments and down payments.

(a) The FCC will require applicants to submit an upfront payment prior to the start of a paging auction. The amount of the upfront payment for each geographic area license auctioned and the procedures for submitting it will be set forth by the Wireless Telecommunications Bureau in a Public Notice in accordance with § 1.2106 of this chapter.

(b) Each winning bidder in a paging auction must submit a down payment to the FCC in an amount sufficient to bring its total deposits up to 20 percent of its winning bid. All winning bidders except small businesses will be required to make such payment within ten business days following the release of a Public Notice announcing the close of bidding. Small businesses must bring their deposits up to 10 percent of their winning bids within ten business days following the release of a Public Notice announcing the close of bidding, and must pay an additional 10 percent prior to licensing, by a date and time to be specified by Public Notice.

§ 22.213 Long-form applications (FCC Form 600).

Each successful bidder for a paging geographic area authorization must submit a "long-form" application (FCC Form 600) within ten business days after being notified by Public Notice that it is the winning bidder. Applications for paging geographic area authorizations on FCC Form 600 must be submitted in accordance with § 1.2107 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 licenses pursuant to agreements with auction winners under § 22.221 of this chapter.

§ 22.215 Authorization grant, denial, default, and disqualification.

(a) Each winning bidder, except those eligible for installment payments, will be required to pay the full balance of its winning bid within ten business days following Public Notice that the FCC is prepared to award the authorization.

(b) A bidder that withdraws its bid subsequent to the close of bidding, defaults on a payment due, or is disqualified, is subject to the payments specified in § 22.207, § 1.2104(g), or § 1.2109 of this chapter, as applicable.

§ 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 15 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 ten percent to lower the cost of its winning bid.

(b) Unjust Enrichment.

(1) If a small business that utilizes a bidding credit under this section seeks to transfer control or assign an authorization to an entity that is not a small business under § 22.223(b)(1), or

seeks to make any other change in ownership that would result in the licensee losing eligibility as a small business, the small business must seek FCC approval and reimburse the U.S. government for the amount of the bidding credit (plus interest at the rate imposed for installment financing at the time the license was awarded), as a condition of approval of such assignment, transfer, or other ownership change.

(2) If a small business that utilizes a bidding credit under this section seeks to transfer control or assign an authorization to a small business meeting the eligibility standards for a lower bidding credit, or seeks to make any other change in ownership that would result in the licensee qualifying for a lower bidding credit under this section, the licensee must seek FCC approval and reimburse the U.S. government for the difference between the amount of the bidding credit obtained by the licensee and the bidding credit for which the assignee, transferee, or licensee is eligible under this section (plus interest at the rate imposed for installment financing at the time the license was awarded), as a condition of the approval of such assignment, transfer, or other ownership change.

(3) The amount of payments made pursuant to paragraphs (b)(1) and (b)(2) of this section will be reduced over time as follows: A transfer in the first two years of the license term will result in a forfeiture of 100 percent of the value of the bidding credit (or the difference between the bidding credit obtained by the original licensee and the bidding credit for which the post-transfer licensee is eligible); in year 3 of the license term the payment will be 75 percent; in year 4 the payment will be 50 percent; and in year 5 the payment will be 25 percent, after which there will be no assessment.

§ 22.219 Installment payments for licenses won by small businesses.

(a) Each licensee that qualifies as a small business under § 22.223(b)(1) may pay the remaining 80 percent of the net auction price for the license in installment payments over the term of the authorization. Interest charges shall be fixed at the time of licensing at a rate equal to the rate for ten-year U.S. Treasury obligations plus 2.5 percent. An eligible licensee may make interest-only payments for two years. Payments of interest and principal shall be amortized over the remaining eight years of the license term.

(b) Late Installment Payment.

(1) Any licensee that submits a scheduled installment payment more than 15 days late will be charged a late payment fee equal to 5 percent of the amount of the past due payment.

(2) Payments will be applied in the following order: late charges, interest charges, principal payments.

(c) Unjust Enrichment.

(1) If a licensee that utilizes installment financing under this section seeks to assign or transfer control of its license to an entity not meeting the eligibility standards for installment financing, the licensee must seek FCC approval and make full payment of the remaining unpaid principal and unpaid interest accrued through the date of assignment or transfer as a condition of FCC approval.

(2) If a licensee that utilizes installment financing under this section seeks to make any change in ownership structure that would result in the licensee losing eligibility for installment payments, the licensee shall first seek FCC approval before making such a change in ownership structure and must make full payment of the remaining unpaid principal and unpaid interest accrued through the date of such change in ownership structure as a condition of FCC approval.

§ 22.221 Eligibility for partitioned licenses.

If partitioned licenses are being applied for in conjunction with a license(s) to be awarded through competitive bidding procedures --

(a) The applicable procedures for filing short-form applications and for submitting upfront payments and down payments contained in this chapter shall be followed by the applicant, who must disclose as part of its short-form application all parties to agreement(s) with or among other entities to partition the license pursuant to this section, if won at auction (*see* 47 CFR 1.2105(a)(2)(viii));

(b) Each party to an agreement to partition the license must file a long-form application (FCC Form 600) for its respective, mutually agreed-upon geographic area together with the application for the remainder of the MTA or EA filed by the auction winner.

(c) If the partitioned license is being applied for as a partial assignment of the MTA or EA license following grant of the initial license, request for authorization for partial assignment of a license shall be made pursuant to § 22.137.

§ 22.223 Definitions concerning competitive bidding process.

(a) Scope. The definitions in this section apply to §§ 22.201 through 22.227, unless otherwise specified in those sections.

(b) Small Business; Consortium of Small Businesses.

(1) A small business is an entity that either:

(i) together with its affiliates and controlling principals has average gross revenues that are not more than \$3 million for the preceding three years; or

(ii) together with its affiliates and controlling principals 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 principals shall be considered on a cumulative basis and aggregated.

(3) A consortium of small businesses is a conglomerate organization formed as a joint venture between or among mutually independent business firms, each of which individually satisfies the definition of a small business in paragraph (b)(1). Each individual member must establish its eligibility as a small business, as defined in this section. Where an applicant (or licensee) is a consortium of small businesses, the gross revenues of each small business shall not be aggregated.

(c) Gross Revenues. Gross revenues shall mean all income received by an entity, whether earned or passive, before any deductions are made for costs of doing business (*e.g.*, cost of goods sold). Gross revenues are evidenced by audited financial statements for the relevant number of calendar or fiscal years preceding the filing of the applicant's short-form application. If an entity was not in existence for all or part of the relevant period, gross revenues shall be evidenced by the audited financial statements of the entity's predecessor-in-interest or, if there is no identifiable predecessor-in-interest, unaudited financial statements certified by the applicant as accurate. When an applicant does not otherwise use audited financial statements, its gross revenues may be certified by its chief financial officer or its equivalent.

(d) Affiliate.

(1) Basis for Affiliation. An individual or entity is an affiliate of an applicant if such individual or entity:

- (i) Directly or indirectly controls or has the power to control the applicant, or
- (ii) Is directly or indirectly controlled by the applicant, or
- (iii) Is directly or indirectly controlled by a third party or parties who also control or have the power to control the applicant, or
- (iv) Has an "identity of interest" with the applicant.

(2) Nature of control in determining affiliation.

(i) Every business concern is considered to have one or more parties who directly or indirectly control or have the power to control it. Control may be affirmative or negative and it is immaterial whether it is exercised so long as the power to control exists.

Example for paragraph (d)(2)(i). An applicant owning 50 percent of the voting stock of another concern would have negative power to control such concern since such party can block any action of the other stockholders. Also, the bylaws of a corporation may permit a stockholder with less than 50 percent of the voting stock to block any actions taken by the other stockholders in the other entity. Affiliation exists when the applicant has the power to control a concern while at the same time another person, or persons, are in control of the concern at the will of the party or parties with the power of control.

(ii) Control can arise through stock ownership; occupancy of director, officer or key employee positions; contractual or other business relations; or combinations of these and other factors. A key employee is an employee who, because of his/her position in the concern, has a critical influence in or substantive control over the operations or management of the concern.

(iii) Control can arise through management positions if the voting stock is so widely distributed that no effective control can be established.

Example for paragraph (d)(2)(iii). In a corporation where the officers and directors own various size blocks of stock totaling 40 percent of the corporation's voting stock, but no officer or director has a block sufficient to give him/her control or the power to control and the remaining 60 percent is widely distributed with no individual stockholder having a stock interest greater than 10 percent, management has the power to control. If persons with such management control of the other entity are controlling principals of the applicant, the other entity will be deemed an affiliate of the applicant.

(3) Identity of interest between and among persons. Affiliation can arise between or among two or more persons with an identity of interest, such as members of the same family or persons with common investments. In determining if the applicant controls or is controlled by a concern, persons with an identity of interest will be treated as though they were one person.

(i) Spousal Affiliation. Both spouses are deemed to own or control or have the power to control interests owned or controlled by either of them, unless they are subject to a legal separation recognized by a court of competent jurisdiction in the United States.

(ii) Kinship Affiliation. Immediate family members will be presumed to own or control or have the power to control interests owned or controlled by other immediate family members. In this context "immediate family member" means father, mother, husband, wife, son, daughter,

brother, sister, father- or mother-in-law, son- or daughter-in-law, brother- or sister-in-law, step-father, or -mother, step-brother, or -sister, step-son, or -daughter, half-brother or -sister. This presumption may be rebutted by showing that:

- (A) The family members are estranged,
- (B) The family ties are remote, or
- (C) The family members are not closely involved with each other in business matters.

Example for paragraph (d)(3)(ii). A owns a controlling interest in Corporation X. A's sister-in-law, B, has a controlling interest in a paging geographic area authorization application. Because A and B have a presumptive kinship affiliation, A's interest in Corporation X is attributable to B, and thus to the applicant, unless B rebuts the presumption with the necessary showing.

(4) Affiliation through stock ownership.

(i) An applicant is presumed to control or have the power to control a concern if he/she owns or controls or has the power to control 50 percent or more of its voting stock.

(ii) An applicant is presumed to control or have the power to control a concern even though he/she owns, controls, or has the power to control less than 50 percent of the concern's voting stock, if the block of stock he/she owns, controls, or has the power to control is large as compared with any other outstanding block of stock.

(iii) If two or more persons each owns, controls or has the power to control less than 50 percent of the voting stock of a concern, such minority holdings are equal or approximately equal in size, and the aggregate of these minority holdings is large as compared with any other stock holding, the presumption arises that each one of these persons individually controls or has the power to control the concern; however, such presumption may be rebutted by a showing that such control or power to control, in fact, does not exist.

(5) Affiliation arising under stock options, convertible debentures, and agreements to merge. Stock options, convertible debentures, and agreements to merge (including agreements in principle) are generally considered to have a present effect on the power to control the concern. Therefore, in making a size determination, such options, debentures, and agreements will generally be treated as though the rights held thereunder had been exercised. However, neither an affiliate nor an applicant can use such options and debentures to appear to terminate its control over another concern before it actually does so.

Example 1 for paragraph (d)(5). If company B holds an option to purchase a controlling interest in company A, who holds a controlling interest in a paging geographic area authorization application, the situation is treated as though company B had exercised its rights and had become owner of a controlling interest in company A. The gross revenues of company B must be taken into account in determining the size of the applicant.

Example 2 for paragraph (d)(5). If a large company, BigCo, holds 70% (70 of 100 outstanding shares) of the voting stock of company A, who holds a controlling interest in a paging geographic area authorization application, and gives a third party, SmallCo, an option to purchase 50 of the 70 shares owned by BigCo, BigCo will be deemed to be an affiliate of company A, and thus the applicant, until SmallCo actually exercises its options to purchase such shares. In order to prevent BigCo from circumventing the intent of the rule which requires such options to be considered on a fully diluted basis, the option is not considered to have present effect in this case.

Example 3 for paragraph (d)(5). If company A has entered into an agreement to merge with company B in the future, the situation is treated as though the merger has taken place.

(6) Affiliation under voting trusts.

(i) Stock interests held in trust shall be deemed controlled by 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.

(ii) If a trustee has a familial, personal or extra-trust business relationship to the grantor or the beneficiary, the stock interests held in trust will be deemed controlled by the grantor or beneficiary, as appropriate.

(iii) If the primary purpose of a voting trust, or similar agreement, is to separate voting power from beneficial ownership of voting stock for the purpose of shifting control of or the power to control a concern in order that such concern or another concern may meet the Commission's size standards, such voting trust shall not be considered valid for this purpose regardless of whether it is or is not recognized within the appropriate jurisdiction.

(7) Affiliation through common management.

Affiliation generally arises where officers, directors, or key employees serve as the majority or otherwise as the controlling element of the board of directors and/or the management of another entity.

(8) Affiliation through common facilities.

Affiliation generally arises where one concern shares office space and/or employees and/or other facilities with another concern, particularly where such concerns are in the same or related industry or field of operations, or where such concerns were formerly affiliated, and through these sharing arrangements one concern has control, or potential control, of the other concern.

(9) Affiliation through contractual relationships.

Affiliation generally 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.

(10) Affiliation under joint venture arrangements.

(i) A joint venture for size determination purposes is an association of concerns and/or individuals, with interests in any degree or proportion, formed by contract, express or implied, to engage in and carry out a single, specific business venture for joint profit for which purpose they combine their efforts, property, money, skill and knowledge, but not on a continuing or permanent basis for conducting business generally. The determination whether an entity is a joint venture is based upon the facts of the business operation, regardless of how the business operation may be designated by the parties involved. An agreement to share profits/losses proportionate to each party's contribution to the business operation is a significant factor in determining whether the business operation is a joint venture.

(ii) The parties to a joint venture are considered to be affiliated with each other.

§ 22.225 Certifications, disclosures, records maintenance and audits.

(a) Short-Form Applications: Certifications and Disclosure. In addition to certifications and disclosures required by Part 1, Subpart Q, of this chapter, each applicant for a paging license which qualifies as a small business or consortium of small businesses shall append the following information as an exhibit to its FCC Form 175:

(1) The identity of the applicant's controlling principals and affiliates, and, if a consortium of small businesses, the members in the joint venture; and

(2) The applicant's gross revenues, computed in accordance with § 22.223.

(b) Long Form Applications: Certifications and Disclosure. Each applicant submitting a long-form application for a paging geographic area authorization and qualifying as a small business shall, in an exhibit to its long-form application:

(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 principals, and, if a consortium of small businesses, the members of the joint venture;

(2) List and summarize all agreements or other instruments (with appropriate references to specific provisions in the text of such agreements and instruments) that support the applicant's eligibility as a small business under §§ 22.217 through 22.223, including the establishment of *de facto* and *de jure* control; such agreements and instruments include, but are not limited to, articles of incorporation and bylaws, shareholder agreements, voting or other trust agreements, franchise agreements, and any other relevant agreements, including letters of intent, oral or written; and

(3) List and summarize any investor protection agreements, including rights of first refusal, supermajority clauses, options, veto rights, and rights to hire and fire employees and to appoint members to boards of directors or management committees.

(c) Records Maintenance. All winning bidders qualifying as small businesses shall maintain at their principal place of business an updated file of ownership, revenue, and asset information, including any documents necessary to establish eligibility as a small business and/or consortium of small businesses under § 22.223. Licensees (and their successors-in-interest) shall maintain such files for the term of the license. Applicants that do not obtain the license(s) for which they applied shall maintain such files until the grant of such license(s) is final, or one year from the date of the filing of their short-form application (FCC Form 175), whichever is earlier.

(d) Audits.

(1) Applicants and licensees claiming eligibility as a small business or consortium of small businesses under §§ 22.217 through 22.223 shall be subject to audits by the Commission. Selection for audit may be random, on information, or on the basis of other factors.

(2) Consent to such audits is part of the certification included in the short-form application (FCC Form 175). Such consent shall include consent to the audit of the applicant's or licensee's books, documents and other material (including accounting procedures and practices) regardless of form or type, sufficient to confirm that such applicant's or licensee's representations are, and remain, accurate. Such consent shall include inspection at all reasonable times of the facilities, or parts thereof, engaged in providing and transacting business, or keeping records regarding licensed paging service and shall also include consent to the interview of principals, employees, customers and suppliers of the applicant or licensee.

(e) Definitions. The terms affiliate, small business, consortium of small businesses, and gross revenues, used in this section are defined in § 22.223.

§ 22.227 Petitions to deny and limitations on settlements.

(a) Procedures regarding petitions to deny long-form applications in the paging service will be governed by §§ 1.2108(b) through 1.2108(d) of this chapter, § 22.130, and § 90.163.

(b) The consideration that an individual or an entity will be permitted to receive for agreeing to withdraw an application or a petition to deny will be limited by the provisions set forth in § 22.129, § 90.162, and § 1.2105(c) of this chapter.

11. Section 22.313 is amended by revising paragraphs (a)(4), (a)(5) and (a)(6) to read as follows:

§ 22.313 Station identification.

* * * * *

(a) * * *

(4) Stations using Basic Exchange Telephone Radio Systems in the Rural Radiotelephone Service;

(5) Nationwide network paging stations operating on 931 MHz channels; or,

(6) Stations operating pursuant to paging geographic area authorizations.

* * * * *

12. Section 22.352 is amended by revising the introductory paragraph to read as follows:

§ 22.352 Protection from interference.

Public Mobile Services stations operating in accordance with FCC rules that provide technical channel assignment criteria for the radio service and channels involved, all other applicable FCC rules, and the terms and conditions of their authorizations are normally considered to be non-interfering. If the FCC determines, however, that interference that significantly interrupts or degrades a radio service is being caused, it may, in accordance with the provisions of Sections 303(f) and 316 of the Communications Act of 1934, as amended, (47 U.S.C. §§ 303(f), 316), require modifications to any Public Mobile station as necessary to eliminate such interference.

* * * * *

13. A new Section 22.503 is added, to read as follows:

§ 22.503 Paging geographic area authorizations.

The FCC considers applications for and issues paging geographic area authorizations in the Paging and Radiotelephone Service in accordance with the rules in this section. Each paging geographic area authorization contains conditions requiring compliance with paragraphs (h) and (i) of this section.

(a) Channels. The FCC may issue a paging geographic area authorization for any channel listed in § 22.531 of this part or for any channel pair listed in § 22.561 of this part.

(b) Paging geographic areas. The paging geographic areas are as follows:

(1) The Nationwide paging geographic area comprises the District of Columbia and all States, Territories and possessions of the United States of America.

(2) The Major Trading Areas (MTAs) as defined in the Rand McNally 1992 Commercial Atlas & Marketing Guide, 123rd Edition, at pages 38-39, with the following changes and additions:

(i) The Seattle paging geographic area does not include Alaska.

(ii) Alaska is a paging geographic area.

(iii) Guam and the Northern Mariana Islands (combined) are a paging geographic area.

(iv) Puerto Rico and the United States Virgin Islands (combined) are a paging geographic area.

(v) American Samoa is a paging geographic area.

(3) The Economic Areas (EAs), as defined by the Department of Commerce, Bureau of Economic Analysis. *See* "Final Redefinition of the BEA Economic Areas", 60 FR 13114 (March 10, 1995).

(c) Availability. The FCC may determine whether to issue a paging geographic area authorization for any specific channel or channel pair in any specific paging geographic area. The FCC may replace existing site specific authorizations for facilities on a channel or channel pair located in a paging geographic area with a paging geographic area authorization for that channel or channel pair, if in its sole discretion, the FCC determines that the public interest would be served by such replacement.

(d) Filing windows. The FCC accepts applications for paging geographic area authorizations only during filing windows. The FCC issues Public Notices announcing in advance the dates of the filing windows, and the specific paging geographic areas and channels for which applications may be accepted.

(e) One grant per geographic area. The FCC may grant one and only one application for a paging geographic area authorization for any specific channel or channel pair in any specific paging geographic area defined in paragraph (b) of this section. Selection from among mutually exclusive applications for a paging geographic area authorization will be made in accordance with the procedures in §§ 22.131 and 22.200 through 22.299. If after the selection process but prior to filing a "long form" application, a successful bidder decides to partition the paging geographic area, the FCC may require and accept multiple "long form" applications from the consortium members.

(f) Exclusive right to expand. During the term of a paging geographic area authorization, the FCC does not accept, from anyone other than the paging geographic area licensee, any major application for authorization to operate a facility that would serve unserved area within the paging geographic area specified in that paging geographic area authorization, on the channel specified in that paging geographic area authorization, unless any extension of the interfering contour of the proposed facility falls:

- (1) within the composite interfering contour of another licensee; or,
- (2) into unserved area and the paging geographic area licensee consents to such extension.

(g) Subsequent applications not accepted. During the term of a paging geographic area authorization, the FCC does not accept any application for authorization relating to a facility that is or would be located within the paging geographic area specified in that paging geographic area authorization, on the channel specified in that paging geographic area authorization, except in the following situations:

(1) FCC grant of an application authorizing the construction of the facility could have a significant environmental effect as defined by § 1.1307 of this chapter. See § 22.115(a)(5).

(2) Specific international coordination procedures are required, prior to assignment of a channel to the facility, pursuant to a treaty or other agreement between the United States government and the government of Canada or Mexico. See § 22.169.

(3) The paging geographic area licensee or another licensee of a system within the paging geographic area applies to assign its authorization or for FCC consent to a transfer of control.

(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. 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 license 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 co-channel facilities of other licensees within the paging geographic area that were authorized on [insert effective date of this rule] and have remained authorized continuously since that date.

(j) Site location restriction. The transmitting antenna of each facility constructed and operated pursuant to a paging geographic area authorization must be located within the paging geographic area specified in the authorization.

(k) Coverage requirements. Failure by a paging geographic area licensee to meet either of the coverage requirements in paragraphs (k)(1) and (k)(2), or alternatively, the substantial service requirement in paragraph (k)(3), may result in automatic termination or non-renewal of a paging geographic area license. 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 a paging 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 (FCC Form 489), no later than 15 days after the end of the three year period, 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 a paging 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 (FCC Form 489), no later than 15 days after the end of the five year period, 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).

(3) As an alternative to the coverage requirements of paragraphs (k)(1) and (k)(2), the paging geographic area licensee may demonstrate that, no later than five years after the initial grant of its paging geographic area authorization, it provides substantial service to the paging geographic area. "Substantial service" means service that is sound, favorable, and substantially above a level of mediocre service that would barely warrant renewal.

14. Section 22.507 is amended by revising it in its entirety to read as follows:

§ 22.507 Number of transmitters per station.

This section concerns the number of transmitters licensed under each station authorization in the Paging and Radiotelephone Service, other than paging geographic area authorizations.

(a) Operationally related transmitters. Each station must have at least one transmitter. There is no limit to the number of transmitters that a station may comprise. However, transmitters within a station should be operationally related and/or should serve the same general geographical area. Operationally related transmitters are those that operate together as a system (e.g. trunked systems, simulcast systems), rather than independently.

(b) Split of large systems. The FCC may split wide-area systems into two or more stations for administrative convenience. Except for nationwide paging and other operationally related transmitters, transmitters that are widely separated geographically are not licensed under a single authorization.

(c) Consolidation of separate stations. The FCC may consolidate separately authorized stations upon request (FCC Form 600) of the licensee, if appropriate under paragraph (a) of this section.

(d) Replacement of site-by-site authorizations with single authorization. After a paging geographic area authorization for a channel has been issued, the FCC may, on its own motion, replace the authorization(s) of any other licensee (for facilities located within that paging geographic area on that channel) with a single replacement authorization.

15. Section 22.529 is revised in its entirety to read as follows:

§ 22.529 Application requirements for the Paging and Radiotelephone Service.

In addition to information required by Subparts B and D of this part, applications for authorization in the Paging and Radiotelephone Service must contain the applicable information and data described in this section.

(a) Administrative information. The following information, associated with Form FCC 600, Schedule A, is required as indicated. Each application of any type, including applications for paging geographic area authorizations, must contain one and only one Schedule A.

(1) The purpose of the filing is required for each application of any type.

(2) The geographic area designator, channel and geographic area name are required only for each application for a paging geographic area authorization.

(3) The FCC control point number, if any, the location (street address, city or town, state), the telephone number and an indication of the desired database action are required only for each application proposing to add or delete a control point.

(4) The FCC location number, file number and location (street address, city or town, state) of authorized facilities that have not been constructed are required only for each application requesting an extension of time to construct those facilities.

(b) Technical data. The following data, associated with FCC Form 600, Schedule B, are required as indicated for each application that is not an application for a paging geographic area authorization. Applications for a paging geographic area authorization must not contain Schedule B. Other type of applications may contain as many Schedule Bs as are necessary for the intended purpose.

(1) For each transmitting antenna site to be added, deleted or modified, the following are required: an indication of the desired database action, the FCC location number, if any, the street address or other description of the transmitting antenna site, the city, county and state, the geographical coordinates (latitude and longitude), correct to ± 1 second, of the transmitting antenna site (NAD 27 required, NAD 83 optional), and in the case of a proposed relocation of a transmitting antenna, the FCC location number and geographical coordinates, correct to ± 1 second, of the current transmitting antenna site, and an indication of the datum (NAD 27 or NAD 83) to which the geographical coordinates of the current location are referenced.

(2) For each transmitting antenna site to be added, deleted or modified, the following supplementary information is required: an indication as to whether or not the transmitting antenna site is within 200 kilometers (124 miles) of the U.S.-Mexico border, and an indication as

to whether or not the transmitting antenna site is North of Line A or East of Line C. Line A and Line C are defined in § 2.1 of this chapter. For each adjacent geographic area within 200 kilometers (124 miles) of each transmitting antenna site to be added, deleted or modified, the geographic area designator and name, and the shortest distance (in kilometers) to the boundary of that geographic area.

(3) For each antenna to be added, deleted or modified, the following is required: an indication of the desired database action, an indication of whether the antenna already exists or is merely proposed, the FCC antenna number, if any, the type of antenna (e.g. collinear, Yagi, half-wave, corner reflector, panel, etc.), the name of the antenna manufacturer and the model number of the antenna, the height (in meters) above average terrain of the center of radiation of the antenna, the beamwidth of the main lobe of the horizontal radiation pattern of the electric field of the antenna, the height (in meters) to the tip of the antenna above ground level, a polar plot of the horizontal gain pattern of the antenna, the antenna gain in the maximum lobe and the electric field polarization of the wave emitted by the antenna when installed as proposed.

(i) For each transmitter to be added, deleted or modified, the following is required: the FCC transmitter number, if any, an indication of the desired database action, the center frequency of the requested channel, the transmitter classification (e.g. base, fixed mobile), the designator for any non-standard emission type to be used, including bandwidth and modulation type, and the maximum effective radiated power.

(ii) For each of the eight cardinal radials, the antenna height above the average elevation along the radial, and the effective radiated power of each transmitter in the direction of the radial.

(iii) For each transmitter proposed to transmit on a channel reserved for point-to-multipoint operation involving transmission to four or more points of communications (i.e. base transmitters), the following is required for each point of communication: an indication of the desired database action, the FCC transmitter number or other key indicator (e.g. I, II, III, IV), the location (city or town, state), and the geographical coordinates (latitude and longitude, NAD 27).

16. Section 22.531 is amended by revising the heading preceding it, the heading and introductory text, and adding a new paragraph (f), to read as follows:

PAGING OPERATION

§ 22.531 Channels for paging operation.

The following channels are allocated for assignment to base transmitters that provide paging service, either individually or collectively under a paging geographic area authorization. Unless otherwise indicated, all channels have a bandwidth of 20 kHz and are designated by their center frequencies in MegaHertz.

* * * * *

(f) For the purpose of issuing paging geographic area authorizations, the paging geographic areas used for the UHF channels are the MTAs (*see* § 22.503(b)(2)), and the paging geographic areas used for the low and high VHF channels are the EAs (*see* § 22.503(b)(3)).

17. Section 22.539 is amended by revising paragraph (e) to read as follows:

§ 22.539 Additional channel policies.

* * * * *

(e) Additional transmitters on same channel. Notwithstanding other provisions of this section, the following applications are not considered to be requests for an additional paging channel:

(1) Applications for transmitters to be located in the same geographic area as an authorized station controlled by the applicant, and to operate on the same paging channel;

(2) Applications for transmitters to be located within a paging geographic area for which the applicant holds the paging geographic area authorization for the requested channel; and,

(3) Applications for paging geographic area authorizations.

* * * * *

18. Section 22.551 is revised in its entirety to read as follows:

§ 22.551 Nationwide network paging service.

The rules in this section govern the application for and provision of nationwide network paging service on the channels reserved specifically for such service in § 22.531(b).

(a) Nationwide network providers; organizers. If and when a nationwide network paging channel becomes available for assignment, the FCC will issue a Public Notice inviting applications from eligibles seeking to provide or organize a nationwide network paging service. The Public Notice will provide complete details regarding application requirements and procedures.

(b) Licensing. The FCC may issue a paging geographic area authorization to the nationwide network provider or organizer. All transmissions of nationwide network messages on the channels reserved for such service in § 22.531(b) are authorized solely under the

authorization(s) of the nationwide network provider or organizer, notwithstanding whether or not the messages pass through facilities owned, operated or licensed to affiliated local carriers.

19. Section 22.559 is amended by revising the heading and introductory text to read as follows:

§ 22.559 Paging application requirements.

In addition to information required by Subparts B and D and § 22.529, applications for authorization to operate a paging transmitter on the channels listed in § 22.531, other than applications for a paging geographic area authorization, must contain the applicable supplementary information described in this section.

* * * * *

20. Section 22.561 is amended by revising the introductory text to read as follows:

§ 22.561 Channels for one-way or two-way mobile operation.

The following channels are allocated for paired assignment to transmitters that provide (or support other transmitters that provide) one-way or two-way public land mobile service, either individually or collectively under a paging geographic area authorization. The paging geographic areas used for these channels are the EAs (*see* § 22.503(b)(3)). These channels may be assigned for use by mobile or base transmitters as indicated, and or by fixed transmitters (including control, repeater or other fixed transmitters). The mobile channels may also be assigned for use by base or fixed transmitters under certain circumstances (*see* § 22.567(h)). Unless otherwise indicated, all channels have a bandwidth of 20 kHz and are designated by their center frequencies in MegaHertz.

* * * * *

21. Section 22.569 is amended by revising paragraph (d) to read as follows:

§ 22.569 Additional channel policies.

* * * * *

(d) Additional transmitters on same channel. Notwithstanding other provisions of this section, the following applications are not considered to be requests for an additional channel:

(1) Applications for transmitters to be located in the same geographic area as an authorized station controlled by the applicant, and to operate on the same paging channel;

(2) Applications for transmitters to be located within a paging geographic area for which the applicant holds the paging geographic area authorization for the requested channel; and,

(3) Applications for paging geographic area authorizations.

* * * * *

22. Section 22.589 is amended by revising the introductory text to read as follows:

§ 22.589 One-way or two-way application requirements.

In addition to information required by Subparts B and D and § 22.529, applications for authorization to operate a paging transmitter on the channels listed in § 22.531, other than applications for a paging geographic area authorization, must contain the applicable supplementary information described in this section.

* * * * *

23. Section 22.717 is amended by removing paragraph (c).

24. A new section 22.721 is added, to read as follows:

§ 22.721 Geographic area authorizations.

Eligible persons may apply for a paging geographic area authorization in the Rural Radiotelephone Service, on the channel pairs listed in § 22.725, by following the procedures and requirements set forth in § 22.503 for paging geographic area authorizations.

25. A new section 22.723 is added, to read as follows:

§ 22.723 Secondary site-by-site authorizations.

Authorizations for new facilities (including new sites and additional channel pairs for existing sites) in the Rural Radiotelephone Service (including BETRS facilities) may be granted after [*insert effective date*] only on the condition that such authorizations shall be secondary to any existing or future co-channel paging geographic area authorization in the Paging and Radiotelephone Service or the Rural Radiotelephone Service. If the paging geographic area licensee notifies the Rural Radiotelephone Service licensee that operation of a co-channel secondary facility must be discontinued because it may cause interference to existing or planned facilities, the Rural Radiotelephone Service licensee must discontinue operation of that facility on the particular channel pair involved no later than six months after such notice.

II. Part 90 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 90 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 90.162 is amended by adding paragraph (f), to read as follows:

§ 90.162 Agreements to dismiss applications, amendments, or pleadings

* * * * *

(f) Notwithstanding the provisions of this section, any payments made or received in exchange for withdrawing a short-form application for an FCC authorization awarded through competitive bidding shall be subject to the restrictions set forth in section § 1.2105(c) of this chapter.

3. A new Section 90.493 is added, as follows:

§ 90.493 Paging operations on exclusive channels in the 929-930 MHz band.

Paging operations on the exclusive channels in the 929-930 MHz band are subject to the rules set forth in this section.

(a) Exclusive channels. The center frequencies of the channels in the 929-930 MHz band that may be assigned on an exclusive basis are as follows: 929.0125, 929.1125, 929.1375, 929.1875, 929.2125, 929.2375, 929.2875, 929.3125, 929.3375, 929.3625, 929.3875, 929.4125, 929.4375, 929.4625, 929.4875, 929.5125, 929.5375, 929.5625, 929.5875, 929.6125, 929.6375, 929.6625, 929.6875, 929.7125, 929.7375, 929.7625, 929.7875, 929.8125, 929.8375, 929.8625, 929.8875, 929.9125, 929.9375, 929.9625, and 929.9875 MHz.

(b) Part 22 licensing, construction and operation rules apply. Licensing, construction and operation of paging stations on the exclusive channels in the 929-930 MHz band are subject to the application filing, licensing procedure, auction procedure, construction, operation and notification rules and requirements that are set forth in Part 22 of this chapter for paging stations operating in the 931-932 MHz band, instead of procedures elsewhere in this part.

(c) Part 22 power limits apply; type acceptance required. Paging operations on the exclusive channels in the 929-930 MHz band are subject to the transmitting power limits set forth in Part 22 of this chapter for paging stations operating in the 931-932 MHz band, instead of

power limits elsewhere in this part. Transmitters used on the exclusive channels in the 929-930 MHz band must be of a type accepted under either Part 22 of this chapter or this part (or both).

4. Section 90.494 is amended by revising the heading, paragraphs (a), (f) and (g), to read as follows:

§ 90.494 Paging operations on shared channels in the 929-930 MHz band.

(a) This section applies to licensing of paging stations on the shared (non-exclusive) channels in the 929-930 MHz band. The center frequencies of these channels are listed in paragraph (b).

* * * * *

(f) The effective radiated power for base stations providing paging service on the shared channels must not exceed 3500 Watts.

(g) Licenses may be granted on these shared paging channels only for expansion (addition of new sites or relocation of existing sites) or other modification, assignment or transfer of control of existing, licensed private (including Special Emergency Radio Service) or commercial paging systems, and for new private (including Special Emergency Radio Service), internal-use paging systems. Any application for authority to operate a new commercial paging system on any of these shared channels is unacceptable for filing.

5. Section 90.495 is removed.

6. Section 90.496 is removed.

APPENDIX B

COMMENTS -- March 18, 1996

1. Ace Communications (Ace)
2. AirTouch Paging (AirTouch)
3. American Paging Inc. (API)
4. Ameritech Mobile Services, Inc. (Ameritech)
5. Ameritel Paging, Inc. (Ameritel)
 - Anserphone of Natchez, Inc.
 - CommNet Paging, Inc.
 - Metro/Delta, Inc.
 - Oregon Telephone Corporation
 - Paging Systems Management, Inc.
 - Professional Answering Service, Inc.
 - Radio Paging Service
 - Radiofone, Inc.
 - RCC Paging, Inc.
 - Sema-Phoon, Inc.
 - Teletouch Communications, Inc.
 - Ventures in Paging L.C.
 - Clifford D. and Barbara J. Moeller d/b/a Valley Answering Service
6. A+ Communications, Inc.
7. A+ Network, Inc.
8. Arch Communications Group (Arch)
 - Westlink Communications
9. ATS Mobile Telephone, Inc. (ATS)
10. AT&T Wireless Services, Inc. (AT&T Wireless)
11. Baker's Electronics and Communications, Inc. (Baker's)
12. Baldwin Telecom, Inc. (Baldwin)
 - Amery Telephone Company
13. Wayne J. Balkenhol
14. Benkelman Telephone Company (Benkelman)
 - Wauneta Telephone Company
15. Border to Border Communications, Inc. (Border)
16. Caraway Communications (Caraway)
17. Chequamegon Telephone Cooperative, Inc. (Chequamegon)
18. Alan Coles
20. Communications Sales and Service, Inc. (CSS)
21. Comp Comm, Inc.
22. Consolidated Communications Mobile Services, Inc. (CCMS)
23. Datafon II, Inc. (Datafon)

- Zipcall Long Distance, Inc.
24. Diamond Page Partnerships (Diamond)
 - AmericaOne
 - Northwest Pager
 - Metro Paging
 - West Virginia Pager
 - PagerOne
 25. Gary Duncan
 26. Roy N. Elliott
 27. Federal Trade Commission (FTC)
 28. HEI Communications, Inc. (HEI)
 29. Frederick W. Hiort, Jr. d/b/a B&B Beepers (Hiort)
 30. Huffman Communications (Huffman)
 31. InterDigital Communications Corporation (InterDigital)
 32. Liberty Cellular, Inc. (Liberty)
 33. Mashell Connect, Inc. (Mashell)
 34. Metamora Telephone Company, Inc. (Metamora)
 35. Metrocall, Inc.
 36. Paul Mihm
 37. MobileMedia Communications, Inc. (MobileMedia)
 38. Mobile Telecommunications Technologies Corp. (MTel)
 39. Mobilfone Service, Inc. (Mobilfone)
 40. Edward E. Muzzio III
 41. Brian S. Neal
 42. Nucla-Naturita Telephone Company (Nucla-Naturita)
 43. Olympic Radio
 44. Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO)
 45. Pacific Bell (Pacific)
 46. PageAmerica Group, Inc. (PageAmerica)
 47. Page Hawaii
 - Lubbock Radio Paging Service, Inc.
 - WT Services, Inc. d/b/a Panhandle Paging
 - Mobile Phone of Texas, Inc.
 48. PageMart, Inc. (PageMart)
 49. PagePrompt U.S.A. (PagePrompt)
 50. Paging Associates, Inc.
 51. Paging Network, Inc. (PageNet)
 52. Paging Partners, Corp.
 53. Pass Word, Inc.
 54. Marguerite Perry
 55. Personal Communications Industry Association (PCIA)

56. Pigeon Telephone Company, Inc. (Pigeon)
57. Porter Communications, Inc. (Porter)
58. Preferred Networks, Inc. (PNI)
59. Priority Communications, Inc. (Priority)
60. ProNet Inc. (ProNet)
61. Puerto Rico Telephone Company
62. Radiofone, Inc.
63. Catherine Reaves
64. Karl A. Rinker d/b/a Rinker Communications (Rinker)
65. Rule Radiophone Service, Inc. (Rule)
 Robert R. Rule d/b/a Rule Communications
66. Donald M. Sarrat
67. Ted Shelly
68. Small Business in Telecommunications (SBT)
69. SMR Systems, Inc. (SMR)
70. Source One Wireless, Inc. (Source One)
71. Supercom, Inc.
72. Sunbelt Transmission Corporation (Sunbelt)
 Snider Communications Corporation
73. TeleBEEPER of New Mexico, Inc. (TeleBEEPER)
74. Teletouch Licenses, Inc. (Teletouch)
75. Total Tele-Page of Nebraska, Inc. (Total Tele-Page)
76. Tri-State Radio Paging, Inc. (Tri-State Radio)
77. United Paging Resources
78. United States Telephone Association (USTA)
79. Ann Von Duerring
80. Genevieve T. Wenski
81. Western Radio Services, Co., Inc.
82. Wilkinson County Telephone Company, Inc. (Wilkinson)
83. Jon D. Word (Word)
 Pioneer Telephone Cooperative, Inc.

REPLY COMMENTS -- April 2, 1996

1. Arch Communications Group
 Westlink Communications
2. A+ Network, Inc.
3. A+ Communications, Inc.
4. AirTouch Paging (AirTouch)
5. American Paging, Inc. (API)
6. Ameritech Mobile Services, Inc. (Ameritech)

7. Ameritel Paging, Inc. (Ameritel)
 - Anserphone of Natchez, Inc.
 - CommNet Paging, Inc.
 - Metro/Delta, Inc.
 - Oregon Telephone Corporation
 - Paging Systems Management, Inc.
 - Professional Answering Service, Inc.
 - Radio Paging Service
 - Radiofone, Inc.
 - RCC Paging, Inc.
 - Sema-Phoon, Inc.
 - Teletouch Communications, Inc.
 - Ventures in Paging L.C.
 - Clifford D. and Barbara J. Moeller d/b/a Valley Answering Service
8. Emery Telephone Company
9. MobileMedia Communications, Inc. (MobileMedia)
10. Metrocall, Inc.
11. Nucla-Naturita Telephone Company (Nucla-Naturita)
12. Paging Network, Inc. (PageNet)
13. Page Hawaii
 - Lubbock Radio Paging Service, Inc.
 - WT Services, Inc. d/b/a Panhandle Paging
 - Mobile Phone of Texas, Inc.
14. Paging Partners, Corp.
15. ProNet Inc. (ProNet)
16. Small Business in Telecommunications (SBT)
17. Teletouch Licenses, Inc. (Teletouch)

EX PARTE COMMENTS

1. Advanced Electronics, Inc. -- filed December 31, 1996
2. AirTouch -- filed May 15, 1996
3. AirTouch -- filed August 15, 1996
4. AirTouch -- filed September 13, 1996
5. AirTouch and Arch -- filed February 11, 1997
6. Motorola -- filed August 13, 1996
7. Puerto Rico Telephone Company -- filed July 24, 1996 and September 6, 1996
8. Teletouch Licenses, Inc. (Teletouch) -- filed December 6, 1996

APPENDIX C

Final Regulatory Flexibility Analysis
Second Report and Order

As required by Section 603 of the Regulatory Flexibility Act, 5 U.S.C. § 603 (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rulemaking (*Notice*) in WT Docket No. 96-18.¹ The Commission sought written public comment on the proposals in the *Notice*, including the IRFA. The Commission's Final Regulatory Flexibility Analysis in this *Second Report and Order* conforms to the RFA, as amended by the Contract With America Advancement Act of 1996.²

A. Need for and Purpose of this Action:

In this *Second Report and Order* the Commission adopts rules to establish geographic area licensing and competitive bidding for Common Carrier Paging (CCP) and exclusive 929 MHz Private Carrier Paging (PCP) services. These rules are adopted to establish a flexible regulatory scheme for paging services, which will promote efficient licensing and competition in the Commercial Mobile Radio Services (CMRS) marketplace. The competitive bidding rules adopted in the *Second Report and Order* are pursuant to Section 309(j) of the Communications Act of 1934, as amended (Communications Act),³ which grants authority to the Commission to use auctions to select among mutually exclusive applications for initial licenses for subscriber-based services.

B. Summary of Issues Raised in Response to the Initial Regulatory Flexibility Analysis:

Several commenters submitted comments in response to the IRFA. These commenters contend that the Commission did not assess how the proposals for market area licensing and competitive bidding will impact small businesses; that market area licensing will alleviate some administrative burdens but the savings will mainly be seen by the largest paging operators; and that market area licensing will impose administrative burdens and additional costs on small businesses. In addition to the comments specifically submitted in response to the IRFA, several commenters raised issues in their comments to the *Notice* regarding the effects of the proposals in the *Notice* on small businesses. These commenters do not support geographic area licensing for the exclusive 929 MHz and 931 MHz paging channels. These commenters contend that geographic area licensing

¹ Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, WT Docket No. 96-18, *Notice of Proposed Rulemaking*, 11 FCC Rcd 3108 (1996) (*Notice*).

² Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAA, Subtitle II of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) *codified at* 5 U.S.C. § 601 *et seq.*)

³ 47 U.S.C. § 309(j).

would be disruptive to existing licensees, as well as to the public, without providing any overriding benefit. The Commission addresses these issues in the *Second Report and Order*, and concludes that geographic area licensing using Major Trading Areas (MTAs)⁴ as the geographic area for these bands, is in the public interest. The Commission also observes that small businesses will be able to use bidding credits and installment payments in order to compete with larger entities in the auction process.

Additionally, several commenters are opposed to geographic area licensing for the 35-36 MHz, 43-44 MHz, 152-159 MHz, and 454-460 MHz bands and claim that geographic area licensing would prevent the continued growth of small paging businesses. Several commenters are also opposed to geographic area licensing for other services, such as Basic Exchange Telecommunications Radio Service (BETRS).⁵ Commenters argue that it is not in the public interest to use competitive bidding to select between applications for BETRS and paging, as this may leave some rural areas without any local exchange service. Commenters contend that requiring local exchange carriers to bid for BETRS spectrum would defy the requirements in the Communications Act for universal service and would jeopardize the Commission's goal to increase subscriber penetration. The Commission addresses these issues in the *Second Report and Order*, and concludes that geographic area licensing, using Economic Areas (EAs)⁶ as the geographic area for these bands, is in the public interest. The Commission notes that EAs, which are smaller than MTAs, will provide more opportunities for small paging businesses. The Commission also observes that small businesses will be able to use bidding credits and installment payments in order to compete with larger entities in the auction process. The Commission concludes that rural areas will not be deprived of service because existing BETRS systems will remain in place and the new partitioning rules adopted in the *Second Report and Order* will allow BETRS operators to enter into partitioning agreements with the

⁴ Rand McNally organizes the 50 states and the District of Columbia into 47 MTAs and 487 BTAs. Rand McNally is the copyright owner of the MTA/BTA Listings, which list the counties contained in each BTA/MTA, as embodied in Rand McNally's Trading Area System BTA/MTA Diskette and geographically represented in the map contained in Rand McNally's *Commercial Atlas & Marketing Guide*. A paging authorization grantee who does not obtain a copyright license from Rand McNally for use of the copyrighted material may not rely on grant of a Commission authorization as a defense to any claim of copyright infringement brought by Rand McNally against such grantee.

⁵ BETRS are radio loops that can take the place of expensive wire or cable to remote areas, and are a part of intrastate basic exchange service. Basic Exchange Telecommunications Service, CC Docket No. 86-495, *Report and Order*, 3 FCC Rcd 214, 217, ¶ 27 (1987). Only local exchange carriers that have been state certified to provide basic exchange telephone service (or others having state approval to provide such service) in the pertinent area are eligible to hold authorizations for BETRS. 47 C.F.R. § 22.702.

⁶ The Bureau of Economic Analysis of the Department of Commerce has divided the U.S. into 172 EAs, effective April 10, 1995, to facilitate regional economic analysis. Each EA consists of one or more economic nodes -- metropolitan areas or similar areas that serve as centers of economic activity -- and the surrounding counties that are economically related to the nodes. Final Redefinition of the BEA Economic Areas, Department of Commerce, Docket No. 950-3020-64-5064-01, 60 Fed. Reg. 13,114 (Mar. 10, 1995).

geographic area paging licensees. Additionally, the Commission notes that BETRS operators will be able to obtain additional sites on a secondary basis.

Commenters are also opposed to geographic licensing for the shared channels and request that the Commission maintain the present system of site-by-site licensing for these channels. The commenters observe that these channels are predominantly used by small businesses. The Commission finds that the concerns raised by these commenters regarding the shared channels are well-founded and therefore declines to impose geographic area licensing for the shared channels.

C. Description and Number of Small Entities Involved

The rules adopted in this *Second Report and Order* will apply to current paging operators and new entrants into the paging market. Under these rules, exclusive 929 MHz paging licenses and licenses for all CCP channels will be granted on a market area basis, instead of site-by-site, and mutually exclusive applications will be resolved through competitive bidding procedures. In order to ensure the more meaningful participation of small business entities in the auction for mutually exclusive geographic area paging licenses the Commission has adopted a two-tier definition of small businesses. A small business will be defined for these purposes as either (1) an entity that, together with its affiliates and controlling principals, 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 principals, has average gross revenues for the three preceding years of not more than \$15 million. The Small Business Administration (SBA) has not yet approved this definition for paging services. The Commission will utilize the SBA's definition applicable to radiotelephone companies, *i.e.*, an entity employing less than 1,500 persons.⁷

The Commission anticipates that a total of 16,630 non-nationwide geographic area licenses will be auctioned. The geographic area licenses subject to auction will consist of 2,550 MTA licenses and 14,080 EA licenses. In addition to the 47 Rand McNally MTAs, the Commission is adding three MTAs for the U.S. territories of (1) Guam and the Northern Mariana Islands, (2) Puerto Rico and the U.S. Virgin Islands, and (3) American Samoa. The Commission is also licensing Alaska as a single MTA separate from the Seattle MTA. There will be a total of 51 MTA licenses auctioned for each non-nationwide 931 MHz and exclusive 929 MHz channel. Auctions of paging licenses have not yet been held, and there is no basis to determine the number of licenses that will be awarded to small entities. Given the fact that nearly all radiotelephone companies have fewer than 1,000 employees,⁸ and that no reliable estimate of the number of prospective paging licensees can be made,

⁷ See 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) Code 4812.

⁸ The 1992 Census of Transportation, Communications, and Utilities, conducted by the Bureau of the Census, shows that only 12 radiotelephone firms out of a total of 1,178 such firms which operated during 1992 had 1,000 or more employees. U.S. Bureau of the Census, U.S. Department of Commerce, 1992 Census of Transportation, Communications, and Utilities, UC92-S-1, Subject Series, Establishment and Firm Size, Table 5, Employment Size of Firms: 1992, SIC Code

the Commission assumes, for purposes of the evaluations and conclusions in this Final Regulatory Flexibility Analysis, that all the auctioned 16,630 geographic area paging licenses will be awarded to small entities, as that term is defined by the SBA.

D. Summary of Projected Reporting, Recordkeeping and Other Compliance Requirements:

Geographic area paging licensees may be required to report information concerning the location of their transmission sites under some circumstances,⁹ although generally they will not be required to file applications on a site-by-site basis. Additionally, geographic area license applicants will be subject to reporting and recordkeeping requirements to comply with the competitive bidding rules. Specifically, applicants will apply for paging license auctions by filing a short-form application (FCC Form 175). Winning bidders will file a long-form application (FCC Form 600) at the conclusion of the auction. Additionally, entities seeking treatment as small businesses will need to submit information pertaining to the gross revenues of the small business applicant and its affiliates and controlling principals. Such entities will also need to maintain supporting documentation at their principal place of business.

Section 309(j)(4)(E) of the Communications Act directs the Commission to "require such transfer disclosures and anti-trafficking restrictions and payment schedules as may be necessary to prevent unjust enrichment as a result of the methods employed to issue licenses and permits."¹⁰ The Commission adopted safeguards designed to ensure that the requirements of this section are satisfied, including a transfer disclosure requirement for paging licenses obtained through the competitive bidding process. An applicant seeking approval for a transfer of control or assignment of a license within three years of receiving a new license through a competitive bidding procedure must, together with its application for transfer of control or assignment, file with the Commission a statement indicating that its license was obtained through competitive bidding. Such applicant must also file with the Commission the associated contracts for sale, option agreements, management agreements, or other documents disclosing the total consideration that the applicant would receive in return for the transfer or assignment of its license.

With respect to small businesses, the Commission has adopted unjust enrichment provisions to deter speculation and participation in the licensing process by those who do not intend to offer service to the public, or who intend to use the competitive bidding process to obtain a license at a lower cost than they would otherwise have to pay and to later sell it at a profit, and to ensure that large businesses do not become the unintended beneficiaries of measures meant to help small firms. Small business licensees seeking to transfer their licenses to entities which do not qualify as small

4812 (issued May 1995).

⁹ See, e.g., 47 C.F.R. § 1.1301 *et seq.*

¹⁰ 47 U.S.C. § 309(j)(4)(E).

businesses (or which qualify for a lower bidding credit), as a condition of approval of the transfer, must remit to the government a payment equal to a portion of the value of the benefit conferred by the government.

Finally, applicants and licensees claiming eligibility for competitive bidding as a small business are subject to audits by the Commission. Selection for audit may be random, on information, or on the basis of other factors. Consent to such audit is part of the certification included in the short-form application (FCC Form 175).

E. Steps Taken to Minimize Burdens on Small Entities:

Section 309(j)(3)(B) of the Communications Act¹¹ provides that in establishing eligibility criteria and bidding methodologies the Commission shall, *inter alia*, promote economic opportunity and competition and ensure that new and innovative technologies are readily accessible by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women. Section 309(j)(4)(A) provides that in order to promote such objectives, the Commission shall consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, or other schedules or methods.¹² In awarding geographic area paging licenses the Commission is committed to meeting the statutory objectives of promoting economic opportunity and competition, of avoiding excessive concentration of licenses, and of ensuring access to new and innovative technologies by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women. The Commission finds that it is appropriate to establish special provisions in the paging rules for competitive bidding by small businesses. The Commission believes that small businesses applying for paging licenses should be entitled to bidding credits and should be permitted to pay their bids in installments.

In order to ensure the more meaningful participation of small business entities in paging auctions, the Commission has adopted a two-tiered definition of small businesses. This approach will give qualifying small businesses bidding flexibility. A small business will be defined as either (1) an entity that, together with its affiliates and controlling principals, 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 principals, has average gross revenues for the three preceding years of not more than \$15 million. The Commission will require that in order for an applicant to qualify as a small business, qualifying small business principals must maintain control of the applicant. The Commission has established bidding credits consistent with the two-tiered definition of a small business. Small

¹¹ 47 U.S.C. § 309(j)(3)(B).

¹² 47 U.S.C. § 309(j)(4)(A).

businesses that, together with affiliates and controlling principals, have average gross revenues for the three preceding years of not more than \$3 million will receive a 15 percent bidding credit. Small businesses that, together with affiliates and controlling principals, have average gross revenues for the three preceding years of not more than \$15 million will receive a bidding credit of 10 percent.

Additionally, licensees who qualify as small businesses in the geographic area paging license auction will be entitled to pay their winning bid amount in quarterly installments over the term of the license, with interest charges to be fixed at the time of licensing at a rate equal to the rate for ten-year U.S. Treasury obligations plus 2.5 percent. Licensees who qualify for this installment payment plan will be permitted to make interest-only payments for the first two years of the license term. Timely payment of all installments will be a condition of the license grant, and failure to make such timely payments will be grounds for revocation of the license.

The Commission is also extending geographic partitioning of MTA and EA license areas to all entities eligible to be paging licensees.¹³ The Commission believes that this provision will allow paging licensees to tailor their business strategies and allow them to use the spectrum more efficiently, will allow more entities to participate in the provision of paging services, and will facilitate market entry by small entities that have the ability to provide service only to a limited population. Additionally, the Commission is maintaining the current site-by-site licensing procedure for the shared channels.

F. Significant Alternatives Considered and Rejected:

The Commission considered and rejected a proposal for geographic area licensing using MTAs for all licenses. Commenters opposed this proposal, contending that MTAs were too large for the smaller paging systems. The Commission believes that the advantages of geographic area licensing -- flexibility, enhanced regulatory symmetry with other CMRS, and eliminating the inefficiencies in the licensing process -- are applicable to the UHF and VHF¹⁴ channels, particularly for regional paging services offered on these bands. Based on the record in this proceeding, the Commission concludes that EAs would be more appropriate than MTAs for the paging channels below 931 MHz. The Commission agrees with the commenters that the geographical definition used should correspond as much as possible to the geographic area that the paging licensees seek to serve, and concludes that EAs, which are smaller than MTAs, would facilitate the ability of paging operators of smaller systems to participate in geographic area licensing.

Additionally, the Commission considered and rejected converting all or some of the shared channels to exclusive use and implementing geographic area licensing. The Commission also

¹³ Partitioning is the assignment of geographic portions of the license along geopolitical or other boundaries.

¹⁴ The VHF band is 30 MHz to 300 MHz and the UHF band is 300 MHz to 3000 MHz.

considered and rejected limiting the number of licensees on the shared channels. In the *Notice*, the Commission asked for comment on whether to (1) convert the shared channels to exclusive use and implement geographic licensing; (2) limit the number of licenses per shared channel and use competitive bidding to choose among applications once the limit is reached; or (3) retain the *status quo*. Most commenters opposed geographic area licensing for the shared channels, because paging systems on these channels are smaller paging systems, not wide-area systems. The Commission observed that smaller paging systems have been able to utilize these channels effectively on a shared basis. Most of the commenters requested that the Commission maintain the present system of site-by-site licensing. The Commission noted that attempting to superimpose a geographic licensing scheme on channels that have historically been shared could cause significant disruption to existing operations. Additionally, the Commission declined to adopt a cap on licensing shared channels, or to convert certain shared channels to exclusive licensing. The difficulty with a licensing cap, as noted by several commenters, is that it is the amount of time a paging channel is used and the transmission equipment and protocol used, not the number of licensees, that determines the capacity limits of a channel. The Commission was also concerned that picking certain shared channels to be designated as exclusive would only cause greater pressure on the remaining shared channels and therefore could limit opportunities for entry by smaller systems. The Commission concluded that the shared channels should not be converted to exclusive use, and the number of licensees should not be limited in order to provide continued opportunities for paging operators, particularly small businesses.

With respect to competitive bidding rules, the Commission considered using a market-by-market stopping rule, which many commenters favored in order to facilitate bringing an earlier end to the auction and permitting the earlier close of uncontested markets. The Commission adopted instead a hybrid simultaneous/license-by-license stopping rule, which combines the advantages of a simultaneous stopping rule and a license-by-license stopping rule. This approach will prevent the auction from being unreasonably long while also preserving bidders' flexibility to pursue back up strategies and acquire licenses that are consistent with their business plans.

The Commission also considered allowing small businesses that are winning bidders to pay a lower down payment than non-small businesses. The Commission concluded, however, that all winning bidders should pay a down payment of 20 percent of their winning bids. The Commission believes that a substantial down payment is necessary to ensure that winning bidders have the financial capability of building out their systems, and will provide stronger assurance against defaults than a reduced down payment. Increasing the amount of the bidder's funds at risk in the event of default discourages insincere bidding and therefore increases the likelihood that licenses are awarded to parties who are best able to serve the public. The Commission also believes that a 20 percent down payment should cover the required payments in the unlikely event of default.

The Commission requested comment on whether, in addition to small business provisions, separate provisions should be adopted for minority- and women-owned entities. Few comments were received on this issue, and commenters failed to provide record evidence of discrimination sufficient to support race-based provisions under the strict scrutiny standard of judicial review. The

Commission is also concerned that the record would not support gender-based provisions under intermediate scrutiny. Balancing its obligation to provide opportunities for women- and minority-owned businesses to participate in spectrum-based services against its statutory duties to facilitate the rapid delivery of new services to the American consumer and promote efficient use of the spectrum, the Commission concluded that it should not delay paging service auctions for the amount of time it would take to adduce sufficient evidence to support race- and gender-based provisions. The Commission believes that most minority- and women-owned businesses will be able to take advantage of the specific provisions that it has adopted for small businesses.

The Commission proposed, with respect to installment payments, that small businesses with not more than \$3 million in average gross revenues for the preceding three years be permitted to make interest-only payments for the first five years of the license term, while small businesses with not more than \$15 million in average gross revenues for the preceding three years be permitted to make interest-only payments during the first two years. The Commission concluded, however, that all licensees qualifying for installment payments should be allowed to make interest-only payments only for the first two years of the license term. The Commission declined to adopt a longer interest-only period for small businesses with average gross revenues of not more than \$3 million. The Commission believes that the two-year interest-only period provides small businesses with the appropriate level of financing to overcome difficulties in attracting capital. Given that additional financial assistance is being made available to very small businesses in the form of a 15 percent bidding credit, the Commission does not think a longer interest-only period is needed.

The Commission sought comment on the need, if any, for a reduced upfront payment for entities qualifying as a small business. The Commission did not, however, adopt reduced upfront payment rules for small businesses participating in the paging license auction because it believes that a uniform upfront payment provision for all bidders in the auction is necessary in order to deter speculation and to ensure that only sincere bidders participate in the auction.

Finally, the Commission considered but elected not to adopt a spectrum set-aside for entrepreneurs. In the *Notice*, the Commission tentatively concluded that it was not necessary to adopt an entrepreneurs' block for paging license auctions, and most commenters opposed the creation of an entrepreneurs' block or other form of spectrum set-aside for paging license auctions. The Commission believes that the large number of licenses of different sizes that will be available in the paging auctions should allow for extensive participation of small businesses without an entrepreneurs' block. Moreover, the Commission believes that the special provisions for small businesses that it has adopted, including installment payments and tiered bidding credits, will give small businesses a significant opportunity to acquire paging licenses through auctions.

G. Report to Congress

The Commission shall send a copy of this Final Regulatory Flexibility Analysis, along with this *Second Report and Order*, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. § 801(a)(1)(A). A copy of this Final Regulatory Flexibility Analysis will also be published in the Federal Register.

APPENDIX D**Initial Regulatory Flexibility Analysis**
Further Notice of Proposed Rulemaking

As required by Section 603 of the Regulatory Flexibility Act, 5 U.S.C. § 603 (RFA), the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the policies and rules proposed in this *Further Notice of Proposed Rulemaking (FNPRM)*. Written public comments are requested on the IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Further Notice of Proposed Rulemaking*.

A. Reason for Action

This rulemaking proceeding was initiated to secure comment on proposals for establishing a regulatory scheme for the common carrier paging (CCP) and private carrier paging (PCP) services which would promote efficient licensing and competition in the commercial mobile radio marketplace. The Commission seeks further comment on several issues: whether nationwide licenses should be subject to coverage requirements, how bidding credits and installment payments should be treated in cases where small businesses wish to partition their licenses, how build-out requirements and license term are affected in cases of geographic partitioning by paging market area licensees, whether spectrum disaggregation is feasible for paging licensees, and revisions to the current FCC Form 600 and the application procedures for licenses on the shared channels to reduce paging application fraud.

B. Objectives

The *Second Report and Order* grants 26 nationwide geographic area licenses to nationwide paging licensees, but does not impose any additional coverage beyond what the nationwide licensees have already achieved. There are no coverage requirements imposed on the non-nationwide geographic area licensees. In the *FNPRM* the Commission seeks comment on whether coverage requirements are appropriate.

In the *Second Report and Order* the Commission allows all licensees, including small business licensees, to partition at any time to another eligible entity. In the *FNPRM* the Commission proposes that unjust enrichment provisions should apply when a small business licensee has benefitted from the small business provisions in the auction rules and then partitions a portion of the license area to another entity that would not qualify for such benefits, or would qualify for a lower bidding credit. Without the unjust enrichment provisions on such transactions, a small business could benefit from special bidding provisions and then become unjustly enriched by immediately partitioning a portion of the license area to parties that do not qualify for such benefits. The objective of this proposal is to prevent unjust enrichment.

In the *FNPRM* the Commission seeks comment on build-out requirements and license term for partitioned geographic area licenses (including nationwide licenses). The Commission also seeks comment on whether nationwide licensees should be permitted to partition their license area, build-out requirements for partitioned nationwide licenses, and the license term of partitioned nationwide licenses.

In the *FNPRM* the Commission seeks comment on whether spectrum disaggregation would be feasible for paging, and how much spectrum a paging licensee should be permitted to disaggregate. The Commission seeks comment on build-out requirements and license term for disaggregated geographic area licenses. If spectrum disaggregation is feasible in paging it may facilitate the efficient use of spectrum, increase competition, and expedite service to the public.

The Commission also seeks comment on paging application fraud, an issue raised by the Federal Trade Commission. Specifically, the Commission seeks comment on whether the current FCC Form 600 should be revised to warn paging applicants of the risk of application fraud, and whether application preparation services should be required to certify that the applicant has received information regarding the Commission's rules and the obligations of licensees. Additionally, commenters are invited to address whether the frequency coordinator should implement additional procedures to reduce fraudulent or speculative paging applications. The objective of these proposals is to inform consumers of the rules and the prevalence of paging application fraud and thus reduce fraud and speculation.

C. Legal Basis

The proposed action is authorized under Sections 4(i), 257, 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 257, 303(r), and 309(j).

D. Reporting, Recordkeeping, and Other Compliance Requirements

Nationwide Channels. The proposals in the *FNPRM* include the possibility of imposing reporting and recordkeeping requirements for the nationwide geographic area licensees to establish compliance with the coverage requirements, if coverage requirements are adopted.

Geographic Partitioning and Spectrum Disaggregation. The proposals in the *FNPRM* include the possibility of imposing reporting and recordkeeping requirements for small businesses seeking licenses through the proposed partitioning and disaggregation rules. The information requirements would be used to determine if the licensee is a qualifying entity 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 will be submitted on the FCC Forms 490 (or 430 and/or 600 filed as one package under cover of the Form 490) which are currently in use and have already received OMB clearance. 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 75 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 25 percent of respondents (which may include small businesses) are estimated to employ in-house staff to provide the information. Applicants (including small businesses) filing the package under cover of FCC Form 490 electronically will incur a \$2.30 per minute on-line charge. On-line time would amount to no more than 30 minutes. The Commission estimates that 75 percent of the applicants may file electronically. The Commission estimates that applicants contracting out the information would use an attorney or engineer (average of \$200 per hour) to prepare the information.

It is also possible that small business partitioners and disaggregators will be required to repay, on an accelerated basis, a portion of the outstanding principal balance owed under an installment payment plan. If unjust enrichment rules are applied to small businesses that partition or disaggregate to non-small businesses, or to small businesses qualifying for a lower bidding credit, small businesses may be required to reimburse the United States government for all or a portion of the special competitive bidding benefits they have received. This could include accelerated payment of bidding credits, unpaid principal, and accrued unpaid interest. It is also possible that each party to a partitioning or disaggregation transfer could be required to guarantee all or a portion of the partitioner's or disaggregator's original auctions-related obligation in the event of default or bankruptcy by any of the parties.

Shared Channels. The proposals in the *FNPRM* do not include the possibility of imposing reporting and recordkeeping requirements for small businesses seeking licenses for shared channels. The *FNPRM* seeks comment on whether the current FCC Form 600 application should be revised to warn applicants of the risk of application fraud; whether application preparation services should be required to certify that the applicant has received information regarding the Commission's rules; and whether the frequency coordinator should be required to implement additional procedures in the coordination process to reduce the likelihood of fraudulent applications. These proposals would, if implemented, furnish additional information to applicants. None of these proposals would impose reporting or recordkeeping requirements on small businesses.

E. Federal Rules which Overlap, Duplicate or Conflict with These Rules

None.

F. Description and Number of Small Entities Involved

Nationwide Channels. The rule changes discussed in the *FNPRM* with respect to implementing coverage requirements for the 26 nationwide licenses will probably not directly affect small businesses because nationwide licensees are probably not small businesses. However, if all 26 nationwide licenses are held by small businesses, the rule change would not affect more than 26 small businesses.

Geographic Partitioning and Spectrum Disaggregation. The partitioning and disaggregation rule changes proposed in this proceeding will affect all small businesses which avail themselves of these rule changes, including small businesses currently holding paging licenses who choose to partition and/or disaggregate and small businesses who may acquire licenses through partitioning and/or disaggregation.

The Commission is required to estimate in its Final Regulatory Flexibility Analysis the number of small entities to which a rule will apply, provide a description of such entities, and assess the impact of the rule on such entities. To assist the Commission in this analysis, commenters are requested to provide information regarding how many total entities, existing and potential, would be affected by the proposed rules in the *FNPRM*. In particular, the Commission seeks estimates of how many such entities will be considered small businesses. As explained in the Final Regulatory Flexibility Analysis for the *Second Report and Order*, the Commission is utilizing the SBA definition applicable to radiotelephone companies, *i.e.*, an entity employing less than 1,500 persons.¹⁵ The Commission seeks comment on whether this definition is appropriate for paging licensees in this context. Additionally, the Commission requests each commenter to identify whether it is a small business under this definition. If a commenter is a subsidiary of another entity, this information should be provided for both the subsidiary and the parent corporation or entity.

The Commission estimates that the approximately 600 current paging carriers could take the opportunity to partition and/or disaggregate a license or obtain an additional license through partitioning or disaggregation.¹⁶ New entrants could obtain paging licenses through the competitive bidding procedure, and take the opportunity to partition and/or disaggregate a license or obtain an additional license through partitioning or disaggregation. Additionally, entities that are neither incumbent licensees nor geographic area licensees could enter the market by obtaining a paging license through partitioning or disaggregation. The Commission estimates that up to approximately 50,000 licensees or potential licensees could take the opportunity to partition and/or disaggregate a license or obtain a license through partitioning and/or disaggregation. This number is based on the total current estimate of paging carriers (approximately 600) and non-nationwide geographic area licenses to be awarded (16,630) and an estimate that each license will probably not be partitioned and/or disaggregated to more than three parties. Given the fact that nearly all radiotelephone companies have fewer than 1,000 employees, and that no reliable estimate of the number of future paging licensees can be made, the Commission assumes for purposes of this IRFA that all of the licenses will be awarded to small businesses. It is possible that a significant number of the up to approximately 50,000 licensees or potential licensees who could take the opportunity to partition

¹⁵ 13 C.F.R. § 121.201, Standard Industrial Classification Code 4812.

¹⁶ See Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993, *First Report*, 10 FCC Rcd 8844, 8854, ¶ 30 (1995) (estimating that there are currently between 500 and 600 paging carriers in the United States).

and/or disaggregate a license or who could obtain a license through partitioning and/or disaggregation will be small businesses.

Shared Channels. The rule changes proposed in the *FNPRM* with respect to adding information to the FCC Form 600 to warn prospective applicants about paging application fraud would probably not have an impact on any small business or other entity applying for a paging license on a shared channel. The proposed changes to the paging license application are intended to warn consumers about the prevalence of application fraud.

G. Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives

The Commission seeks comment on whether coverage requirements should be imposed for the nationwide geographic area licensees. Any significant alternatives presented in the comments will be considered. Coverage requirements for the nationwide geographic area licensees, if adopted, would probably not affect small businesses.

With respect to partitioning, the Commission seeks comment on whether nationwide licensees should be permitted to partition their license area, build-out requirements for partitioned nationwide licenses, and license term of partitioned nationwide licenses. For MTA and EA geographic area licenses, the Commission proposes that unjust enrichment provisions should apply when a licensee has benefitted from the small business provisions in the auction rules and partitions a portion of the geographic license area to another entity that would not qualify for such benefits. The alternative to applying the unjust enrichment provisions would be to allow an entity who had benefitted from the special bidding provisions for small businesses to become unjustly enriched by partitioning a portion of their license area to parties that do not qualify for such benefits. The Commission also seeks comment on build-out requirements and license term for partitioned MTA and EA geographic area licenses.

The Commission seeks comment on whether spectrum disaggregation would be feasible for paging, and how much spectrum a paging licensee should be permitted to disaggregate. The Commission seeks comment on build-out requirements and license term for disaggregated geographic area licenses. If spectrum disaggregation is feasible in paging it may facilitate the efficient use of spectrum, increase competition, and expedite service to the public.

The Commission also seeks comment on an issue raised by the Federal Trade Commission in comments regarding paging application fraud. Specifically, the Commission seeks comment on whether the current FCC Form 600 should be revised to warn applicants of the risk of application fraud, and whether application preparation services should be required to certify that the applicant has received information regarding the Commission's rules and the obligations of licensees. Commenters are invited to address whether the frequency coordinator should implement additional procedures to reduce fraudulent or speculative paging applications. The alternative to revising the

application and/or the coordination process would be to allow application mill fraud which may affect many unwitting consumers.

The *FNPRM* solicits comment on a variety of alternatives discussed herein. Any significant alternatives presented in the comments will be considered.