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

In the Matter of	)	
	)	
Amendment of Part 95 of the Commission's	)	WT Docket No. 98-169
Rules to Provide Regulatory Flexibility in the	)	RM-8951
218-219 MHz Service	)	

REPORT AND ORDER
AND MEMORANDUM OPINION AND ORDER

Adopted: September 7, 1999 **Released:** September 10, 1999

By the Commission:

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I. INTRODUCTION

1. In a *Notice of Proposed Rulemaking* released September 17, 1998,[1] we undertook a comprehensive examination of the Commission's regulations governing the licensing and use of frequencies in the 218-219 MHz band. We sought comment on what actions we could take to improve the efficiency of spectrum use, reduce the regulatory burden on spectrum users, encourage competition and provide services to the largest feasible number of users within the 218-219 MHz band.[2] We proposed measures to provide additional flexibility for the use of the service, in the belief that additional flexibility would further these goals.[3] We now address our proposed changes to the 218-219 MHz Service and the comments those proposals generated.

2. In this *Report and Order and Memorandum Opinion and Order (Report and Order)*, we modify our regulations governing the licensing of the 218-219 MHz Service to maximize the efficient and effective use of the 218-219 MHz frequency band.[4] We believe that these rule changes create a regulatory structure that will enable licensees to meet the public's current and future needs through the most technically and economically efficient use of this spectrum practicable.

3. Additionally, we address the constitutional issues raised by Graceba Total Communications, Inc., a winning bidder in the July 1994 auction of this service, that are before us on remand from the D.C. Circuit Court of Appeals (D.C. Circuit), as well as similar issues raised by commenters in this proceeding. We believe that the measures taken in this *Report and Order* are in the public interest and will resolve all outstanding issues concerning the 1994 auction.

II. EXECUTIVE SUMMARY

4. The following is a synopsis of the major actions we adopt. In this *Report and Order*, we:

! Conclude that licensees can best design service offerings to meet market demand through the redesignation of the 218-219 MHz Service from a strictly private radio service (*i.e.*, a service that is used to support the internal communications requirements of an entity) to a service that can be used in both common carrier and private operations;

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[1] *Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service and Amendment of Part 95 of the Commission's Rules to Allow Interactive Video and Data Service Licensees to Provide Mobile Services (proceeding terminated), Order, Memorandum Opinion and Order, and Notice of Proposed Rulemaking*, 13 FCC Rcd 19064 (1998) (*218-219 MHz Flex Order*; *218-219 MHz Flex MO&O*; or *218-219 MHz Flex NPRM*).

[2] *Id.*, 13 FCC Rcd at 19066.

[3] While our proposals are designed to foster service in the 218-219 MHz band, the Commission makes no representations or warranties about the use of this spectrum for particular services.

[4] *See* 47 C.F.R. Part 95, Subpart F.

! Clarify that both one- and two-way communications and Response Transmitter Unit-to-Response Transmitter Unit (RTU-to-RTU) communications, regardless of regulatory status, is permitted in the 218-219 MHz Service;

! Extend the term of 218-219 MHz Service licenses to ten years from the date of the license grant;

! Adopt a restructuring plan for existing licensees that (i) were current in installment payments; (ii) were less than ninety days delinquent on the last payment due before March 16, 1998; or (iii) had properly filed grace period requests under the former installment payment rules ("Eligible Licensees");

! Permit Eligible Licensees to choose (i) reamortization of principal and interest installment payments over a ten-year period; (ii) an amnesty option wherein Eligible Licensees surrender any licenses they choose to the Commission for subsequent auction and, in return, have all of the outstanding debt on those licenses forgiven; or (iii) a prepayment option whereupon licensees may retain or return as many licenses as they desire; however, licensees electing the prepayment option must prepay the outstanding principal of any license they wish to retain;

! Address petitions, comments and reply comments raising constitutional challenges to the Commission's race- and gender-based bidding credits used in the 1994 auction of this service;

! Eliminate from our rules the minority- and women-owned business bidding credits and simultaneously grant credits of commensurate size to all winning small business bidders in the 1994 auction of this service;

! Eliminate the three- and five-year construction benchmarks and adopt a "substantial service" analysis to be assessed at the expiration of the 218-219 MHz license term as a condition for renewal;

! Relax the license transfer restriction for licenses acquired by lottery;

! Remove the cross-ownership restriction and allow ownership of both frequency segment A (218.0-218.5 MHz) and frequency segment B (218.5-219.0 MHz) in the same service area;

! Permit partitioning and disaggregation of spectrum in the 218-219 MHz Service;

! Replace service-specific technical standards with regulations that are applicable to all permissible uses of the 218-219 MHz Service, but retain and modify the requirement that 218-219 MHz Service licensees provide absolute interference protection;

! Conclude that the Part 1 rules will govern competitive bidding issues in the 218-219 MHz Service;

! Retain the current small business size standards applicable to the 218-219 MHz Service.

5. Moreover, in a *Memorandum Opinion and Order*, we dismiss the petition filed by Interactive

America Corporation ("IAC") on December 27, 1996, asking for reconsideration of rules we adopted for the second auction of 218-219 MHz Service licenses (Auction No. 13).[5]

III. BACKGROUND

6. The 218-219 MHz Service is designated as a point-to-multipoint, multipoint-to-point, short-distance private radio service in which licensees may provide information or services to individual subscribers within a service area, and subscribers may provide interactive responses.[6] These systems use radio channels in the 218-219 MHz band for fixed and mobile services between the licensee's cell transmitter station (CTS) and the subscriber's response transmitter unit (RTU), or between two CTSs.[7]

7. The 218-219 MHz Service was initially designated the "Interactive Video and Data Service" (IVDS), and was established in response to a petition for rulemaking filed by TV Answer, Inc. (TV Answer) (now known as EON Corporation (EON)), that proposed interactive capabilities for television viewers.[8] The *1992 Allocation Report and Order*[9] established the 218-219 MHz Service with a 500 kilohertz frequency segment for two licenses in each of the 734 cellular-defined service areas.[10] The original licensing criteria the Commission established included: a five-year license term; restrictions on ownership of both frequency segments in a given market; and specific construction benchmarks.[11] In addition, based on the service model proposed by TV Answer, the Commission

adopted specific technical requirements designed to reduce the potential for harmful interference to nearby

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[5] Auction No. 13 was initially scheduled to commence on February 18, 1997. However, on January 29, 1997, the auction was postponed.

[6] 47 C.F.R. § 95.803(a).

[7] 47 C.F.R. §§ 95.803(b), 95.805(a)-(b), (e).

[8] Amendment of Parts 0, 1, 2 and 95 of the Commission's Rules to Provide for Interactive Video Data Services, GEN Docket No. 91-2, *Notice of Proposed Rule Making*, 6 FCC Rcd 1368 (1991) (*Allocation Notice*).

[9] Amendment of Parts 0, 1, 2 and 95 of the Commission's Rules to Provide Interactive Video and Data Services, GEN Docket No. 91-2, *Report and Order*, 7 FCC Rcd 1630, 1630-33 (1992) (*1992 Allocation Report and Order*), *on recon.*, *Memorandum Opinion and Order*, 7 FCC Rcd 4923 (1992), *further recon.*, *Second Memorandum Opinion and Order*, 8 FCC Rcd 2787 (1993).

[10] *1992 Allocation Report and Order*, 7 FCC Rcd at 1630-33. The 218.0-218.5 MHz block is frequency segment A, and the 218.5-219.0 MHz block is frequency segment B. 47 C.F.R. § 95.853(a). These service areas consist of 306 Metropolitan Statistical Areas (MSAs) and 428 Rural Service Areas (RSAs). Thus, a total of 1468 licenses — consisting of 612 MSA licenses and 856 RSA licenses — were allocated for this service.

[11] *1992 Allocation Report and Order*, 7 FCC Rcd at 1637-41.

operations, including reception of TV Channel 13 broadcasts in the 210-216 MHz band.[12]

8. We have issued 218-219 MHz Service licenses by both random selection (lottery) and competitive bidding (auction). On September 15, 1993, eighteen 218-219 MHz Service system licenses were awarded by lottery.[13] They were granted on March 28, 1994. In the Omnibus Budget Reconciliation Act of 1993 (*1993 Budget Act*), Congress authorized the Commission to award licenses for certain spectrum-based services by auction.[14] We subsequently determined that 218-219 MHz Service licenses should be awarded by competitive bidding and adopted rules and procedures for this licensing structure.[15] Using these procedures, we held the first auction for 218-219 MHz Service licenses on July 28 and 29, 1994, covering the remaining licenses.[16] On January 18, 1995, and February 28, 1995, the Commission conditionally granted licenses to the winning bidders, subject to the bidder satisfying the terms of the auction rules, including down payment requirements.[17]

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[12] *Id.* at 1633-37.

[13] Public Notice, Interactive Video and Data Service Licenses Granted, Mimeo No. 42412 (released Mar. 30, 1994). The September 1993 IVDS lottery was permitted under the *Omnibus Budget Reconciliation Act of 1993*, Pub. L. No. 103-66, Title VI, § 6002(a), 107 Stat. 312, 387 (1993) (*1993 Budget Act*), the pertinent applications having been accepted for filing by the Commission prior to July 26, 1993. *1993 Budget Act* § 6002(e).

[14] *1993 Budget Act* § 6002(e).

[15] *Second Report and Order*, 9 FCC Rcd 2348 (1994) (*Competitive Bidding Second Report and Order*), *on recon.*, *Second Memorandum Opinion and Order*, 9 FCC Rcd 7245 (1994) (determining that 218-219 MHz Service licenses should be awarded through competitive bidding and prescribing certain general rules and procedures to be used for all auctionable services); Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Fourth Report and Order*, 9 FCC Rcd 2330 (1994) (*Competitive Bidding Fourth Report and Order*), *on recon.*, *Sixth Memorandum Opinion and Order and Further Notice of Proposed Rule Making*, 11 FCC Rcd 19341 (1996) (*Competitive Bidding Sixth MO&O/Further Notice*) (establishing specific auction procedures for the 218-219 MHz Service, setting forth auction methodology and payment procedures, incorporating by reference many of the general rules and procedures set forth in the *Competitive Bidding Second Report and Order*, such as the installment payment and associated grace period rules, and establishing provisions such as installment payments to ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women (collectively, "designated entities") are afforded a meaningful opportunity to participate in 218-219 MHz Service auctions).

[16] Public Notice, Announcing High Bidders for 594 Interactive Video and Data Service (IVDS) Licenses, Mimeo No. 44160 (released Aug. 2, 1994), *erratum*, Public Notice, Mimeo No. 44265 (released Aug. 9, 1994). A total of 594 MSA licenses were auctioned in the 298 MSAs that had not been licensed by lottery.

[17] *See* News Release, Interactive Video and Data Service (IVDS) Applications to be Granted January 18, 1995, Mimeo No. 51403 (Dec. 29, 1994) (listing first group of grants); Public Notice, Interactive Video and Data Service (IVDS) Applications to be Granted February 28, 1995, 10 FCC Rcd 3388 (1995) (listing second group of grants). More recently, in the *Part 1 Third Report and Order*, we streamlined the general competitive bidding procedures to provide a uniform set of Part 1 provisions to be applied to all auctionable services, including the 218-219 MHz Service. *See* Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, 4660-4685 MHz, WT Docket No. 97-82, ET Docket No. 94-32, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374 (1997) (*Part 1 Third Report and Order*). The new Part 1 license-related payment rules apply to existing 218-219 MHz Service licensees effective March 16, 1998. *Id*. at 385. The summary of the *Part 1 Third Report and Order* appeared in the Federal Register on January 15, 1998 (*see* 63 Fed. Reg. 2315) so the revised license-related payment terms took effect on March 16, 1998.

9. Graceba Total Communications, Inc. (Graceba) – a winning bidder on two markets – filed two petitions challenging the 218-219 MHz Service auction methodology as artificially inflating prices and challenging the constitutionality of the bidding credits that were awarded in the auction.[18] Graceba did not qualify for a bidding credit. Graceba requested a twenty-five percent reduction in its total bid amount. In December 1995, the Commission denied Graceba's petitions.[19] Upon appeal by Graceba, the U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) remanded the constitutional issue to the Commission for further consideration.[20] In the course of Graceba's litigation, two other parties – Community Teleplay, Inc. (Community) and the IVDS Coalition (Coalition) – intervened in support of Graceba's constitutional arguments. An Application for Review raising these issues remains pending before the Commission.[21]

10. On September 4, 1996, Euphemia Banas, *et al*. (collectively, "Petitioners") filed a Petition for Rulemaking, seeking a change in the 218-219 MHz Service license term from five to ten years, with a corresponding extension of the installment payment amortization.[22] The Petition for Rulemaking was later amended with requests for regulatory relief on issues such as construction benchmarks, ownership limitations, and technical restrictions.[23] In order "to give the Commission an opportunity to consider [the] Petition for Rulemaking and numerous informal requests of potential bidders and license holders seeking to obtain additional flexibility for the service," the Wireless Telecommunications Bureau (Bureau) postponed a planned auction of 981 licenses that was to begin on February 18, 1997.[24]

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[18] *See infra*, para. 56.

[19] *See* In the Matter of Interactive Video and Data Service (IVDS) Licenses, *Order*, 11 FCC Rcd 1282 (1995).

[20] *Graceba Total Communications, Inc. v. FCC*, 115 F.3d 1038 (D.C. Cir. 1997).

[21] *See* Application for Review of Community, filed June 29, 1998.

[22] Petition for Rulemaking of Euphemia Banas, Trans Pacific Interactive, Inc., Wireless Interactive Return Path, LLC, New Wave Communications, LLC, Loli, Inc., Multimedia Computer Communication, Inc., Southeast Equities, Inc., Robert H. Steele, MAR Partnership, IVDS On-Line Partnership, A.B.R. Communications Inc., IVIDCO, LLC, Vision TV, Dunbar TV Corp., and Legacy TV, Inc. (Sept. 4, 1996) (Petition for Rulemaking). The Commission designated the Petition for Rulemaking as RM-8951. *See* Public Notice, Report No. 2166 (Nov. 22, 1996) (setting comment date of Dec. 23, 1996). Comments in support of the Petition for Rulemaking were timely filed by ITV, In-Sync, and Progressive Communications, Inc. (Progressive).

[23] *See* Letter Amendment to Petition for Rulemaking, RM-8951 (Jan. 28, 1997) (Letter Amendment); Second Letter Amendment to Petition for IVDS Rulemaking, RM-8951 (Feb. 26, 1997) (Second Letter Amendment); Third Letter Amendment to IVDS Petition for Rulemaking, RM-8951 (Mar. 13, 1998) (Third Letter Amendment). The IVDS License Holders Committee, an ad-hoc coalition, informally contacted Commission staff with similar requests. *See, e.g.*, Letter from Michele C. Farquhar, Chief, Wireless Telecommunications Bureau to Donald F. Lounibos, IVDS License Holders Committee (Jan. 8, 1997) (responding to issues raised by the Committee at a meeting held with Commission staff on November 13, 1996, and in a follow-up electronic mail correspondence). We received no comments in opposition to the Petition for Rulemaking.

[24] Wireless Telecommunications Bureau Postpones February 18, 1997 Auction Date for 981 Interactive Video and Data Service (IVDS) Licenses, *Public Notice*, 12 FCC Rcd 1389 (1997). The auction was announced on December 4, 1996, and was to consist of the unauctioned 856 RSA licenses, and 125 MSA licenses being reauctioned because the first auction winners were found in default. Auction of Interactive Video and Data Service (IVDS) – Auction Notice and Filing Requirements for 981 IVDS Licenses Scheduled for February 18, 1997, *Public Notice*, 11 FCC Rcd 20950 (1996). The Bureau announced postponement of the auction on January 29, 1997. Wireless Telecommunications

11. Under the Commission's competitive bidding rules in effect at the time of the July 28 and 29, 1994, auction, winning bidders that qualified as small businesses were allowed to pay twenty percent of their net bid(s) as a down payment and the remaining eighty percent in installments over the five-year term of the license(s), with interest-only payments for the first two years, and interest and principal payments amortized over the remaining three years.[25] The first interest-only payment, due March 31, 1995, was deferred to June 30, 1995, pursuant to administrative action by the Office of Managing Director.[26] The Bureau further stayed the date for making the initial interest-only payments pending Commission resolution of licensees' substantive requests related to the payment requirements.[27] The Bureau lifted the stay effective January 5, 1996, on which date licensees were required to make the interest-only payments back-due from March 31, 1995 and June 30, 1995.[28] Although the interest-only payments due September 30, 1995 and December 31, 1995 remained

uncollected,[29] we denied requests to set back the installment payment date and the first principal and interest payments were due on March 31, 1997.[30]

12. In the *1995 IVDS Omnibus Order*, the Commission cautioned licensees that if they individually required financial assistance, they should request a three- or six-month grace period during the first ninety days following any missed installment payments.[31] The Commission's rules in effect at that time provided that any licensee whose installment payment was more than ninety days past due was in default, unless the licensee properly filed a grace period request.[32] Licensees with properly filed grace period requests would not be held in default during pendency of their requests and the interest accruing would be amortized by adding it

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Bureau Postpones February 18, 1997 Auction Date for 981 Interactive Video and Data Service (IVDS) Licenses, *Public Notice*, 12 FCC Rcd 1389 (1997).

[25] 47 C.F.R. § 95.816(d)(3) (1994) (incorporating by reference 47 C.F.R. § 1.2110 (1994)).

[26] "Quarterly Installment Payments for IVDS `Auction' Licensees to Begin June 30, 1995," *Public Notice*, Mimeo No. 53031 (rel. Mar. 29, 1995).

[27] Interactive Video and Data Service (IVDS) Licensees, Request for Stay to Postpone Commencement of Installment Payment Program, *Order*, 11 FCC Rcd 3031 (WTB 1995).

[28] Interactive Video and Data Service (IVDS) Licensees, Various Requests by Auction Winners, *Order*, 11 FCC Rcd 1282, 1284, n.23 (1995) (*1995 IVDS Omnibus Order*).

[29] In the *218-219 MHz Flex NPRM*, these interest payments were referred to as "Suspension Interest."

[30] *1995 IVDS Omnibus Order*, 11 FCC Rcd at 1285.

[31] *Id*. *See also* 47 C.F.R. § 1.2110(e)(4)(ii); "Wireless Telecommunications Bureau Staff Clarifies `Grace Period' Rule for IVDS `Auction' Licensees Paying By Installment Payments," *Public Notice*, 10 FCC Rcd 10724 (WTB 1995).

[32] 47 C.F.R. § 1.2110(e)(4)(ii) and (iii); *see also* 47 C.F.R. § 95.816(c)(6) for references to default (incorporating by reference 47 C.F.R. § 1.2104).

to the other interest payments over the remaining term of the license.[33] Upon expiration of any grace period without successful resumption of payment, or upon default with no such request submitted, the license would cancel automatically.[34] The Commission amended the grace period rules in 1998 to provide for two automatic grace periods of ninety days,[35] subject to late fees. The 1998 amendment of the grace period rules did not affect pending grace period requests filed by 218-219 MHz Service licensees.[36]

13. To date, since the grants of initial authorizations in the service, the deployment of the 218-219 MHz Service has not been successful; in fact, the vast majority of licensees have yet to provide service. We have also taken steps to promote development of the 218-219 MHz Service. These include removal of the one-year construction benchmark; waiver of additional construction benchmarks for both lottery and auction licensees; and authorization of mobile as well as fixed operation on this spectrum.[37] However, with a few, limited exceptions, licensees have still been unable to offer services in the 218-219 MHz Service.[38] Moreover, those licensees actually deploying services are providing service different than that originally envisioned when the service was established.[39] In fact, several commenters also suggest that the concept of interactive television as originally envisioned when the Commission allocated the 218-219 MHz Service is no longer commercially viable.[40]

14. Against this backdrop, the Commission issued the *218-219 MHz Flex Order*, wherein it suspended the late payment fee and automatic cancellation provisions of Section 1.2110(f)(4) of the Commission's rules for 218-219 MHz Service licensees that had remitted adequate installment payments as of March 16, 1998, for the pendency of this rule making.[41] We also stayed decisions on grace period requests properly filed under the pre-1998 rules until resolution of the issues in the *218-219 MHz Flex*

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33 47 C.F.R. § 1.2110(e)(4)(ii)(iii) (1994).

34 *Id*.

35 *Part 1 Third Report and Order*, 13 FCC Rcd at 436. *See also* 47 C.F.R. § 1.2110(f)(4)(ii)(iii) (1998).

36 *218-219 MHz Flex Order*, 13 FCC Rcd at 19072.

37 *See* Amendment of Part 95 of the Commission's Rules to Modify Construction Requirements for Interactive Video and Data Service (IVDS) Licenses, WT Docket No. 95-131, *Report and Order*, 11 FCC Rcd 2472 (1996) (eliminating the one-year construction benchmark) (*One-Year Construction Report and Order*). Amendment of Part 95 of the Commission's Rules to Allow Interactive Video and Data Service Licensees to Provide Mobile Service to Subscribers, WT Docket No. 95-47, *Report and Order*, 11 FCC Rcd 6610 (1996) (*Mobility Report and Order*).

38 *See, e.g*, MKS Interactive Comments at 5. A complete list of commenters and reply commenters to this proceeding is provided in Appendix A.

39 *See* Community Comments at 3 (describing how Community "switched gears" after being unable to develop interactive television applications, and instead focused on wireless data applications for the 218-219 MHz Service).

40 *See, e.g.*, CRSPI Comments at 2 (calling the original concept for IVDS "obsolete").

41 *218-219 MHz Flex Order, MO&O, and NPRM*, 13 FCC Rcd at 19066 & 19073.

NPRM and resolved several matters raised in petitions for reconsideration of the Commission's *Mobility Report and Order*.[42] We also redesignated this service as the "218-219 MHz Service" to reflect the breadth of services available with this spectrum, and requested comments concerning proposals for both payment restructuring options and changes to the 218-219 MHz Service rules that are intended to allow 218-219 MHz Service providers to fully utilize the service.[43] By the instant *Report and Order*, we largely adopt our proposals with the expectation that these rule changes will foster full and effective development and deployment of the 218-219 MHz Service.

IV. DISCUSSION

A. Regulatory Status and Permissible Communications

15. *Background*. As part of our examination of the ways to maximize the efficient and effective use of the 218-219 MHz Service, we sought comment on what actions are necessary to afford 218-219 MHz Service providers the opportunity to design or alter their service offerings in response to market demand. We tentatively concluded that this goal could be met by redesignating the 218-219 MHz Service from a strictly private radio service[44] to a service that can be used in both common carrier and private operations, and that such an approach would be consistent with Commission precedent.[45] We also sought alternative proposals that would accomplish this goal.[46]

16. *Discussion*. Commenters in this proceeding supported the proposition that 218-219 MHz Service providers should be given maximum flexibility to tailor their services to meet market demand.[47] Our proposal to provide maximum flexibility by allowing both common carrier and private operations met with

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42 *Id.*

43 *Id.*, 13 FCC Rcd at 19066, 19073, & 19075-80.

44 When the 218-219 MHz Service was initially allocated, we concluded that, because of the personal nature of these communications and the fact that they are offered to the public on a subscription basis to individual members of the general public, the service should be classified as a Private Radio Service. *Allocation Notice*, 6 FCC Rcd at 1370.

45 *218-219 MHz Flex NPRM*, 13 FCC Rcd at 19082. The Commission has previously determined that authorizing a wide variety of service offerings within a service comports with its statutory authority and serves the public interest. *See, e.g.*, Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, CC Docket No. 92-297, *Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking*, 12 FCC Rcd 12545, 12636 (1997) (*LMDS Second Report and Order*). *Cf.* Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service, GN Docket No. 96-228, *Report and Order*, 12 FCC Rcd 10785, 10798-800 (1997) (*WCS Report and Order*).

46 *218-219 MHz Flex NPRM*, 13 FCC Rcd at 19082.

47 *See, e.g.*, Bay Area Comments at 2 (predicting that the 218-219 Service provides "a unique opportunity to demonstrate the extent to which market forces can replace regulation in the communications industry.")

near-unanimous support among commenters.[48] The Coalition noted that our proposal would allow 218-219 MHz Service providers the same freedom of choice of regulatory status as we have provided in other service areas.[49] The 218-219 MHz Licensees (218-219 MHz Group) agreed that our proposal would provide service flexibility.[50] Dispatch Interactive Television, Inc. (Dispatch) asserted that our proposal presents the best approach to ensure that 218-219 MHz spectrum is put to its highest and best use.[51]

17. AirTouch Paging (AirTouch), however, did not support our proposal. AirTouch predicts that 218-219 MHz Service providers may never offer the services as originally envisioned when this spectrum was allocated, and that providers are likely to offer other commercial services that generate greater revenue.[52] We will adopt our proposal to provide 218-219 MHz Service licensees with more flexibility. As Dispatch notes, our new rules will continue to allow 218-219 MHz Service licensees to provide services allowed under the current rules, but these entities will also have the flexibility to respond to market forces by offering additional or different services.[53] Our decision to give 218-219 MHz Service licensees additional flexibility is also consistent with our past treatment of the service. AirTouch correctly notes that in the *Mobility Report and Order*, the Commission considered and rejected proposals that we now propose to adopt.[54] First, we note that the Commission concluded in the *Mobility Report and Order* that the added flexibility of mobile operations would promote the development of service offerings not originally envisioned – or permitted under the service rules – when the 218-219 MHz Service was allocated.[55] Consequently, we believe that the *218-219 MHz Flex NPRM* represents a continuation of our efforts to provide licensees with additional flexibility that will allow the provision of services in the 218-219 MHz frequency band in response to market demand. However, we disagree with AirTouch's assertion that our past decisions prevent us from making the proposed changes.[56] As Community notes, we "gave plenty of reasons for this change" by showing the need (1) to accommodate a wide variety of service offerings, (2) to provide consistency and allow for a market-driven

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48 *See, e.g.*, MKS Comments, ¶ 7; CRSPI Comments at 6; Hughes Comments at 3; In-Sync Comments at 3; 219-219 Licensees Reply Comments at 5.

49 Coalition Corrected Reply Comments at 10; s*ee also* Dispatch Comments at 3; ISTA Comments at 17.

50 218-219 Group Comments at 2.

51 Dispatch Comments at 3.

52 AirTouch Comments at 4.

53 Dispatch Reply Comments at 4, n.7.

54 AirTouch Comments at 7. At that time, we identified several drawbacks to interconnection, including, *inter alia*, the impairment of the development of the service as envisioned and the resulting potential reclassification of the service as commercial. *Mobility Report and Order*, 11 FCC Rcd at 6621-22.

55 *Mobility Report and Order*, 11 FCC Rcd at 6613-14.

56 AirTouch Comments at 7.

approach to service offerings, and (3) to allow for regulatory parity.[57] The need to provide additional flexibility to the 218-219 MHz Service is the underlying basis for the regulatory changes to the 218-219 MHz Service that we adopt today. Furthermore, we conclude that we are providing the "reasoned analysis" necessary for our revised 218-219 MHz Service rules, and no additional justification is necessary.[58]

18. In addition, we reject AirTouch's contention that our proposed rules would undermine the auction process, and specifically, the auction of Narrowband PCS (NPCS) licenses in which AirTouch was a winning bidder.[59] AirTouch argues that our proposal would undermine the auction process by eliminating the "fundamental regulatory differences" in permissible services, regulatory classifications, license flexibility, and power limitations.[60] It has been the Commission's consistent policy to continue to authorize new competition in the telecommunications market and to further serve the public interest by fostering diverse communications services.[61] The Commission previously concluded, for example, that incumbent Commercial Mobile Radio Service (CMRS) licensees had "no reasonable basis to expect that we would limit the possibility of further entry" when we allocated the Wireless Communications Service (WCS).[62] We have repeatedly allowed for the provision of additional services in existing licensed services after concluding that it was in the public interest to do so.[63] All auctions applicants participate in the Commission's auctions process subject to a developing telecommunications market. Because we conclude that auction winners have no expectation that they will be shielded from potential competitors when the Commission determines that it is in the public interest to allow such potential competition – either through allocations or expansion of existing services –

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57 Community Reply Comments at 7.

58 *See Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (an agency "must examine the relevant data and articulate a satisfactory explanation for its action including a `rational connection between the facts found and the choice made.'" (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156 (1962)); *see also Northern Municipal Distr. Group v. Federal Energy Reg. Comm.*, 165 F.3rd 935 (D.C. Cir. 1999)). Because we have made the required connection between the facts we have found regarding the 218-219 MHz Service and the actions we take today, we conclude that we have met the applicable standard. *See also* Dispatch Reply Comments at 6.

59 AirTouch comments at 5.

60 *Id.*

61 *See, e.g., LMDS Second Report and Order*, 12 FCC Rcd at 12636; Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, ET Docket No. 94-32, *Second Report and Order*, 11 FCC Rcd 624, 630-35 (1995) (*GWCS Second Report and Order*). *Cf. WCS Report and Order*, 12 FCC Rcd at 10798-800.

62 *WCS Report and Order*, 12 FCC Rcd at 10801.

63 *See, e.g., Mobility Report and Order*, 11 FCC Rcd 6610; Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions, *Report and Order*, FCC 98-231 (released Sept. 25, 1998); Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services, *First Report and Order and Further Notice of Proposed Rule Making*, 11 FCC Rcd 8965 (1996) (concluding that fixed services, excluding broadcast services, are permissible service offerings on spectrum allocated for broadband and narrowband CMRS).

we find AirTouch's arguments are without merit.[64]

19. We also proposed to rely on 218-219 MHz Service providers to specifically identify the type of service they intend to provide within the technical parameters of the spectrum allocation.[65] Commenters generally support our efforts to allow them the flexibility to choose their regulatory status.[66] We will adopt Section 95.807 as proposed in the *218-219 MHz Flex NPRM* to provide for this choice. Mobile operation, first authorized in the 218-219 MHz Service by the *Mobility Report and Order*, is governed by Section 332 of the Act.[67] Under the rules we adopt, 218-219 MHz Service mobile service providers will elect regulatory status as either commercial or private under the definitions of CMRS and Private Mobile Radio Service (PMRS), as set forth originally in the *CMRS Second Report and Order*.[68] For fixed operations, they will elect common carrier or private status based on the nature of their service offerings under the definitions set forth in Section 3 of the Communications Act of 1934, as amended.[69]

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[64] We also reject AirTouch's argument that the Commission's freeze on paging applications should affect our decision with respect to the 218-219 Mhz Service because the paging freeze is outside the scope of this proceeding. AirTouch Comments at 8 (citing Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, *Notice of Proposed Rulemaking*, 11 FCC Rcd 3108 (1996)).

[65] *218-219 MHz Flex NPRM*, 13 FCC Rcd at 19082.

[66] *See, e.g.*, ISTA Comments at 18. *See also infra* para. 22 for a discussion of additional commenters who implicitly support the ability of a 218-219 MHz Service provider to choose its regulatory status, but who take issue with our proposed means for them to make this choice.

[67] 47 U.S.C. § 332. Section 3(n) of the Act, 47 U.S.C. § 151(n), defines "mobile service" to include (1) both one- and two-way radio communication service; (2) a mobile service which provides a regularly interacting group of base, mobile, portable, and associated control and relay stations; and (3) the Personal Communications Service (PCS).

[68] Implementation of Sections 3 (n) and 332 of the Communications Act Regulatory Treatment of Mobile Services, *Second Report and Order*, 9 FCC Rcd 1411, 1425-48 (1994) (*CMRS Second Report and Order*). Mobile radio services are regulated under Section 332 of the Act, which defines a commercial mobile service as any mobile service that provides service that is (1) on a for-profit basis, (2) interconnected, and (3) available to the public, 47 U.S.C. § 332(d)(1), and a private mobile service as any mobile service that is not a commercial mobile service or the functional equivalent thereof. 47 U.S.C. § 332(d)(3). Section 332 of the Act also states that providers of commercial mobile services shall be treated as common carriers for purposes of the Act. 47 U.S.C. § 332(c)(1). The *CMRS Second Report and Order*, in interpreting Section 332 of the Act, established CMRS to include the same three elements as the Act's commercial mobile service. The Commission also defined PMRS as "a mobile service that is neither a commercial mobile radio service nor the functional equivalent of a service that meets the definition of commercial mobile radio service." The definitions of CMRS and PMRS are contained in Section 20.3 of the Commission's rules, 47 C.F.R. § 20.3. At the time of the *CMRS Second Report and Order*, mobile operations were prohibited in the 218-219 MHz Service, and therefore the Commission did not include the 218-219 MHz Service in its definition of commercial services. *CMRS Second Report and Order*, 9 FCC Rcd at 1424. Finally, we note that we are addressing similar concerns in regard to regulatory status in the CMRS in another open proceeding. *See* Amendment of the Commission's Rules to Permit Flexible Service Offerings for the Commercial Mobile Radio Services, WT Docket No. 96-6, *First Report and Order and Further Notice of Proposed Rule Making*, 11 FCC Rcd 8965 (1996).

[69] Fixed common carrier operations are governed by the definition of "common carrier" in 47 U.S.C. § 153(10) ("any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier"), supplemented by 47 U.S.C. § 153 (43), (44), & (46) (defining "telecommunications," "telecommunications carrier," and "telecommunications service"). The Commission previously determined that the 218-219 MHz Service, under the rules previously in effect for the service, was a private fixed service not subject to common

20. We cannot agree with EON's suggestion that we allow a 218-219 MHz Service provider to designate a "primary" status in these situations.[70] Rather, if a service offering falls within the statutory definition that encompasses common carrier status, the application and subsequent license would be subject to Title II and the common carrier licensing requirements of Title III of the Communications Act and our rules. Otherwise, services would be provided on a non-common carriage basis, and the application and the license would be subject to Title III and certain other statutory and regulatory requirements, depending on the specific characteristics of the service.[71] Any interested party will be able to challenge the regulatory status granted a 218-219 MHz Service licensee.[72] Our treatment of regulatory status will be consistent with our treatment of other wireless services.[73] Thus, for modifications that do not require prior Commission authorization – such as a change from non-common carrier status to common carrier status – we will require licensees to notify the Commission on FCC Form 601 within 30 days after the date the changes are made. To the extent that Title II of the Act restricts common carriers from discontinuing, reducing, or impairing service without prior Commission approval,[74] we will require both public notice and Commission approval prior to a change from common carrier to non-common carrier status. In this case, in addition to the application for modification on FCC Form 601, common carrier licensees must submit an attachment requesting authorization for discontinuance.

21. In the *218-219 MHz Flex NPRM*, we proposed to apply regulatory fees and license application requirements consistent with the election of common carrier or private status made by the licensee.[75] We note that in our recent proceeding that adopted the Universal Licensing System, we consolidated our procedural rules for the wireless radio services into a unified set of procedures, contained in Part 1 of our rules.[76] To the

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carrier regulation. *See* Christina Del Valle *et al*, *Memorandum Opinion and Order*, 11 FCC Rcd 2948 (1996).

[70] EON Reply Comments at 1.

[71] *See, e.g., WCS Report and Order*, 12 FCC Rcd at 10847.

[72] See § 95.807(b) of the rules we adopt today. We have adopted a similar proposal in other services. *See, e.g.,* Amendment of the Commission's Rules Concerning Maritime Communications, *Third Report and Order and Memorandum Opinion and Order*, 13 FCC Rcd 19853 (1998).

[73] *See LMDS Second Report and Order*, 12 FCC Rcd at 12554-55 (1997); 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, *Third Report and Order and Fifth Notice of Proposed Rulemaking*, 12 FCC Rcd 10943 (1997). *See also* Amendment to Parts 2, 15, and 97 of the Commission's Rules to Permit Use of Radio Frequencies Above 40 GHz for New Radio Applications, *Memorandum Opinion and Order on Reconsideration and Notice of Proposed Rulemaking*, 13 FCC Rcd 16947 (1998) (*40 GHz NPRM*), Section 21.910 of our rules (47 C.F.R § 21.910) (describing a similar procedure for the Multipoint Distribution Service).

[74] 47 U.S.C. § 214(a).

[75] *218-219 MHz Flex NPRM*, 13 FCC Rcd at 19082. *See also* Hughes Comments at 3.

[76] Amendment of Parts 0, 1, 13, 22, 24 26, 27, 80, 87, 90, 95, 97, and 101 of the Commission's Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Service, WT Docket No. 98-20, *Report and Order*, 13 FCC Rcd 21027 (1998) (*ULS Report and Order*).

extent that 218-219 MHz Service licensees must submit information specific to the type of service it is providing (*i.e.* fixed or mobile, common carrier or non-common carrier), it must do so on FCC Form 601 and the appropriate schedule(s). We conclude that the regulatory approach we adopt for service offerings within the 218-219 MHz Service, while similar to proposals made by In-Sync Interactive Corp. (In-Sync)[77] and the 218-219 Group,[78] allows us to provide licensees the flexibility to choose their service offering while concurrently allowing the Commission to perform its statutory duty.

22. Commenters expressed an additional concern that our proposed requirement that licensees and applicants "specifically identify" their intended service offering in "sufficient detail"[79] would harm 218-219 MHz Service providers if they are forced to reveal detailed service information that could be used by others to gain a competitive advantage.[80] We recognize that there is a legitimate interest in protecting the confidentiality of business plans, but we also must be able to classify the regulatory status of a service provider. Because 218-219 MHz Service licensees will be able to change regulatory status by filing an application for license modification on FCC Form 601 and simply checking a box to indicate their regulatory status, we do not envision that our collection of regulatory information will have an adverse effect on licensees. Nevertheless, in those cases where an applicant or licensee believes that providing certain information would place it at a severe competitive disadvantage, it may request confidential treatment of its filings, pursuant to our rules.[81] Furthermore, for the benefit of those existing licensees who do not wish to make the disclosures necessary for us to provide additional flexibility in this service, we will classify those licenses for which an election has not been made under new Section 95.807 of our rules as providing service on a solely private, non-common carrier basis, and will regulate those licenses accordingly.[82]

23. Because the 218-219 MHz Service was based on a model that envisioned two-way RTU-to-CTS and CTS-to-RTU communications, we clarify that both one- and two-way communications are permissible under our rules. We recognize that some proposed applications for the service – such as remote meter reading, vending machine reporting, and street light monitoring – may be based solely on one-way communications.[83] In response to additional comments, we further note that RTU-to-RTU communications

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77 In-Sync Comments at 4, n.7.

78 218-219 Group Comments at 3.

79 *218-219 MHz Flex NPRM*, 13 FCC Rcd at 19083.

80 In-Sync Comments at 4; EON Reply Comments at 1; Coalition Corrected Reply Comments at 10.

81 *See* 47 C.F.R. §§ 0.457-0.459.

82 This procedure will not limit an existing licensee's ability to elect the regulatory status for its licenses under Section 95.807; rather, it provides an option for those licensees who believe that the competitive disadvantage associated with providing information for such an election outweighs the benefits of the additional flexibility in regulatory status and associated permissible communications.

83` ITV Comments at 6; ISTA Comments at 9; Eagle Reply Comments at 2.

are permissible regardless of the licensee's regulatory status,[84] and that this is one example of the type of permissible communication that licensees regulated under our CMRS rules might choose to provide.[85] Similarly, we will no longer prohibit interconnection in the 218-219 MHz Service, so long as a licensee chooses to be regulated as a service that permits interconnection.[86] The permissibility of one- and two-way communications may result in applications that make the terms RTU and CTS less descriptive, but we decline to change our terminology, as Concepts to Operations, Inc. (Concepts) suggests.[87] Parties are familiar with the current terms, and the designations have not stopped the development of numerous innovative applications that have been proposed for use in the 218-219 MHz Service.[88]

24. Although we also sought alternatives that will ensure that 218-219 MHz Service providers can design their service offerings in response to market demand, no commenter offered an alternate proposal, nor are we persuaded by AirTouch's arguments for restricting the 218-219 MHz Service providers' ability to choose either common carrier or private operations.[89] Accordingly, we conclude that our proposal will provide an effective means of providing flexibility to 218-219 MHz Service providers, and we will allow both common carrier and non-common carrier uses in the service. By this action, we allow 218-219 MHz Service providers flexibility in both the scope of services they might provide and the means by which they may design their system to accomplish this. For example, our previous rules expressly prohibited common carrier service in the 218-219 MHz Service,[90] and structured the 218-219 MHz Service to disallow both direct RTU-to-RTU communications and mobile RTU interconnection with the public switched network or any commercial mobile radio service.[91] We will now allow 218-219 MHz Service providers to design systems without these restrictions. The rules we adopt today are consistent with our past efforts to foster innovative uses for the 218-219 MHz Service.[92]

B. License Term

25. *Background*. Under our current rules, the term of each system or CTS licensed to operate in the

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84 Hughes Comments at 3-4; EON Reply Comments at 1.

85 *See 218-219 MHz Flex NPRM* , 13 FCC Rcd at 19082, n.124.

86 *See* CRSPI Comments at 6.

87 Concepts Reply Comments at 3.

88 *See 218-219 MHz Flex Order*, 13 FCC Rcd at 19075 (discussing various uses for the spectrum).

89 ISTA suggests that the service "should not be limited" to the common carrier and private operations we proposed, but does not elaborate. ISTA Comments at 18.

90 Former rule 95.805(f), 47 C.F.R. § 95.805(f).

91 Former rule 95.805(c), 47 C.F.R. § 95.805(c).

92 *See Mobility Report and Order*, 11 FCC Rcd 6610 (1996).

218-219 MHz Service is five years.[93] The length of the license term was based on a concern "to reduce any potential for trafficking in licenses by persons who have no real interest in constructing," and to be "consistent with the license term used in most other private radio services."[94] To support their request for a ten-year license term, Petitioners note that (a) in services with similar technologies and market areas, the license term is ten years;[95] (b) the use of auctions to award licenses negates the original intent of the five-year term (*i.e.*, discouraging trafficking of lottery-won licenses);[96] and (c) awarding licenses by auction requires a longer license term in which 218-219 MHz Service providers (many of whom are small businesses) may secure adequate financing, develop viable services, and eventually recoup their initial investment.[97] Petitioners also contend that the extension of the license term would trigger a reamortization of the installment payments over the longer license term.[98] Consequently, they request that the Commission offer 218-219 MHz Service providers a choice of (a) fulfilling payment obligations with any changes associated with adjustments adopted through the *Notice*; (b) amnesty; or (c) payment through a royalty-based schedule as an alternative to auction payments.[99]

26. *Discussion*. There is uniform sentiment favoring extension of the 218-219 MHz Service license term to ten years for all auction-granted licenses.[100] While the parties are in general agreement regarding

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93 47 C.F.R. § 95.811(d).

94 *1992 Allocation Report and Order*, 7 FCC Rcd at 1641. The five-year license term conforms to the five-year license term of the General Mobile Radio Service, 47 C.F.R. § 95.105, and the Personal Radio Service under which the 218-219 MHz Service is classified, 47 C.F.R. § 95.1(c).

95 Petition for Rulemaking at 3-4.

96 *Id.* at 4. *See also One-Year Construction Report and Order*, 11 FCC Rcd at 2473.

97 Petition for Rulemaking at 4-7.

98 *Id.* at 9.

99 *See* Third Letter Amendment (attachment at 3-4); *cf.* MKS Petition at 5 (requesting that all licensees in good standing be allowed to return their licenses to the Commission for a full refund). We chose to not seek comment on Petitioners' option of making royalty payments in lieu of installment payments for the same reasons that we explicitly rejected royalties as an auction payment mechanism in the past. *See Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2393; Implementation of section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Notice of Proposed Rulemaking*, 8 FCC Rcd 7635, 7645 (1993); *see also* Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, *Second Report and Order*, 8 FCC Rcd 7700, 7838 (1993). Specifically, the Commission stated, *inter alia*, that a royalty program would require adoption of complex, intrusive accounting rules for identifying the share of a firm's revenues that is attributable to a particular license, and send an erroneous message to bidders that the government (taxpayers) is better able to bear risk than the firm (shareholders). Furthermore, the Commission said that a royalty program making government revenues dependent on the success of a regulated service may give rise to conflicts of interest. *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2382.

100 Commenters and Reply Commenters expressly support extension; none oppose it. The 218-219 Group asserts that an extension of the term of all eligible licensees from five to ten years will advance the public interest by promoting small business participation, reducing barriers to entry, and enhancing competition. 218-219 Group Comments at 4-5. In-Sync supports a term extension because it will provide a more attractive time frame to investors and because other

extended license terms for auction-granted licenses, Community believes that similar treatment should not be accorded licenses awarded through the random selection process.[101] Community further states that lottery winners not meeting the original five-year construction benchmark or the "substantial service" benchmark within one year of renewal should forfeit their licenses.[102] The Coalition supports this view, stating that the Commission should allow lottery licenses to expire at the end of their five-year terms and then be re-auctioned because re-auction is the best and most straightforward way to prevent unjust enrichment of lottery licensees, and because it ensures that the 218-219 MHz licenses are efficiently allocated to those that value them the most.[103]

27. Contrary to Community's assertions, there is no reason to treat those who obtained their licenses by way of auction differently than those who obtained them by lottery. This finding is consistent with our past actions in the 218-219 MHz Service context when ruling on requests from both types of licensees for waiver of the Commission's rules regarding construction benchmarks.[104] In those instances we did not differentiate between the licensees when assessing whether a waiver was appropriate and whether enforcement of the construction benchmarks was contrary to the public interest. The imposition of a five-year license term and the construction benchmarks on IVDS licensees were both designed to reduce the attractiveness of licenses to entities interested in them only as a speculative vehicle.[105] Similarly, we did not differentiate in the case of Pioneer's Preference licenses. In those instances, although the licensees did not have to pay for the licenses, they remained subject to the same service and filing requirements.[106] We find that it is in the public interest to extend the license term of all licenses because this additional flexibility will allow for more efficient use of the spectrum. Restricting the license extension only to those who obtained licenses by auction may possibly create a competitive advantage in those licensees by granting to them additional time to further develop the service. Equity therefore weighs in favor of an extension of all license terms to ten years as proposed in the *218-219 MHz Flex NPRM*.

28. Moreover, as In-Sync has stated, a ten-year term would better enable lottery licensees to attract

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comparable services operate under ten-year license terms. In-Sync Comments at 5-6.

101 Community also would retain the current benchmarks and assignability restrictions for such licensees (*i.e.* those awarded by lottery). Community Comments at 4, 11.

102 *See* Community Comments at 2.

103 *See* Coalition Reply Comments at 22.

104 *See* Requests by Interactive Video and Data Service Lottery Winners to Waive the March 28, 1997, Construction Deadline, *Order*, 12 FCC Rcd 3181 (1997) (*Three-Year Lottery Benchmark Waiver Order*); Requests by Interactive Video and Data Service Auction Winners to Waive the January 18, 1998 and February 28, 1998 Construction Deadlines, *Order*, 13 FCC Rcd 756 (1998); Request of Licensees in the 218-219 MHz Service for Waiver of the Five-Year Construction Deadline, *Order*, 14 FCC Rcd 5190 (1999) (*Five-Year Benchmark Waiver Order*).

105 *See 1992 Allocation Report and Order*, 7 FCC Rcd 1630, 1641.

106 *See* Application of Nationwide Wireless Network Corporation, *Memorandum Opinion and Order*, 13 FCC Rcd 12914 (1998).

needed financing for system construction and operation.[107] Kingdon R. Hughes (Hughes) also expresses the belief that maintaining a five-year term for lottery winners would discourage construction.[108] We agree that incentives for equipment manufacturers to make the necessary investment to supply cost-effective equipment to the 218-219 MHz industry will be enhanced by the presence of large market operators ready to buy their products.

29. We find that auctionable service licensees should have consistent license terms. This position is in accord with Hughes, the Interactive Video Data Service Trade Association (ISTA) and ITV, Inc. and IVDS Affiliates, LLC (ITV), who maintain that a ten-year license term will promote regulatory parity.[109] In-Sync observes that licensees in the Multipoint Distribution Service (MDS), Point-to-Point Microwave Radio Services, Local Television Transmission Services and Digital Electronic Message Services are all granted ten-year authorizations. Once again, we have not altered our service rules in the past based upon how the licenses were acquired, and we decline to do so in this instance as well.[110] All 218-219 MHz Service licensees, therefore, should be accorded equal license terms to initiate service.

30. Further, we continue to believe that licenses in the 218-219 MHz Service can attract small businesses interested in opportunities to participate in the provision of spectrum-based services.[111] In this regard, a five-year term is particularly burdensome to small businesses paying for licenses using installment payments; to date, auctions have been held in four other wireless services in which certain designated entities were eligible for installment payment plans, and each of those services has a ten-year license term.[112] Hughes, ISTA and ITV maintain, and we agree, that a ten-year license term will help eliminate competitive inequities.[113]

31. Therefore, we amend our Rules to extend the term of 218-219 MHz Service licenses to ten years from the date of license grant. In doing so, we note that a ten-year license term comports with our proposal to redesignate the 218-219 MHz Service from a private radio service (generally licensed for a five-year term) to a service that can also provide common carrier services (generally licensed for a ten-year term). To ensure regulatory parity and because all eligible 218-219 MHz Service licensees will face the same competitive

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107 *See* In-Sync Reply Comments at 9.

108 *See* Hughes Reply Comments at 2.

109 *See* Hughes Comments at 4; ISTA Comments at 18; ITV Comments at 6.

110 *See Fresno Mobile Radio Inc. v. FCC*, 165 F.3d 965 (D.C. Cir. 1999), where the D.C. Circuit held that the Commission could not differentiate between auction and non-auction licensees with regard to construction rules.

111 47 U.S.C. § 309(j)(4)(D); *See Competitive Bidding Fourth Report and Order*, 9 FCC Rcd at 2337; *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2357.

112 47 C.F.R. § 24.15 (narrowband and broadband Personal Communications Services (PCS)); 47 C.F.R. § 90.149 (900 MHz Specialized Mobile Radio (SMR)); 47 C.F.R. § 21.929 (MDS).

113 *See* Hughes Comments at 4; ISTA Comments at 18; ITV Comments at 6.

setting and opportunity costs going forward under the regulatory flexibility we have proposed (irrespective of whether they acquired their licenses by auction or lottery), we extend the license term of all licenses in the 218-219 MHz Service to ten years.

32. Finally, we believe we should extend the license terms to ten years of those licensees who were issued licenses on March 28, 1994[114] and who have timely filed renewal applications or timely filed waiver requests pending at the FCC.[115] During the original five-year license term, the Bureau suspended the three-year and five-year construction bench marks of these licensees pending resolution of the construction requirement. The Bureau found that enforcement of the three-year and five-year construction requirements would be unreasonable and contrary to the public interest because the proposed rule changes to the 218-219 MHz Service were "inextricably tied to [the licensees'] construction requirements and the mechanisms used to satisfy those benchmarks."[116] We see no reason to treat these licensees differently from the other licensees who will receive an extended license term. Accordingly, because of the unique circumstances of this case in that the proposed rule changes to the 218-219 MHz Service were inextricably tied to [the licensees'] construction requirements and the mechanisms used to satisfy those benchmarks, if the licensee has timely filed the appropriate license renewal form, we will extend the license term to ten years from the initial date of license issuance. If at the end of that time, the licensee has fully constructed its authorization and complied with all other Commission Rules, we will grant the license renewal. We will not grant any renewal application if the licensee fails to construct or place the station in operation before the end of the ten-year term.[117]

C. Payment Options

33. *Introduction*. On January 18, 1995, and February 28, 1995, the Commission conditionally granted licenses to the winning bidders of the July 28 and 29, 1994, auctions,[118] subject to meeting the terms of the auction rules, including payment requirements.[119] As discussed above, licensees qualified as small businesses were permitted to pay eighty percent of their net bid(s) in installments over the five-year term of

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[114] Eighteen licenses were granted to lottery winners on March 28, 1994.

[115] The licenses of all licensees who failed to file a timely renewal application automatically cancelled as of the expiration date without further action by the Commission.

[116] *Three-Year Lottery Benchmark Waiver Order*, 12 FCC Rcd at 3184; *Five-Year Benchmark Waiver Order*, 14 FCC Rcd at 5194.

[117] 47 C.F.R. § 1.949 requires licensees to file applications for renewal no later than the expiration date of the authorization for which renewal is sought and no sooner than ninety days prior to expiration.

[118] *218-219 MHz Flex Order*, 13 FCC Rcd at 19069. *See also* "High Bidders for 594 Interactive Video and Data Service (IVDS) Licenses," *Public Notice*, Mimeo No. 44160 (rel. August 2, 1994), *Erratum*, Mimeo No. 44265 (rel. August 9, 1994).

[119] *218-219 MHz Flex Order* 13 FCC Rcd at 13069. *See also* "Interactive Video and Data Service (IVDS) Applications to be Granted January 18, 1995," *News Release*, Mimeo No. 51403 (rel. December 29, 1994) (listing first group of grants); "Interactive Video and Data Service (IVDS) Applications to be Granted February 28, 1995," *Public Notice*, 10 FCC Rcd 3388 (1995) (listing second group of grants).

the license(s), with interest-only payments for the first two years, and interest and principal payments amortized over the remaining three years.[120] After a series of deferrals of the interest-only payments, the Commission required licensees to make their first interest and principal payments on March 31, 1997, or properly file a grace period request pursuant to the Commission's rules.[121] The licenses of those failing to take either of these actions cancelled, pursuant to the Commission's default rules.[122] In the *218-219 MHz Flex Order*, the Commission effectively suspended the payments for IVDS licensees that had remitted adequate installment payments as of March 16, 1998, and stayed decisions on grace period requests properly filed under the pre-1998 rules, pending resolution of the issues in the *218-219 MHz Flex NPRM*.[123] We also requested comments concerning proposals for payment restructuring options.

34. As described below, we adopt the payment restructuring proposals contained in the *218-219 MHz Flex NPRM* with some modifications. By this *Report and Order*, we establish a menu of three options that provides specific relief for licensees that wish to retain their licenses but are experiencing financial hardship or that wish to return their licenses due to an inability to assume their financial responsibilities. The three options are: (1) Reamortization and Resumption of Payments (Resumption), (2) Amnesty, and (3) Prepayment, whereby an eligible licensee may prepay the principal of any license it wishes to retain with cash and prepayment credits generated from down payments on spectrum returned to the Commission and any installment payments previously made.

1. Eligibility for Restructuring and Relief

35. *Background*. As of March 16, 1998, the effective date of the revised installment payment rules,[124] the installment payment portfolio for the 218-219 MHz Service consisted of: (i) licensees that were current in payments (i.e., less than ninety days delinquent) on March 16, 1998; (ii) licensees that had properly filed grace period requests under the former installment payment rules; (iii) entities that made some installment payments but that were not current in their installment payments as of March 16, 1998, and did not have grace period requests on file in conformance with the former rules; and (iv) entities that never made any installment payments.[125] In the *218-219 MHz Flex Orde*r, we stated that entities that had failed to remit adequate payments by March 16, 1998, or those that had failed to properly file a grace period request under the old rules were in default on their payment obligations and would be notified by the Bureau regarding debt

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120 *See* para. 11, *supra*. *See also*, 47 C.F.R. § 95.816(d)(3) (1994) (incorporating by reference 47 C.F.R. § 1.2110 (1994).

121 *218-219 MHz Flex Order*, 13 FCC Rcd at 13069.

122 47 C.F.R. § 1.2110 (1994).

123 *218-219 MHz Flex Order* and *NPRM*, 13 FCC Rcd at 19066, 19073.

124 *Part 1 Third Report and Order*, 13 FCC Rcd at 442; 47 C.F.R. §§ 1.2110(f)(4)(ii), (iii).

125 *See 218-218 MHz Flex Order* 13 FCC Rcd at 19072 .

collection procedures.[126] The *218-219 MHz Flex NPRM* proposed allowing non-defaulted licensees to participate in the financial restructuring options.[127]

36. *Discussion*. Most commenters specifically address the issue of eligibility for participation in the restructuring proposals. Nine of these propose expanding the available financial restructuring options to all entities, including those we proposed to treat as ineligible for participation, while three others indicate that only licensees falling within the *218-219 MHz NPRM* criteria should be eligible.[128] Some of the commenters supporting unrestricted eligibility note that subjecting all licensees to the original terms of their agreements would have draconian effects and unnecessarily penalize auction participants that have already lost invested funds.[129] Bay Area 218-219 MHz Group (Bay Area) and EON take a different tack, encouraging the Commission to provide an easy exit for "speculators" and other overtly unqualified licensees.[130] Two other commenters support eligibility for licensees that paid for the license up front, with refunds available to licensees seeking to return their licenses.[131] Finally, In-Sync proposes that licensees be given 120 days after adoption of the rules in this proceeding to sell their licenses to third parties, who would then be permitted to assume the seller's installment payment obligations at a discounted rate of either thirty-five percent (if the assignee were a "very small business") or twenty-five percent (if the assignee were a "small business").[132]

37. We decline to substantially modify the eligibility criteria proposed in the *218-219 MHz Flex NPRM*. Therefore, "Eligible Licensees" for the restructuring program outlined below are only (i) those licensees that were current in installment payments (i.e. less than ninety days delinquent) as of March 16, 1998,[133] or (ii) those licensees that had properly filed grace period requests under the former installment payment rules. Allowing the others to fully participate in the restructuring program would be unfair to licensees that have complied with the Commission's rules and made payments and/or properly filed grace period requests. Moreover, treating entities that have failed to follow the Commission's rules similarly to those that have made all of the required installment payments or followed the grace period rules could

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126 *Id*. at 19073.

127 *218-218 MHz Flex NPRM* 13 FCC Rcd at 19085.

128 *See* IVDS/RLV Comments at 5; ITV Comments at 7; MKS Interactive Comments at 3; Bay Area Comments at 5; Hispania Reply Comments at 5; Interactive Reply Comments at 5; Eagle Reply Comments at 4; EON Comments at 1; IVDS Coalition Reply Comments at ii. (proposing restructuring options for all entities); and In-Sync Comments at 8; 218-219 MHz Group Comments at 3; ISTA Comments at 18 (proposing limited eligibility).

129 *See* Hispania Reply Comments at 5.

130 *See* Bay Area Comments at 4; EON Comments at 1.

131 *See* Hughes Comments at 2, 5-6; Hughes Reply Comments at 2; MKS Comments at 6.

132 In-Sync Comments at 8.

133 This group of licensees includes licensees from which the Commission accepted late payment of one or more installments prior to March 16, 1998. For purposes of the restructuring program we adopt today, we treat all licensees that were current in their installment payments as of March 16, 1998, the same. Thus, effectively we waived the payment deadlines for any late payers that became current before March 16, 1998.

undermine the integrity of our rules and the auction process. The factors that led to the financial and technical difficulties of these former licensees, all of them small businesses, are unique to the 218-219 MHz Service and, we believe, unlikely to be repeated.

38. Nevertheless, we are cognizant that some entities have shown good faith by making late installment payments, while others have been incapable of working within the Commission's rules due to myriad intervening factors discussed previously in this *Report and Order*.[134] Accordingly, we will not fully enforce the original payment and default terms for former licensees in the 218-219 MHz Service that were not current in their installment payments as of March 16, 1998, and did not have grace period requests on file in conformance with the former rules ("Ineligible Licensees"). Although their licenses automatically cancelled under our payment rules, the Commission will recommend that these entities receive debt forgiveness for their outstanding principal balance and accrued interest owed. Within the category of Ineligible Licensees, the Commission recognizes that certain licensees made some installment payments, albeit incomplete or late, while other licensees have not made any payments to the Commission. The Commission does not believe that the Ineligible Licensees that made some payments should be at a greater financial disadvantage under this *Report and Order* than licensees that never made any installment payments. Therefore, we recommend a refund of the installment payments made by the Ineligible Licensees, subject to Department of Justice approval.[135] We believe that this relief is appropriate under these circumstances. For purposes of future auctions that do not involve the extension of credit by the government, these former licensees will be deemed "former defaulters"[136] and eligible to participate provided that they can make the certification required under Section 1.2105(a)(2)(x) of the Commission's general competitive bidding rules.[137]

39. Finally, we will not offer the restructuring options to those that have paid in full for their licenses. The relief described below is not intended to undo the results of the auctions. Rather, we specifically provide restructuring relief to those experiencing financial difficulties. The relief is similar to that offered in the *C Block Restructuring Orders*, where the Commission chose to offer limited relief to licensees

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134 *See* paras. 8, 13 and 14, *supra*.

135 Under the Federal Claims Collection Act and related regulations, only the United States Department of Justice ("DOJ") can compromise a claim in excess of $100,000. *See* Federal Claims Collection Act, 31 U.S.C. § 3711. *See also* 4 C.F.R. §§ 101-105. Because many of the debts that are subject to the proposed compromise exceed $100,000 and involve FCC licenses subject to common facts and circumstances, the Commission is recommending that DOJ approve the compromise of all 218-219 MHz Service debt as a package.

136 *See* 47 C.F.R. § 1.2105(a)(2)(xi). *See also* Amendment of Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, *Fourth Report and Order*, 13 FCC Rcd 15743, 15753, ¶ 18 (1998).

137 Whether these former licensees will be eligible for federal loan programs will be determined based upon U.S. Treasury regulations. Under the Debt Collection Improvement Act ("DCIA"), no person may obtain any federal financial assistance if the person has an outstanding debt with any federal agency which is in a delinquent status, as determined under standards prescribed by the Secretary of Treasury. Pub. L. No. 104-134, § 3100(j)(1), 110 Stat. 1321 (1996), codified at 31 U.S.C. § 3720B. *See also* 31 C.F.R. § 285.13 (setting forth Department of Treasury regulations regarding delinquent debtors). In addition, in the *Part 1 Proceeding*, the Commission adopted a certification procedure as part of changes to the application procedures whereby applicants must certify that the applicant is not in default on any payment for Commission licenses (including down payments) and that it is not delinquent on any non-tax debt owed to any federal agency. Bidders that cannot make this certification may be ineligible for installment payment plans. *Part 1 Third Report and Order*, 13 FCC Rcd at 436, ¶ 8.

participating in the installment payment program but not to those who paid in full.[138] All licensees, however will benefit from the added service flexibility we adopt today, including those that paid in full and are in the best position to use their licenses to provide service to the public. Furthermore, the added service flexibility should increase the ability of a licensee to sell a license in the secondary market, should a licensee that paid in full for its license no longer wish to be a licensee.

2. Reamortization and Resumption of Payments

40. *Background*. In the *218-219 MHz Flex NPRM*, we tentatively concluded that we should permit reamortization of principal and interest installment payments for non-defaulted 218-219 MHz Service licensees in conjunction with the extension of the license term from five to ten years, an approach that is consistent with our general auction rules.[139] Therefore, we proposed reamortization of installment payment terms for 218-219 MHz Service licensees to allow for two years of interest-only payments, followed by payments consisting of interest and principal over the remaining eight years of the license terms. In addition, to ensure that all 218-219 MHz Service licensees that are not currently in default can take advantage of the proposed reamortization of installment payments, we proposed granting all properly filed grace period requests as of the effective date of reamortization. This proposal would require recalculation of every non-defaulted licensee's installment payment obligations as reamortized, and applying all payments already received in accordance with the revised schedule, with any excess funds held in reserve for application against future installment payments.

41. With regard to interest charges for 218-219 MHz Service licensees, we noted that Section 95.816(d)(2) of our rules requires the fixing of such charges at the time of licensing at a rate equal to the rate for five-year U.S. Treasury obligations.[140] We also proposed that the previously suspended 1995 September and December interest-only payments ("Uncollected Payments") would be paid with each of the first eight scheduled installment payments, as reamortized.[141] Under the *218-219 MHz Flex NPRM* proposal, licensees would choose to continue making installment payments by submitting a payment consisting of all accrued interest and principal (as reamortized) due and owing as of that date. At that time, if necessary, licensees would be able to utilize the two automatic ninety-day late payment periods in our installment payment rules, subject to the applicable late payment fees, before their licenses would automatically cancel as being in

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138 *See* Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications (PCS) Licensees, WT Docket No. 97-82, *Second Report and Order and Further Notice of Proposed Rule Making*, 12 FCC Rcd 16436, 16450 (1997) ("*C Block Second Report and Order*"), and Amendment of the Commission's Rules Regarding Installment Payment Financing For Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, *Order on Reconsideration of the Second Report and Order*, 13 FCC Rcd 8345, 8358-60 (1998) ("*C Block First Reconsideration Order*") (collectively, the "*C Block Restructuring Orders*").

139 47 C.F.R. § 1.2110(f)(3)(ii) (as amended by the *Part 1 Third Report and Order*, 13 FCC Rcd at 521) ("[a]llow installment payments for the full license term"). *See also 218-219 MHz Flex NPRM*, 13 FCC Rcd at 19078.

140 *See* 47 C.F.R. § 95.816(d)(2).

141 *218-219 MHz Flex NPRM*, 13 FCC Rcd at 19086; *Accord C Block Second Report and Order*, 12 FCC Rcd at 16450.

default.[142]

42. *Discussion*. Almost all commenters support reamortization and the resumption of payment proposals, but differ on issues ranging from scheduling to interest amounts.[143] The commenters primarily focus on the purported financial burden of restarting payments under the *218-219 MHz Flex NPRM*.[144] They note that under the proposal, licensees would receive the benefit of a ten-, versus five-year amortization, but they would be required to bring their balances current within ninety days of this *Report and Order*.[145] Accordingly, the Commission would require licensees to pay two years worth of principal payments, as well as the accrued interest, in a lump sum, within ninety days of this *Report and Order* to retain their licenses. The commenters suggest that the Commission provide additional relief to permit a readjustment period for the new rules and to allow licensees to make new capital arrangements.[146] Licensees provide five basic methods for such additional relief: (i) reamortization of the licensee's entire outstanding balance, including all then-accrued principal and interest payments, rather than requiring arrearages to be paid in the first payment following adoption of amended rules;[147] (ii) provision of an interest-only basis for the first five years, instead of the two-year period of interest-only financing proposed in the *218-219 MHz Flex NPRM*;[148] (iii) a ten-year payout schedule that would be entirely interest-free;[149] (iv) indexing interest charges to ten-year Treasury obligations effective as of the release date of the *218-219 MHz Flex Order*, instead of the licensing date, as stated in the *218-219 MHz Flex NPRM;*[150] and (v) delay the collection of reamortized installment payments of *any* kind for six months after adoption of new service rules.[151]

43. After consideration of the comments and replies in this proceeding, we will modify the reamortization and resumption of payment proposal contained in the *218-219 MHz Flex NPRM*. We will

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142 47 C.F.R. §§ 1.2110(f)(4)(i), (ii), (iii).

143 IVDS/RLV Comments at 5; ITV Comments at 6; Community Comments at 12; 218-219 Group Comments at 6; In-Sync Comments at 7; ISTA Comments at 18; IVDS Enterprises Comments at 5; Coalition Reply Comments at 13. AirTouch does not specifically address the amortization and resumption of payment issues, but its comments are generally critical of new and flexible options for licensees in the 218-219 MHz Service. *See* AirTouch Comments and Reply Comments.

144 IVDS/RLV Comments at 5; ITV Comments at 6; Community Comments at 12; 218-219 Group Comments at 6; In-Sync Comments at 7; ISTA Comments at 18; IVDS Enterprises Comments at 5; Coalition Reply Comments at 13.

145 *Id.*

146 *See* Coalition Corrected Reply Comments at 13.

147 *See* In-Sync Comments at 7.

148 *See* 218-219 MHz Group Comments at 6.

149 *See* CRSPI Reply Comments at 2.

150 *See* Coalition Reply Comments at 13.

151 *Id.*

adopt the initial part of the proposal that provides for reamortization of principal and interest installment payments for Eligible Licensees in conjunction with the extension of the license term from five to ten years. This proposal received widespread support from commenters in this proceeding, and we believe that its adoption best serves the public interest. We are mindful, however, that reamortization may not provide sufficient relief standing alone to encourage licensees to resume payments. A crucial element of encouraging licensees to resume payments is ensuring that they will not be burdened with insurmountable first payments. We also note that in the *C Block Second Report and Order*, the Commission found that lump sum payments could place a significant burden on licensees.[152] Accordingly, we will reamortize a licensee's entire outstanding balance, including all then-accrued installment payments, rather than requiring all such arrearages to be paid in the first payments following adoption of this *Report and Order*.[153]

44. Under the resumption option, the Commission will capitalize all accrued and unpaid interest into the principal amount as of the election date.[154] Accrued and unpaid interest will include the "Uncollected Payments" (*see* para. 11, *supra*). Any licensee electing resumption may be required to execute loan documents. Failure to fully and timely execute and deliver to the Commission (or its agent) any required loan documents within the time specified by the Bureau, will result in automatic cancellation of the license. Resumption of payments will not begin until the end of the third month after the Election Date,[155] giving licensees a minimum of 180 days after publication of this *Report and Order* in the *Federal Register* to make their first payment. Furthermore, under the current late payment rules for installment payments, licensees will have the option of utilizing the two ninety-day non-payment periods if they need additional time to avoid default.[156] We believe that licensees will have sufficient time to: (i) make an informed decision as to whether or not to elect repayment; (ii) obtain necessary capital; and (iii) begin repaying their financial obligations. We also find that providing these modifications will substantially increase licensees' flexibility to make market-driven decisions regarding their licenses and enable them to revise their business plans to make them more attractive to lenders and investors. Because payments will have been effectively suspended from March 16, 1998, until the Resumption Date, we decline to grant requests to extend the two-year interest-only period to five years, as well as other extension requests. We will retain Section 95.816(d)(2) of our rules, thereby fixing interest charges equal to the rate for five-year U.S. Treasury obligations at the time of licensing, rather than the ten-year rate at the time of release of this *Report and Order*, as some commenters request.[157] Our

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152 *C Block Second Report and Order*, 12 FCC Rcd at 16450.

153 In-Sync Comments at 7.

154 This capitalization will take into account the Remedial Bidding Credit. *See infra*, para. 61.

155 We refer to this date as the "Resumption of Payment Date." The "Election Date" is discussed further *infra*, at para 54. It refers to the date on which eligible licensees must elect one of the three restructuring options adopted in this *Report and Order*, and falls on the last day of the third month following publication of this *Report and Order* in the *Federal Register*.

156 47 C.F.R. §§ 1.2110(f)(4)(i), (ii), (iii).

157 *See* 47 C.F.R. § 95.816(d)(2).

decision to fix interest charges at the time of licensing is consistent with our general rules.[158] Furthermore, we believe that maintaining the interest rates at their initial level avoids administrative burdens and unnecessary hardships for licensees and the Commission. We note that the retention of the five-year interest rate fixed as of the licensing date is more favorable to the licensees than the application of the ten-year rate.[159] Changing the interest for all licensees would consume additional administrative resources as all of the loans would need to be recalculated as of the grant date and payments would need to be re-applied. Furthermore, the recalculation will result in additional unpaid interest due from Eligible Licensees. We delegate to the Bureau authority to set forth all procedures for implementing the resumption of payments.

45. In light of the provisions we adopt in this *Report and Order*, we need not adopt the proposal contained in the *218-219 MHz Flex NPRM* providing for the grant of all properly filed grace period requests.[160] Instead, we dismiss all grace period requests. Parties that have filed valid grace period requests have effectively received the benefit of an extended grace period. Any improperly filed grace period requests are procedurally defective and are also dismissed. At this time we also dismiss as moot Community's "Emergency Motion for Stay" of implementation of the new installment payment rules.[161] Community had a properly filed grace period request pending at the time the Commission released the *218-219 MHz Flex Order*. Community requests a stay of the implementation of the 1998 grace period rules because it believes that application of the new rules to its situation might result in a default based on the expiration of the two ninety-day automatic grace periods.[162] The Commission made clear in the *218-219 MHz Flex Order* that late payment and license cancellation provisions were suspended in cases such as Community's, during the pendency of the rulemaking in this docket.[163] Given the resumption option provided herein, Community will not be at a disadvantage in following the 1998 grace period rules, and the suspension period is in excess of any grace period that might have been provided.[164]

3. Amnesty

46. *Background.* In the *218-219 MHz Flex NPRM*, the Commission proposed permitting licensees to surrender any licenses they choose to the Commission for reauction and, in return, have all of the

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158 47 C.F.R. § 1.2110(f)(3)(i).

159 The interest rate is approximately one-eighth percent to three-eighths percent higher for ten-year treasury notes than for five-year treasury notes at the license grant dates.

160 *218-219 MHz Flex NPRM*, 13 FCC Rcd at 19082.

161 "In the Matter of Community Teleplay, Inc., Segment B License in The Interactive Video and Data Service for the Norfolk-Virginia Beach Metropolitan Statistical Area," Emergency Petition for Stay, July 30, 1998. *See also*, "In the Matter of Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures," Petition for Reconsideration, Community Teleplay, Inc., January 20, 1998.

162 *Id*.

163 *218-219 MHz Flex NPRM*, 13 FCC Rcd at 19073.

164 47 C.F.R. §§ 1.2110(f)(4)(ii), (iii) (1999).

outstanding debt on those licenses forgiven (*i.e.*, an "amnesty" option).[165] Under the proposal, for each license returned under the amnesty option the licensee would choose either to (i) receive no credit for its down payment but remain eligible to bid on the surrendered licenses in the reauction, with no restriction on after-market acquisitions; or (ii) obtain credit for seventy percent of its down payment and forego for a period of two years from the start date of the next auction of the 218-219 MHz Service, eligibility to reacquire the surrendered licenses through either auction or any secondary market transaction. Under either option, all installment payments made on surrendered licenses, plus the seventy percent credit under the second option, would be applied to previously accrued interest for retained markets, with any excess installment payments (but not down payments) refunded, subject to applicable federal debt collection laws.

47. *Discussion.* All commenters addressing the issue of amnesty generally favor it, with most suggesting some modification of the *218-219 MHz Flex NPRM* proposals. We conclude that it is in the public interest to adopt an amnesty option that permits any Eligible Licensee to surrender any or all of its licenses in exchange for relief from its outstanding debt and waive any applicable default payments, subject to Department of Justice approval and pursuant to applicable federal claims collections standards.[166] Accordingly, Eligible Licensees may elect resumption, amnesty, or a combination thereof for all of the 218-219 MHz licenses they hold. We believe the amnesty option will speed use of the 218-219 MHz spectrum to provide services to the American public. The surrender of licenses under this option will provide qualified parties with an opportunity to obtain 218-219 MHz Service licenses at a future auction. The amnesty option we adopt today is in the public interest because, while amnesty relieves a licensee from further debt obligations and any applicable default payments, a coordinated surrender of licenses facilitates expeditious award of the spectrum through a future auction and will provide new market opportunities for all eligible entities. In addition, we note that rapid auction of those licenses surrendered will also comply with the Congressional directive that we promote competition and participation in the telecommunications industry by diverse entities.

48. EON seeks clarification of the combination amnesty and resumption option to allow a seventy percent credit and two-year abstention, and suggests that, if necessary, we broaden the disqualification period to exclude the future acquisition of *any* 218-219 MHz Service licenses to be auctioned in the ensuing two-year period.[167] We will maintain our initial proposal allowing for a seventy-percent credit and two-year abstention for surrendered licenses. We see no reason to prevent qualified licensees from bidding on other 218-219 MHz Service licenses, and to do so would unduly penalize licensees that choose this option. Moreover, denying these licensees the opportunity to participate in all auctions during the next two years would undermine the Commission's desire to provide maximum flexibility to licensees in developing their business plans. For example, a licensee may determine it is in its best interests to return some licenses to the Commission, retain some of its licenses and attempt to acquire other licenses near the ones it retains. By allowing licensees to make individual decisions of this nature, we believe that we will be meeting our

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165 *See 218-219 MHz Flex NPRM* 13 FCC Rcd at 19086. *See, e.g., C Block First Reconsideration Order*, 13 FCC Rcd at 8358-60.

166 *See* 4 C.F.R. §§ 101-105.

167 *See* EON Comments at 1.

obligation to facilitate provision of communications services to the public.

49. A large number of commenters raise the issue of parity, and claim that since licensees in the 218-219 MHz Service paid a twenty percent down payment rather than the ten percent down payment required of C block licensees, the Commission should return ten percent of the amount paid.[168] One licensee proposes surrender and a flat $2500 payment with no additional penalties. We will not return any portion of the down payment to eligible licensees electing the amnesty option, irrespective of the percentage difference between C block and IVDS down payments. We believe that permitting licensees to return spectrum and avoid the risk of future default with no further financial liability is a significant benefit. Moreover, we believe that refunding down payments would undermine the integrity of the auctions process by relieving participants of even the most basic obligation of their participation.[169] Such an approach would not only be unfair to the other participants, but would encourage speculation in future auctions.

50. Many licensees paid the installment payments due prior to March 16, 1998, after which installment payments effectively were suspended by the *218-219 MHz Flex Order*. We believe that due to the actions we take in this *Report and Order*, it would be unjust and inequitable to treat installment payments the same as we do down payments, especially because the most fiscally responsible licensees made installment payments while others did not. Consequently, where an Eligible Licensee has elected amnesty for some of its licenses and resumption for others, we direct the Office of the Managing Director to apply all installment payments associated with the returned spectrum to accrued interest on the retained licenses. Any excess funds should be applied to reduce the principal owed on retained licenses. Where a licensee elects amnesty for all of its licenses, we direct the Office of the Managing Director to refund the installment payments to the licensee, in accordance with procedures to be established by the Bureau and the Office of Managing Director on delegated authority. In addition, we will forgive payment of any due, but unpaid, installment payments for any surrendered license.[170]

4. Prepayment

51. *Background*. The *C Block Restructuring Orders* provided for this option and at least two commenters request a similar option.[171] Under the prepayment option in the *C Block Restructuring Orders*, any licensee was entitled to prepay the outstanding principal debt obligations for any licenses it elected to

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168 *See* Hispania Reply Comments at 5; Interactive Comments at 5; and Hughes Comments at 3. Hispania's Reply Comments refer incorrectly to 10 percent as the level of down payment made by successful bidders in the 1994 auctions.

169 *Cf.*, Mountain Solutions LTD, Inc., *Order*, 12 FCC Rcd 5904 (1997) (*review denied*), *Memorandum Opinion and Order*, 13 FCC Rcd 21983 (1998); Carolina PCS I Limited Partnership, *Memorandum Opinion and Order*, 12 FCC Rcd 22938 (1997); C.H. PCS, Inc., *Order*, 11 FCC Rcd 9343 (1996); BDPCS, Inc., *Memorandum Opinion and Order*, 12 FCC Rcd 3230 (1997), *petition for reconsideration granted in part and denied in part, Memorandum Opinion and Order*, FCC 97-300 (rel. Sept. 29, 1997). *See also*, National Telecom PCS, Inc., *Memorandum Opinion and Order*, 12 FCC Rcd 10163 (1997) (*review pending*).

170 Forgiveness of this obligation will be subject to coordination with the Department of Justice pursuant to applicable federal claims collections standards. *See* 4 C.F.R. Parts 101-105.

171 In-Sync Comments at 7. *See also* 219-219 Group Comments at 9.

retain, subject to various restrictions.[172] The remaining licenses were required to be surrendered to the Commission for a future auction.[173] In exchange, the Commission forgave the debt on the surrendered licenses, and any associated payments owed. A licensee electing this option made its prepayment by using seventy percent of the total of all down payments made on the licenses it surrendered to the Commission, plus 100 percent of any installment payments previously paid for all licenses, plus any "new money" it was able to raise. The remaining portion of the down payment applicable to the surrendered licenses was not refunded or credited but retained by the Federal Government. Licensees were prohibited from bidding on their returned spectrum at auction or from reacquiring it in the secondary market for two years from the start of the next auction of C block spectrum. Licensees could, however, bid on spectrum surrendered by other licensees, provided such licensees were not affiliates.

52. *Discussion*. In-Sync specifically requests that we adopt a similar prepayment option.[174] Its proposal would allow first for the ten-year reamortization, then permit licensees the opportunity to choose whether to continue to pay in quarterly installments or pay the outstanding principal in a lump sum, subject to a 25 to 35 percent bidding credit. In-Sync notes that this approach would reduce many of the administrative burdens associated with installment payments, such as collecting payments, processing grace period requests, procuring documentation from licensees, and coordinating with other federal agencies.[175] We find that In-Sync's reasoning here is sound, and the prepayment option would be a logical extension of the *218-219 MHz NPRM* proposals. Prepayment may make it easier for licensees to raise the additional capital necessary to build-out their systems and deploy new services by providing licensees with a means of eliminating debt. Thus, consumers benefit by receiving service sooner. Prepayment also removes the Commission from the role of lender. In addition, prepayment benefits the public because it assures taxpayers of full payment of licenses. Indeed, we have expressed our preference for prepayment by eliminating installment payments as a means of financing small business participation for the immediate future.

53. Although we will not adopt the precise prepayment option adopted in the *C Block Restructuring Orders*, we will provide similar relief here. Eligible licensees may retain or return as many licenses as they desire; however, licensees electing the prepayment option must prepay the outstanding principal balance for any license they wish to retain. Licensees will receive a prepayment credit equal to 100 percent of their installment payments and eighty-five percent of their down payments associated with the returned spectrum as credit on their retained spectrum. The uncredited portion of the down payment, fifteen percent of a twenty percent down payment, equals three percent of the purchase price. This percentage is equivalent to the three percent default penalty.[176] If the prepayment credit does not equal the outstanding principal amount, the licensee must submit additional funds on or before the Resumption Date in order to retain the license, subject

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172 *C Block First Reconsideration Order*, 13 FCC Rcd at 8360.

173 *Id*.

174 In-Sync Comments at 7.

175 *Id*.

176 *C Block Second Report and Order*, 12 FCC Rcd at 16466.

to the Commission's full payment rules.[177] This option applies to all of the licenses a licensee holds and cannot be combined with the amnesty or resumption options.

5. Election Procedures

54. We conclude that Eligible Licensees electing one of the three restructuring options described in this *Report and Order* must file a written notice ("Election Notice") of such election with the Bureau on or before the Election Date [178] as specified in this section. Some commenters believe we should require winning bidders to expressly elect one of the two amnesty options proposed in the *218-219 MHz Flex NPRM* and that any failure to make an election should result in the automatic application of the original five-year payment schedule.[179] We will not adopt this measure because of its disproportionate financial effect. Eligible Licensees failing to make a specific election of any of the options by the specified Election Date will be placed automatically in the amnesty category. We delegate to the Bureau the authority to implement this *Report and Order*, including creating election procedures.

D. Previous Provisions for Designated Entities

55. *Background*: When the auction for what is now the 218-219 MHz Service was conducted on July 28 and 29, 1994, Part 95 of the Commission's rules included provisions to encourage participation by minority- and women-owned entities and small businesses.[180] Small businesses were entitled to pay eighty percent of their winning bids in installments.[181] Businesses owned by minorities and/or women were entitled to a twenty-five percent bidding credit that could be applied to one of the two licenses available in each market. Bidders that were both small businesses and minority- and/or women-owned entities could use installment financing as well as bidding credits.[182]

56. On August 2, 1994, the Commission announced the winning bidders in the IVDS auction, which

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177 47 C.F.R. § 1.2109(a).

178 As explained in note 155, "Election Date" means the last day of the third month following the month on which this *Report and Order* appears in the *Federal Register*. The Bureau will provide more information concerning filing procedures in a subsequent public notice.

179 ITV Comments at 6.

180 47 C.F.R. § 95.816(d).

181 This financing option was spread over a five-year term, with interest set at a fixed rate equal to that in effect for five-year U.S. Treasury notes on the day of issuance of a license. *See Competitive Bidding Fourth Report and Order*. *See also Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2390-91, ¶ 239.

182 *See Competitive Bidding Fourth Report and Order*, 9 FCC Rcd at 2338-89, ¶¶ 46-47.

included the recipients of bidding credits.[183] Graceba Total Communications, Inc. ("Graceba"), a winning bidder on two markets, did not qualify for a bidding credit.[184] On August 26, 1994, Graceba filed a petition for reconsideration ("Procedural Petition") of the *Bid Amount Public Notice*. Graceba argued that the auction had been conducted so as to artificially inflate prices.[185] In February 1995, prior to acting on the Procedural Petition, the Commission granted Graceba's licenses for the two markets in which it was the winning bidder. Subsequently, but while Graceba's petition was still pending, the U.S. Supreme Court decided *Adarand Constructors v. Peña ("Adarand")*,[186] holding that racial classifications are unconstitutional unless "narrowly tailored" and in furtherance of "compelling governmental interests."[187] Included in this category of classifications subject to "strict scrutiny" are those that are a part of federal programs aimed at providing remedies for race discrimination.[188] On July 11, 1995, Graceba filed an "Emergency Petition For Relief and Request for Expedited Consideration" ("Graceba Emergency Petition") challenging the constitutionality of the bidding credits on the basis of the *Adarand* case. Graceba requested a twenty-five percent reduction in its total bid

amount, to place it on a par with those minority and women bidders that had received twenty-five percent bidding credits.[189]

57. In December 1995, the Commission denied both of Graceba's petitions, along with those filed by other bidders in the 1994 auction seeking similar relief.[190] The Commission denied the Graceba Emergency Petition on the grounds that it constituted an untimely filed petition for reconsideration.[191] Upon appeal by Graceba, the D.C. Circuit upheld the denial of Graceba's Procedural Petition, but remanded the constitutional

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183 *See* "Announcement of Bid Amounts," *Public Notice* - Mimeo No. 44160 (rel. August 2, 1994) (*Bid Amount Public Notice*).

184 The licenses acquired were for markets 283A (Panama City, FL) and 246A (Dothan, AL).

185 *See* Procedural Petition at 1-2.

186 515 U.S. 200, 115 S. Ct. 2097, 132 L. Ed.2d 158 (1995).

187 *Id*. at 227, 115 S. Ct. at 2113.

188 By adopting a strict scrutiny standard for race classifications, *Adarand* partially overruled *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 110 S. Ct. 2997, 111 L. Ed. 2d 445 (1990) ("*Metro Broadcasting*"), in which "intermediate scrutiny" had been applied by the Court in upholding the Commission's use of minority preferences in broadcasting.

189 *See* Graceba Emergency Petition at 14. In its Procedural Petition, Graceba had asked for a 40 percent reduction to the amount of its bid.

190 *See* In the Matter of Interactive Video and Data Service (IVDS) Licenses, *Order*, 11 FCC Rcd 1282 (1995).

191 *Id.*, 11 FCC Rcd at 1285.

issues contained in the Graceba Emergency Petition to the Commission for further consideration.[192] On April 30, 1998, after the remand, Graceba filed with the Commission a "Petition for Action on Remand and Supplement to Emergency Petition for Relief and Request for Expedited Consideration" ("Remand Petition").[193]

58. In the course of Graceba's appeal, Community and the Coalition filed a petition to intervene in support of Graceba's constitutional arguments. However, since Community and certain members of the Coalition then had a "petition for relief" pending before the Commission raising identical issues, the Court dismissed the intervention petition.[194] The Bureau subsequently dismissed Community's petition, stating that petitioners should have objected to the payment conditions related

to their licenses when they had first been issued in January and February 1995.[195] These petitioners then filed with the Commission an Application for Review, which is pending.[196]

59. *Discussion:* Although the Commission did not seek comment on the constitutional issues raised by Graceba and Community in their respective filings, several commenters make arguments in this proceeding related to those issues. Community and CRSPI ask that the Commission retroactively award discounts equivalent to the twenty-five percent bidding credit to entities not previously eligible to receive them in the IVDS auction.[197] Community cites *Adarand* and the decision of the D.C. Circuit in *Graceba* and requests that the Commission resolve the Community Application for Review prior to adoption of any new

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[192] *Graceba Total Communications, Inc. v. FCC*, 115 F.3d 1038 (D.C. Cir. 1997). In *Graceba*, the Court remanded for further consideration the constitutional challenge to the race- and gender-based bidding credits used in the 1994 auction. Though not a commenter in this proceeding, Graceba raised issues in the Remand Proceeding that are similar to those asserted here by Community.

[193] Concurrently, Graceba filed a "Motion for Leave to File Supplement to Emergency Petition for Relief and Request for Expedited Consideration," which we grant.

[194] *Graceba*, 115 F.3d at 1040 ("Because Community Teleplay and members of the Coalition have a petition still pending before the Commission raising an identical claim, however, they must await the conclusion of those proceedings before bringing their claims here"). Community requests that winning bids be reduced by 25 percent and that 25 percent of down payments be directly refunded. Community argues that any evidence of racial or gender discrimination is societal and that it does not originate with the Commission. They state that the bidding credits were not narrowly tailored, as required by *Adarand*. *See* Community Petition for Relief filed December 5, 1995 ("Community Petition").

[195] *See* In Re Community Teleplay, Inc., *et al.* Petition For Relief of Application of Bidding Credits in the Interactive Video and Data Service, *Order*, DA 98-1008, (rel. May 28, 1998).

[196] Application for Review of Community, filed June 29, 1998 ("Community Application for Review").

[197] EON supports the comments of CRSPI and Community and requests that the Commission grant a 25 percent refund or credit, at the licensee's option, to "all non-preferred class auction winners, not just those represented in Graceba's case." *See* EON Reply Comments at 3. The Coalition similarly asks for a retroactive refund or credit for bidders not receiving race- or gender-based bidding credits in 1994. *See* Coalition Reply Comments at 15-16, n.14.

rules for the 218-219 MHz Service.[198] EON supports resolution of the Community Application for Review, either prior to, or contemporaneously with, this proceeding. We agree that the issues in the two separate filings are closely related. Accordingly, this *Report and Order* addresses the Graceba Emergency Petition, Remand Petition, the pending Community Application for Review, and the comments and reply comments that raise similar constitutional issues in this rulemaking.

60. Both Graceba and Community argue that the Commission has made no findings with respect to specific instances of past discrimination that might justify the use of gender- and race-based classifications.[199] The Commission previously focused on the constitutional ramifications of *Adarand* in the course of auctioning C block spectrum in the Personal Communications Service.[200] There, bidding credits similar to the ones used in the auction of what is now the 218-219 MHz Service had been adopted. Like the bidding credits presently under consideration, the C block bidding credits were adopted using the *Metro Broadcasting* intermediate scrutiny standard formulated prior to *Adarand*. In the *Competitive Bidding Sixth Report and Order*, the Commission acknowledged its concern that the record developed there would not adequately support the race- and gender-based provisions of the C block competitive bidding rules under a strict scrutiny standard.[201] To avoid the delay in the auction process that developing such a record would likely entail, coupled with the delay that the Commission anticipated would occur due to legal challenges to these provisions, the Commission decided to eliminate the race- and gender-based provisions for the C block auction and instead employ similar provisions for small businesses.[202] Subsequently, in order to determine whether adequate evidence exists to support such provisions, the Commission's Office of Communications Business Opportunities ("OCBO") commenced a series of studies to examine the minority and female ownership of telecommunications and electronic mass media facilities in the United States ("OCBO Studies").[203] Until completion of the OCBO Studies, it is premature to formulate even tentative conclusions as to the sufficiency of the ownership data being compiled to justify provisions for minority- and women-owned entities. However, while we continue to compile a record looking toward constitutionally appropriate

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198 Petitioners maintain that concurrent resolution of the Community Application for Review and this rulemaking proceeding is necessary to forestall the need to again restructure installment payments at a later date. *See* Community Comments at 15. *See also* CRSPI Comments at 8. Further, Community maintains that failure to provide the relief it is requesting here and in the Community Application for Review will perpetuate what it maintains is "an unlawful taking" by the Commission. Community Comments at 14. *See also* Community Application for Review at 13-17. While we agree that a consolidated resolution of the related matter is advisable to address the payment reamortization issues, we see no merit in Community's "taking" argument, which likens the high bids voluntarily made in the auction to mandatory administrative assessments. *Id.* at 15-16. This argument fails to acknowledge the fundamental distinction between the exactment by a government agency of mandatory fees and the voluntary placing of an auction bid based entirely on a bidder's own evaluation of the fair market value of the licenses being auctioned.

199 *See* Graceba Emergency Petition at 4.

200 See Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Sixth Report and Order*, 11 FCC Rcd 136 (1995); *Erratum*, 11 FCC Rcd 5433 (1995) (*Competitive Bidding Sixth Report and Order*).

201 *See Competitive Bidding Sixth Report and Order*, 11 FCC Rcd at 143.

202 *See id*.

203 Studies currently underway include demographic reviews of the sale and transfer of wireless facilities and broadcast stations.

means to encourage minority and female participation in telecommunications ownership, we will provide a remedy responsive to commenters and the issues raised in the Graceba Emergency Petition and the Remand Petition, as well as the Community Application for Review. We will eliminate from our rules the minority- and women-owned business bidding credits and will simultaneously grant credits of commensurate size to all winning small business bidders in the first IVDS auction.

61. To implement this decision, we will apply a twenty-five percent bidding credit ("Remedial Bidding Credit") to the accounts of every winning bidder in the 1994 auction of what is now the 218-219 MHz Service that met the small business qualifications for that auction.[204] The Remedial Bidding Credit will be applied prior to computation of the reamortization or payment resumption features described in paras. 40-45. No action on the part of minority- and women-owned winning bidders will be required to implement this remedy. We note that there is no known negative impact on minority- and women-owned bidders because all such bidders also met the small business qualifications and are therefore not disadvantaged by our action. Small business winning bidders that did *not* utilize the installment payment option in the auction shall also be eligible to receive the Remedial Bidding Credit, and they will receive a refund of any resulting excess payment.

62. We believe that in this case the conversion of race- and gender-based bidding credits to small business bidding credits resolves the issues presented by Graceba. Regardless of race or gender, all small business winning bidders were eligible to pay for their licenses in installment payments in what is now the 218-219 MHz Service, so there is no need to invoke the strict scrutiny standard of *Adarand*. Thus, we believe it is appropriate to extend the further benefit of a bidding credit based solely on size.[205] These remedies are consistent with the approach to bidding credits taken in other post-*Adarand* auctions.[206]

63. In devising this remedy, we remain mindful of the need to avoid any major disruptions to the operations of existing 218-219 MHz Service providers and the public. We believe this remedy strikes a proper balance among all factors bearing our consideration, including the importance of finality as a principle in the granting of licenses, fairness to auction participants whose views are not represented in petitions or

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[204] Under 47 C.F.R. § 1.2110 (b)(1) (1994), a small business was an entity that "has no more than a $6 million net worth and, after federal income taxes (excluding any carry over losses), has no more than $2 million in annual profits each year for the previous two years." More recently, the Commission eliminated consideration of net worth and annual profits in favor of a gross revenue test and adopted a two-tiered small business definition. Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Tenth Report and Order*, 11 FCC Rcd 19974, 19981-83 (1996) ("*Tenth Report and Order*"). For future auctions, a small business is an entity that, together with its affiliates and persons or entities that hold interests in such entity and their affiliates, has average annual gross revenues not to exceed $15 million for the preceding three years. A very small business is defined as an entity that, together with its affiliates and persons or entities that hold interests in such entity and their affiliates, has average annual gross revenues not to exceed $3 million for the preceding three years. 47 C.F.R. § 95.816 (d)(4)(i) and (ii).

[205] We note that our records reflect that the replacement of minority credits with small business credits will not result in the increase of any auction winner's debt.

[206] *See, e.g.*, 47 C.F.R. § 90.910 (800 MHz Specialized Mobile Radio); 47 C.F.R. § 90.810 (900 MHz Specialized Mobile Radio); 47 C.F.R. § 90.1017 (Phase II 220 MHz Service); 47 C.F.R. § 90.1103 (Location and Monitoring Service); 47 C.F.R. § 80.1252 (VHF Public Coast Service); 47 C.F.R. §§ 24.712, 24.717 (C, D, E and F Broadband PCS); 47 C.F.R. § 101.1107 (Local Multipoint Distribution Service); 47 C.F.R. § 27.209 (WCS).

comments, and the good-faith reliance the Commission placed on then-valid U.S. Supreme Court precedent[207] and the *1993 Budget Act*[208] in adopting the minority and female bidding credits.[209] We reject the remedial options suggested by commenters such as the "condemnation" of licenses and the conducting of auctions *de novo* as disruptive and unsuitable alternatives,[210] given these other significant concerns. The relief we provide today is reasonably constructed to avoid major disruptions to the affected service.[211]

64. In light of our disposition of this case, we are dismissing the Community Application for Review as moot. To the extent Graceba has requested in its Remand Petition that the Commission alter rules and auction results in radio services for which Graceba is not licensed and has no interest, we find that Graceba lacks standing, and we deny such request. In addition, addressing rules relating to other radio services is beyond the scope of this proceeding.

E. Service and Construction Requirements

65. *Background.* In the *218-219 MHz Flex NPRM*, we noted our commitment to eliminate possible barriers that would impede the maximization of efficient and effective spectrum use, and thus determined that strict construction requirements are not the most effective means to promote flexible uses of this spectrum.[212] Hence, we proposed to change the construction requirements in the 218-219 MHz Service to make these requirements consistent with those presently used in other services.[213] Specifically, we proposed to eliminate the three- and five-year construction benchmarks which are currently provided in our rules, and instead

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[207] *See supra*., note 188.

[208] In the *1993 Budget Act*, Congress enjoined the Commission to ensure that businesses owned by minorities and women are given the opportunity to participate in the provision of spectrum-based services, and, in this regard, directed us to consider the use of, among other things, bidding credits.

[209] After the auction and the *Adarand* decision, the U.S. Supreme Court decided *VMI*. 518 U.S. at 515, 116 S. Ct. at 2264, 135 L. Ed. 2d at 735. Based on *VMI*, we concluded that the gender-based bidding credits used in the 1994 auction of what is now the 218-219 MHz Service are required to meet an intermediate scrutiny standard. *See* Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Tenth Report and Order*, 11 FCC Rcd 19974, 19976 (1996) (*Competitive Bidding Tenth Report and Order*). Accordingly, upon completion of the OCBO Study, we will measure the sufficiency of the evidence of minority and female ownership against the *Adarand* and *VMI* standards, respectively. In this regard, Graceba posits that strict scrutiny of gender-based bidding credits is required. *See* Graceba Emergency Petition at 8. However, the precedent cited by Graceba predates *VMI*.

[210] Boston/Houston suggests that the Congress or the Commission consider condemning or revoking the licenses in the 218-219 MHz Service band to compensate license holders for the investments they have made. *See* Boston/Houston Reply Comments at 6.

[211] *See National Fuel Gas Supply v. FERC*, 313 U.S. App. D.C. 293, 59 F.3d 1281 (D.C. Cir. 1995).

[212] *218-219 MHz Flex NPRM*, 13 FCC Rcd at 19088.

[213] *See LMDS Second Report and Order*, 12 FCC Rcd at 12659-12661; *WCS Report and Order*, 12 FCC Rcd at 10841-10844.

require licensees to provide "substantial service" to their areas within five years of license grant.[214]

66. In an effort to reduce the number of speculative application filings and the potential for spectrum warehousing, the Commission promulgated construction benchmarks in its original rules for the 218-219 MHz Service that required the deployment of service within five years of a license grant.[215] Specifically, licensees were required to construct a sufficient number of stations to cover ten percent of the population or land area within one year, thirty percent within three years, and fifty percent within five years.[216] Additionally, they were required to submit a status report on the construction of a system at the end of each benchmark.[217] Under our rules, a licensee who fails to satisfy the benchmark automatically loses its authorization.[218]

67. In 1996, the Commission eliminated the one-year construction benchmark. The Commission concluded that this benchmark was not necessary to prevent spectrum warehousing because the introduction of auctions discouraged this practice.[219] Further, the Commission indicated that removing this benchmark would promote greater flexibility in selecting service options, obtaining financing, selecting equipment, and other considerations related to the construction of their systems.[220] The Bureau later waived the three-year construction benchmark for all licenses in the 218-219 MHz Service determining that enforcing the benchmark while this policy was under review would be unreasonable and contrary to the public interest.[221] Recently, the Bureau waived the five-year construction benchmark for all 218-219 MHz Service licenses with five-year construction benchmark deadlines ending on March 28, 1999, as well.[222] The Bureau again noted that the rules affecting the buildout criteria may ultimately change as a result of the instant rulemaking

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214 *218-219 MHz Flex NPRM*, 13 FCC Rcd at 19088-89.

215 *Id.*; *see also* 47 C.F.R. § 95.833.

216 47 C.F.R. § 95.833(a).

217 47 C.F.R. § 95.833(b).

218 47 C.F.R. § 95.833(a). Each 218-219 MHz Service system licensee must make the service available to at least 30 percent of the population or land area within the service area within three years of grant of the 218-219 MHz Service system license, and 50 percent of the population or land area within five years of grant of the 218-219 MHz Service system license. Failure to do so will cancel the 218-219 MHz system license automatically. For the purposes of this section, a CTS is not considered as providing service unless that CTS and two associated RTUs are placed in operation.

219 *One-Year Construction Report and Order*, 11 FCC Rcd at 2473. The one-year construction benchmark was waived for 17 of the 18 licensees that received their licenses as a result of the September 1993 lottery.

220 *Id.*

221 Requests by Interactive Video and Data Service Auction winners to Waive the January 18, 1998, and February 28, 1998, Construction Deadlines, *Order*, 13 FCC Rcd 756 (WTB 1998); Requests by Interactive Video and Data Service Lottery winners to Waive the March 28, 1997 Construction Deadline, *Order*, 12 FCC Rcd 3181 (WTB 1997).

222 *See Five-Year Benchmark Waiver Order*.

proceeding and, therefore,
concluded that waiving this benchmark requirement would be reasonable, would promote efficient use of the spectrum, and would be in the public interest.[223]

68. *Discussion.* Most commenters support our proposal to eliminate the three- and five-year construction benchmarks and replace them with a "substantial service" construction requirement.[224] Specifically, 218-219 MHz Licensees, In-Sync and Hughes indicate that the current benchmarks are unnecessary and may result in artificial buildout, forcing licensees to spend money on equipment that may not meet the needs of its systems to comply with administrative deadlines.[225] Thus, the commenters favor a more flexible approach to construction benchmarks, urging the Commission to avoid rules that encourage artificial buildout requirements.[226] We agree with the commenters that eliminating the three- and five-year construction benchmarks for all 218-219 MHz licensees serves the public interest, and thus replace it with a "substantial service" analysis.

69. We believe that a "substantial service" analysis would be the best method to encourage the construction of facilities in unserved markets. In the *218-219 MHz Flex NPRM*, we solicited comment on a definition for "substantial service," as well as "safe harbor" examples of substantial service showings.[227] In-Sync suggests that we define "substantial service" to include services provided to businesses or industries that indirectly provide service to the public.[228] Furthermore, In-Sync requests a definition broad enough to include consumer services as well.[229]

70. Upon reviewing the record, we conclude that the public interest would be best served if we define "substantial service" as a "service that is sound, favorable, and substantially above a level of mediocre

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223 *Id.*

224 ITV Comments at 10-11; 218-219 MHz Licensees Comments at 11-12 and Reply Comments at 9; Hughes Comments at 6 and 7; In-Sync Comments at 10 and Reply Comments at 7; ISTA Reply Comments at 19; EON Reply Comments at 1. We acknowledge that some commenters requested clarification of what satisfied the construction benchmarks with regard to types of transmissions and in terms of construction. Given the outcome of this proceeding, we conclude that it is not necessary to address these issues, in the context of the benchmarks pursuant to the five-year license term, as they are now irrelevant. We will instead lend guidance to licensees as to what will satisfy the construction benchmarks pursuant to the ten-year license term.

225 218-219 MHz Licensees Comments at 9; In-Sync Comments at 10; Hughes Comments at 6.

226 CRSPI Comments at 6; Boston/Houston Comments at 11.

227 *218-219 MHz Flex NPRM*, 13 FCC Rcd at 19088-89.

228 In-Sync Comments at 10.

229 *Id.*

service which might minimally warrant renewal."[230] Additionally, to facilitate licensees in their efforts to comply with this standard, we will consider the following "safe harbor" examples in determining whether a 218-219 MHz Service licensee has provided substantial service: (a) a demonstration of coverage to twenty percent of the population or land area of the licensed service area; or (b) a demonstration of specialized or technologically sophisticated service that does not require a high level of coverage to be of benefit to customers; or (c) a demonstration of service to niche markets or a focus on serving populations outside of areas currently serviced by other licensees. We have taken this approach in the past with respect to other services.[231] Furthermore, we believe that these examples are reasonable and will offer the flexibility licensees need to develop and provide service to various populations that are currently unserved. We recognize that this list of examples is not exhaustive. Hence, we will review the record of the licensee in its entirety and will assess each case individually at renewal.

71. Earlier in this *Report and Order*, we determined that amending our rules to allow a ten-year license term for the 218-219 MHz Service would best serve the public interest by ensuring regulatory parity among the licensees.[232] In the *218-219 MHz Flex NPRM*, we, under a ten-year scenario, proposed to require that all 218-219 MHz Service providers either make service available to at least twenty percent of the population or land area, or demonstrate substantial service, within ten years of license grant.[233] Alternatively, we asked whether, in lieu of establishing benchmarks, we should require licensees to provide substantial service to their service area within ten years of the license grant as a condition of renewal. Furthermore, we sought comment on whether to require incumbent licensees to comply with a five-year substantial service benchmark five years from the effective date of rules promulgated pursuant to this instant proceeding and the ten-year requirement at the end of their ten-year license term.

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230 *LMDS Second Report and Order*, 12 FCC Rcd at 12660; *WCS Report and Order*, 12 FCC Rcd at 10843-10844; In the Matter of Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, *Memorandum Opinion and Order on Reconsideration and Third Report and Order*, WT Docket 96-18, FCC 99-98 (1999); Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.-40.0 GHz Bands, *Report and Order and Second Notice of Proposed Rulemaking*, 12 FCC Rcd 18600, 18621-18625 (1997); 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, *Third Report and Order and Fifth Notice of Proposed Rulemaking*, 12 FCC Rcd 10943, 11015-11021 (1997); 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 and Implementation of Sections 3(n) and 322 of the Communications Act, *Third Order on Reconsideration*, 11 FCC Rcd 1170-1171 (1995).

231 *See LMDS Second Report and Order*, 12 FCC Rcd at 12660; *WCS Report and Order*, 12 FCC Rcd at 10844; 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 - Implementation of Section 309(j) of the Communications Act, GN Docket No. 93-252, *Third Order on Reconsideration*, 11 FCC Rcd 1170 (1995); 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 – Implementation of Section 309(j) of the Communications Act – Competitive Bidding and Implementation of Sections 3(n) and 322 of the Communications Act, GN Docket No. 93-252, *Second Report and Order and Second Further Notice of Proposed Rule Making*, FCC 95-159, 10 FCC Rcd 6884, 6887 (1995).

232 *See supra*, para. 31.

233 *218-219 MHz Flex NPRM*, 13 FCC Rcd at 19089.

72. We received mixed responses to these proposals. The majority of commenters suggest that we conduct our "substantial service" assessment at the end of the license term as a condition of renewal, as this period will provide a complete record for Commission review.[234] ITV indicates that the public interest is not served by having two construction deadlines falling within a short period of time, and therefore the public interest would be best served with one assessment at the time of license renewal.[235] Hughes disagrees with our proposal that a twenty percent coverage of land area or population should be imposed.[236] Hughes urges the adoption of a single "substantial service" standard.[237] ISTA, on the other hand, states that either standard – "substantial service" or twenty percent coverage – is adequate to motivate development of the service.[238]

73. Both Community and EON request that we retain the five-year construction benchmark for lottery winners in the top nine markets, favoring extension on a case-by-case basis.[239] Community states that lottery-won licenses should be extended for five years only after construction benchmarks have been met.[240] According to Community, auction-won licenses should be extended upon following clear "safe harbor" provisions that define "substantial progress" for auction licensees.[241] Community proposes that we require auction winners to reach the "substantial service" benchmark at year six of the extension.[242] EON disagreed with our proposal to extend the buildout or service requirement to ten years for lottery-won licenses because the extension may slow development since the return on investment is not an incentive for fast development for lottery-won licenses as in the case of auction-won licenses.[243]

74. We disagree with the approaches suggested by Community and EON. Retaining two separate requirements for lottery-won licensees and auction-won licensees does not facilitate our efforts to streamline

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234 ITV Comments at 10-11; In-Sync Comments at 10; 218-219 MHz Licensees Reply Comments at 11. It should be noted that although the 218-219 MHz Licensees favored a "substantial service" five-year construction benchmark in its original comments, its reply comments supported a "substantial service" assessment at license renewal.

235 ITV Comments at 10-11.

236 Hughes Comments at 6 and 7.

237 *Id.*

238 ISTA Reply Comments at 6.

239 Community Comments at 8 and Reply Comments at 2; EON Comments at 1.

240 Community Comments at 10.

241 *Id.* at 10-11.

242 *Id.* at 11.

243 EON Comments at 1.

the service rules and ensure regulatory parity among all of the 218-219 MHz licensees.[244] One commenter, who owns both lottery- and auction-won licenses, notes that it makes no sense to require buildout for the lottery market at an earlier time than the auctioned market.[245] We agree. Although we have expressed concern about system development among lottery winners in the past, we believe that they will have incentives, reasonably similar to those of auction winners, to utilize this spectrum efficiently to maximize the economic opportunities that their licenses create.[246] Moreover, we are confident that both types of licenses – lottery winners and auction winners – will be able to build systems and provide competitive services, given the increased flexibility provided by the rules in this *Report and Order*.

75. Section 309(j)(4)(B) of the Communications Act mandates that we promote investment in and rapid development of new technologies and service by means of performance requirements, such as deadlines and penalties for performance failures.[247] We believe that the approach we are adopting today better achieves this mandate than the buildout requirement that had been in place until now. Given that five years has already passed and the three- and five-year benchmarks were suspended, a single benchmark requirement of substantial service at renewal is warranted. Furthermore, we will require licensees to file supporting documentation showing compliance with the construction requirements at the time of renewal. Failure to demonstrate that "substantial service" is being provided will result in a license not being renewed. We believe that these requirements will offer maximum flexibility, providing a more realistic opportunity for current and future 218-219 MHz licensees to meet their construction obligations and provide high quality wireless services to the public.

F. License Transferability

76. *Background.* In September 1993, eighteen licenses were awarded by lottery. As a strategy to reduce license "trafficking" and the filing of speculative applications, the Commission prohibited the transfer of a 218-219 MHz license until the system's five-year construction benchmark (fifty percent coverage) had been met.[248] This prohibition does not, however, apply to 218-219 MHz Service licenses that were acquired through the competitive bidding process.[249]

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244 *See* Fresno Mobile Radio, Inc. v. Federal Communications Commission, 165 F.3d 965 (D.C. Cir. 1999) (*Fresno*). The Court remanded the case to the Commission because two different standards for buildout were required for auction license winners and incumbents (non-auction winners).

245 Hughes Reply Comments at 5-6.

246 *See Fresno*, 165 F.3d at 969. The Court deemed "foolish," the notion that incumbents (non-auction license winners) have less incentive than auction license winners to quickly utilize the spectrum.

247 47 U.S.C. § 309(j)(4)(B) (1999).

248 47 C.F.R. § 95.819(b).

249 *Competitive Bidding Fourth Report and Order*, 9 FCC Rcd at 2335, 2343; *see also* 47 C.F.R. § 95.819(a) (noting that transferability of auction won licenses is governed by Section 1.2111 of the Commission's rules).

77. In the *218-219 MHz Flex NPRM*, we sought comment on whether we should retain the license transfer restriction for lottery-won licenses.[250] In the event we retain the license transfer restriction, we sought comment on the manner in which the restriction should be applied in light of the proposed service rule changes involving the construction benchmarks and the partitioning and disaggregation of 218-219 MHz Service licenses.[251]

78. *Discussion.* Most commenters support a total elimination of the license transfer restriction imposed on lottery-won licenses.[252] In-Sync states that this elimination will increase ownership flexibility.[253] Furthermore, the 218-219 MHz Group and Bay Area indicate that the license transfer restriction is based on obsolete "anti-trafficking" concerns and that lifting the restriction will ensure regulatory parity among all 218-219 MHz eligible licensees.[254]

79. Community urges that we retain our current restriction against license transferability because such rules discourage speculative sales of licenses and encourage system construction buildout.[255] Community also states that lottery licensees that do not wish to construct a 218-219 MHz

system, should return the license to the Commission to be re-issued by way of competitive bidding as opposed to private sale.[256]

80. The Commission's initial concerns for imposing the license transfer restriction (*i.e.*, "trafficking") are no longer relevant. Previously, we were concerned that licensees would acquire licenses for the sole purpose of reselling them to reap a profit, with no intention of building systems to provide service to the public. In light of this concern, we placed limitations on the ability to transfer lottery-won licenses in order to discourage the filing of speculative applications.[257] However, in 1997, Congress passed the Omnibus

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250 *218-219 MHz Flex NPRM*, 13 FCC Rcd at 19090.

251 *Id.*

252 ITV Comments at 13; 218-219 MHz Licensees Comments at 12 and Reply Comments at 10 n.32; Bay Area at 4; Hughes Comments at 7 and Reply Comments at 7; In-Sync at 11; EON Reply Comments at 2; ISTA Reply Comments at 7-8.

253 In-Sync Comments at 11.

254 218-219 MHz Licensees Comments at 12; Bay Area Comments at 4.

255 Community Comments at 11 and Reply Comments at 4.

256 *Id.*

257 *See 1992 Allocation Report and Order* at 1641; Amendment of Part 22 of the Commission's Rules to Provide for Filing and Processing of Applications for Unserved Areas in the Cellular Service and to Modify Other Cellular Rules, *First Report and Order and Memorandum Opinion and Order on Reconsideration*, 6 FCC Rcd 6185, 6222-6224 (1991).

Budget Reconciliation Act which eliminated our authority to award licenses by lottery in this context.[258] Because there will be no future lotteries, relaxing the license transfer restriction rule in this instance will not have the result of creating an incentive to acquire licenses with the intention of quickly reselling them for a profit, and applicants will less likely enter into these proceedings for this purpose. License transfer restrictions are no longer essential vehicles to dissuade this practice. We also note that in recent services we generally have not utilized "anti-trafficking" rules.[259]

81. Furthermore, the problems that have plagued the 218-219 MHz Service warrant the removal of obstacles that would thwart the development of this service. Specifically, we recognize that nine of the largest markets were acquired by lottery and have experienced difficulty deploying service in this spectrum. Hence, concerns with the possibility of "trafficking" are now outweighed by our present concern to adopt rules that encourage the utilization of this spectrum. We believe that applying the license transfer restriction in this instance would have an adverse effect on the deployment of service and that relaxing the restriction would be in the public interest as this would place licenses in the possession of those licensees with the incentive and the resources to develop the service in these markets. We, therefore, disagree with Community's assessment concerning the necessity of "anti-trafficking" rules for this service[260] and support the relaxation of this restriction where license transfers for lottery-won licenses will be individually examined to determine whether the license transfer is appropriate under our general public interest standards.

82. Other commenters suggest that we attach "conditions" on the elimination of the transfer restriction. For instance, ISTA states that we should eliminate the transfer restriction once the five- year construction benchmark is met.[261] Applying this option is impractical because we no longer require licensees to meet a five-year construction benchmark.[262] EON suggests that we create an initial window for license transfers that, upon expiration, requires buildout or meeting the service benchmark before a license transfer is allowed.[263] Although this is a potentially viable option because it creates a degree of flexibility for license transfers, we believe that a more liberal approach would best promote the utilization of the 218-219 MHz spectrum.

83. In this *Report and Order*, we are reassessing our current rules for the 218-219 MHz Service and removing potential barriers to maximize the development of viable services in this spectrum. As such, the relaxation of the license transfer restriction for the eighteen lottery-won licenses will promote this objective. However, we note that we will evaluate all license transfer applications on a case-by-case basis pursuant to

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258 *See* 47 U.S.C. § 309(i)(5) (1999).

259 *See, i.e., LMDS Second Report and Order*, 12 FCC Rcd 12545; *39 GHz Report and Order and Second NPRM*, 12 FCC Rcd 18600.

260 CTI Reply Comments at 4.

261 ISTA Comments at 19.

262 *See Five-Year Benchmark Waiver Order*.

263 EON Comments at 1.

Section 1.948 of our rules to determine whether the license transfer would be in the public interest.[264]

G. Spectrum Aggregation

84. *Background.* In establishing rules for the 218-219 MHz band, we concluded that the best way to promote competition in the developing marketplace would be to make at least two facilities available in each market.[265] Therefore, our cross-ownership rule prohibits an entity from holding or having an interest in the licenses for both frequency segment A (218.0-218.5 MHz) and frequency segment B (218.5-219 MHz) in the same service area.[266]

85. *Discussion.* Petitioners sought elimination of the cross-ownership rule, stating, *inter alia*, that competing services with larger bandwidth and greater capitalization provide the necessary competition to alleviate any concern that a 218-219 MHz Service licensee would exert monopoly power by aggregating one megahertz of spectrum, and that a full one megahertz of spectrum would enhance spectrum flexibility through expanded applications and services.[267] In 1996, the Commission denied a request for rulemaking on this issue.[268] In deciding not to grant the petition for rulemaking, we concluded that since the *interactive television marketplace* is in a relatively early state of competition," allowing a single entity to acquire both licenses in a service area would limit the opportunity for other potential competitors to emerge.[269] However, it is now clear that restricting the competitive analysis of the 218-219 MHz band to the interactive television service is inconsistent with failure of that service to develop in the marketplace and with the myriad services that are being proposed and that our rules now permit in the 218-219 MHz Service.[270] Therefore, it is now appropriate to reexamine the cross-ownership prohibition.

86. While most of the comments on this issue are in favor of permitting cross-ownership, EON and Community oppose permitting aggregation of those licenses. They argue that such an approach would create the possibility for a single licensee in a specific market, with a potential monopolistic effect on 218-219 MHz suppliers of equipment and applications.[271] This potential will then effectively create a disincentive for

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264 *See* 47 C.F.R. § 1.948.

265 *Allocation Notice*, 6 FCC Rcd at 1371.

266 47 C.F.R. § 95.813(b)(1).

267 Letter Amendment at 4-5; *accord* MKS Petition at 5.

268 *Competitive Bidding Sixth MO&O/Further Notice*, 11 FCC Rcd at 19363.

269 *Id.* (emphasis added).

270 *See 218-219 MHz Flex MO&O*, 13 FCC Rcd at 19075, ¶ 16, 19091, ¶ 49.

271 EON Comments at 1; Community Reply Comments at 9.

suppliers to invest in product development and place control of market entry in the hands of one entity.[272]

87. Ten parties take an opposing view and favor permitting the aggregation of 218-219 MHz service licenses.[273] In-Sync, ISTA, IVDS Enterprises Joint Venture (IVDS Enterprises), Interactive Innovations, Inc. (Interactive), Hispania & Associates, Inc. (Hispania), Eagle Interactive Partner, Inc. (Eagle), and the Coalition support permitting a licensee to hold both the "A" and "B" licenses in the same market. The primary reason cited by the parties for such a change is that a licensee with a 500 kHz bandwidth cannot be a serious competitor to operations in different bands that have larger available bandwidths. Dispatch also supports our proposal because licensees will face competition from other service providers which in turn will eliminate any anticompetitive concerns.[274] Concepts supports cross-ownership because the Commission has opened up various bands to competing services in the past and should do so in this case as well.[275] IVDS/RLV, L.L.C. and Friends of IVDS, Inc. (IVDS/RLV) also is in favor of cross-ownership between the A- and B-band licenses because it allows flexibility, thereby enhancing the interference elimination techniques.[276]

88. The evolution of services in the 218-219 MHz Service has made our cross-ownership restrictions a bar to investment in product development and creation of new services. Economies of scale and the types of service utilized in this band suggest that more bandwidth would be optimum for the development of 218-219 MHz operations. We agree with the majority of commenters that bandwidth greater than 500 kHz is necessary to compete effectively with operations in different bands offering similar services. Thus, we believe that permitting spectrum aggregation in the 218-219 MHz Service will promote, not inhibit, competition.

89. In the *218-219 MHz Flex NPRM*, we also sought comment on whether the 218-219 MHz Service spectrum should be included in any overall spectrum caps. While Hughes agrees with our proposal because aggregation may actually lead to development of new services and increased demand for products, it asserts that the 218-219 MHz Service spectrum should be included in any overall spectrum caps that are generally imposed on CMRS licenses.[277] The decisional factor in whether to apply a spectrum cap to a particular service is a balancing of the potential benefits and costs. We believe that the benefits normally associated with the spectrum cap are insufficient at this time to impose the spectrum cap on the 218-219 MHz Service.

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272 *Id.*

273 These commenters are the 218-219 Group, Bay Area, Dispatch, In-Sync, ISTA, IVDS Enterprises, Interactive, Hispania, Eagle, and Coalition.

274 Dispatch Comments at 4.

275 Concepts Comments at 5.

276 IVDS/RLV Comments at 3.

277 Hughes Comments at 7.

90. The CMRS spectrum cap was imposed out of concern that "excessive aggregation [of spectrum] by any one of several CMRS licensees could reduce competition by precluding entry by other service providers and might thus confer excessive market power on incumbents."[278] It is intended to promote a vigorous competitive market for the provision of commercial mobile radio services, to ensure that each mobile service provider has the opportunity to obtain sufficient spectrum to compete effectively, and to ensure that no single provider is able to preclude the provision of service by effective competitors or significantly reduce the number of competitors by aggregating spectrum.[279]

91. It is possible that CMRS licensees may be the most efficient users of the 218-219 MHz spectrum because of their existing base station infrastructures. For example, it may be that a current CMRS licensee would be able to use its existing infrastructure to provide services in the most cost efficient manner. There may be other economies of scope in the provision of different services as well. Applying the CMRS spectrum cap to the 218-219 MHz spectrum would interfere with the realization of these savings by preventing the direct participation by those entities who own the existing CMRS infrastructure and, consequently, prevent customers from benefitting from these savings, with little off-setting benefit in competition.

H. Partitioning and Disaggregation

92. In the *Partitioning Report and Order*, we expanded our rules to permit geographic partitioning and spectrum disaggregation for broadband PCS licensees.[280] Since the adoption of partitioning and disaggregation rules for broadband PCS, we have adopted and proposed adopting partitioning and disaggregation for a number of services.[281] Consistent with the broadband PCS rules, we proposed to permit partitioning and disaggregation for the 218-219 MHz Service.

93. We now conclude that a flexible approach to partitioned areas, similar to the approach we adopted for broadband PCS, is appropriate for the 218-219 MHz Service. We will therefore permit partitioning of 218-219 MHz Service licenses based on any area defined by the parties within the licensee's

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278 *Implementation of Sections 3(n) and 332 of the Communications Act*, GN Docket No. 93-252, *Third Report and Order*, 9 FCC Rcd 7988, 8101 (1994).

279 *See CMRS Third Report and Order* at 8108.

280 Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees, WT Docket No. 96-148, *Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 21831 (1996) (*Partitioning Report and Order*). Partitioning is the assignment of geographic portions of the license along geopolitical or other boundaries. Disaggregation is the assignment of discrete portions or blocks of spectrum licensed to a geographic licensee or qualifying entity. *Id.* at 21833, n.2.

281 *See, e.g.*, 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, *Fourth Report and Order*, 12 FCC Rcd 13453 (1997); Rule Making to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, To Reallocate the 29.5-30.0 GHz Frequency Band, To Establish Rules and Policies for Local Multipoint Distribution Service And for Fixed Satellite Services, *Fourth Report and Order*, 13 FCC Rcd 11655 (1998).

service area.[282] We conclude that combined partitioning and disaggregation should also be permitted for the 218-219 MHz Service. This approach would afford parties optimal flexibility to respond to market forces and demands for service relevant to their particular locations and service offerings. We authorize a partitionee and disaggregatee to hold its license for the remainder of the original licensee's term. We believe that this approach would prevent licensees from using partitioning and disaggregation to circumvent our established license term rules. Additionally, by limiting the license term of the partitionee or disaggregatee, we ensure that there will be maximum incentive for parties to pursue available spectrum as quickly as practicable, thus expediting the delivery of service to the public.

94. In the *Partitioning Report and Order*, we concluded that allowing partitioning and disaggregation would help to (a) remove potential barriers to entry, thereby increasing competition; (b) encourage parties to use spectrum more efficiently; and (c) speed service to unserved and underserved areas.[283] Similarly, we believe that such an approach for the 218-219 MHz Service would result in the same public interest benefits. Providing licensees with the flexibility to partition potentially creates smaller service areas that could be licensed to small businesses, including those entities that previously may not have had the resources to participate successfully in spectrum auctions. With regard to the copyright concerns Rand McNally has raised, we will revise our final rules to remove the reference to MTAs or BTAs as potential geographic areas to be used for partitioning in the 218-219 MHz service. Rather, we will provide a specific reference to the United States Department of Commerce Bureau of Economic Analysis Economic Areas and EA-like areas which the Commission has defined in other contexts.[284] We believe that this approach resolves the copyright concerns raised by Rand McNally.[285] We further note that our substitution of EA-like areas for MTAs and BTAs does not limit the ability of licensees to partition a license to their desired degree of specificity (including by the submission of exact coordinates, if they choose), but is designed solely to address the copyright concerns raised by Rand McNally.

I. Technical Standards

95. *Background*. Having concluded that we will be able to meet our goal of providing licensees the flexibility to design their service offerings in response to market demand, we now turn to the specific technical restrictions associated with the service. In the *218-219 MHz Flex NPRM*, we invited comment on

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[282] In the *218-219 MHz Flex NPRM*, we proposed partitioning rules which permitted licensees to utilize FCC-recognized service areas when defining a partitioned service area, and defined "FCC-recognized service areas" to include Major Trading Areas (MTAs) and Basic Trading Areas (BTAs). Rand McNally, copyright owner of the MTA and BTA classifications, asserts that the Commission must not use the MTA/BTA classifications for partitioning within the 218-219 MHz Service without first negotiating a specific licensing agreement. Rand McNally Comments at 2.

[283] *Partitioning Report and Order*, 11 FCC Rcd at 21843.

[284] *See, e.g.*, 47 C.F.R. § 90.823.

[285] *See* Rand McNally comments at 2.

our technical rules, including those rules requiring automatic power control capability,[286] antenna height and transmitter power limitations,[287] duty cycle limitations,[288] and other interference protection standards. We also asked whether the interference provisions of Section 95.861

of our rules,[289] which require 218-219 MHz Service licensees to resolve problems with interference to television broadcast reception or discontinue operation, are sufficient to protect broadcast spectrum.[290]

96. We established the technical restrictions on the 218-219 MHz Service in the *1992 Allocation Report and Order*. TV Answer and the Association for Maximum Service Television had previously reached an agreement whereby then-IVDS licensees and TV Channel 13 operations could co-exist.[291] Both this agreement and our interference restrictions were based on TV Answer's system design.[292] However, the potential applications for the 218-219 MHz Service go far beyond the service envisioned by TV Answer when these rules were designed. Concurrent with the expansion of potential applications for the service, we have received various requests for waiver of these technical standards,[293] as well as petitions that we relax or eliminate certain technical rules.[294]

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[286] 47 C.F.R. § 95.855(a). Automatic power control capability, included in the RTU circuitry, automatically adjusts the RTU power output to the minimum amount necessary for communication between the CTS and the RTU. This capability minimizes the possibility of an RTU causing interference to a television broadcast receiver. We implemented the automatic power control requirement for all RTUs in the *1992 Allocation Report and Order*, 7 FCC Rcd at 1635, 1648.

[287] 47 C.F.R. §§ 95.855, 95.859.

[288] 47 C.F.R. § 95.863. A transmitter "duty cycle" is a limit to the amount of time a transmitter can transmit during a specific time frame, which, in the 218-219 MHz Service as initially allocated, minimizes the potential for interference to reception of TV Channel 13.

[289] 47 C.F.R. § 95.861.

[290] *218-219 MHz Flex NPRM*, 13 FCC Rcd 19092. The applicable rule is at 47 C.F.R § 95.861.

[291] *1992 Allocation Report and Order*, 7 FCC Rcd at 1632.

[292] *Id.*, 7 FCC Rcd at 1633.

[293] *See* Jay M. Lieberman and Michael R. Walton, dba J & M Partnership Request for Waiver (July 14, 1997) (seeking waiver of the antenna height and power ratios, 47 C.F.R. § 95.859(a)); Ronald E. Dowdy Request for Waiver (July 9, 1997) (seeking the same); Raveesh K. Kumra Request for Waiver (Apr. 17, 1997) (seeking waiver of the antenna height and power ratios, 47 C.F.R. § 95.859(a), and the duty cycle limitations, 47 C.F.R. § 95.863(a)). These waiver requests were incorporated into the record of this proceeding by the *218-219 MHz Flex NPRM*. *218-219 MHz Flex NPRM*, 13 FCC Rcd at 19094, n.201.

[294] These requests include petitions seeking waiver of automatic power control in RTUs with power in excess of 100 milliwatts, 47 C.F.R. § 95.855(a). *See* Third Letter Amendment (attachment at 2). *Cf.* Phoenix Data Communication, Inc., Request for Waiver of Section 95.855 of the Commission's Rules, *Order*, 13 FCC Rcd 25195 (WTB, 1998) (*Phoenix Waiver*) (discussing waiver of the RTU automatic power control requirement, filed in conjunction with an application for type acceptance of its proposed equipment); Requests for Waiver of Section 95.859(a)(2), Concerning Interactive Video and Data Service (IVDS) Transmitter Power Limits, *Order*, 11 FCC Rcd 4669 (WTB 1996) (*1996 Waiver Order*) (discussing waiver of 47 C.F.R. § 95.859(a)(2) to permit use of specific CTS

97. *Discussion.* Commenters overwhelmingly claim that our current rules no longer serve the 218-219 MHz Service, and that by retaining the rules, we will significantly hinder the flexibility we are seeking to provide licensees of the service.[295] As EON notes, the spectrum is being used for purposes other than those for which the original restrictions were created.[296] In their discussion of specific technical rules, commenters claim that the current restrictions discourage manufacturers from developing equipment for the service.[297] Many commenters also claim that 218-219 MHz Service licensees would be able to better develop services if greater parity existed between services.[298] In addition, Concepts also claims that the current technical rules contain several inconsistencies.[299]

98. There is broad agreement that the current technical rules can be relaxed without increasing the possibility of interference. ISTA notes that by separating the 218-219 MHz Service transmitter and the television receiver, potential interference can be eliminated, and IVDS cited tests by Young Design and Berkeley Varitronic Systems, Inc., that concluded that the interference potential is virtually eliminated if the transmitter is separated from television sets by a distance of fifty feet or more.[300] Several commenters also agree with our tentative conclusions that the evolution toward precise digital technology, both within the evolving 218-219 MHz Service industry,[301] and on the part of the broadcast industry,[302] will further reduce interference potential.[303] ISTA, for example, suggests that the evolution toward digital will enable all

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technology programmed to transmit only during the TV Channel 13 horizontal blanking interval).

295 *See, e.g.*, ITV Comments at 14.

296 EON Reply Comments at 2; *See also* Petty Comments at 1 (noting that most services now contemplated for the 218-219 MHz Service involve applications not associated with television); 218-219 Group Comments at 15 and In-Sync Comments at 14 (noting that because it is unlikely that set-top boxes that could interfere with TV Channel 13 reception due to their proximity to television sets will be used – as proposed in TV Answer's service model – our power control rule will be unnecessary in many cases).

297 *See, e.g.*, Phoenix Reply Comments at 2; Boston/Houston Comments at 10; 218-219 Group Comments at 15 (discussing automatic power control); ISTA Comments at 14; IVDS Enterprises Comments at 1.

298 ISTA Comments at 18; 218-219 Group Comments at 18.

299 Concepts Comments at 3-4.

300 ISTA Comments at 5-6; IVDS Enterprises Comments at 1.

301 For example, current licensees of 218-219 MHz Service systems have indicated in presentations to Bureau staff that the marketable uses of systems in the band appear to use digital emission types of equipment, utilizing much lower transmitter power than is presently authorized, and that digital emissions produce imperceptible (or no) interference to TV Channel 13 when the RTU transmitting antenna is at least three feet away from the TV receiver.

302 *See generally, e.g.*, Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, MM Docket No. 87-268, *Fifth Report and Order*, 12 FCC Rcd 12809 (1997).

303 *218-219 MHz Flex NPRM*, 13 FCC Rcd at 19094-95. *See also id*, 13 FCC Rcd at 19078 (denying petitions to expand the area of RTU duty cycle limits); *Mobility Report and Order*, 11 FCC Rcd at 6611.

spectrum technologies to monitor and control their respective spectrums and suppress interference.[304] Finally, commenters note that we allow other services to operate in frequencies adjacent to the television spectrum without the same types of technical restrictions we impose on 218-219 MHz Service operations and that, because these other adjacent-band services are able to operate without causing interference, the technical restrictions on the 218-219 MHz Service are not justified.[305] Several commenters contrast the minimal technical restrictions for the Automated Maritime Telecommunications Systems (AMTS) – which operates in the band immediately adjacent to TV Channel 13 – with the more stringent technical restrictions for the 218-219 MHz Service, which is separated from Channel 13 by 2 MHz.[306] Other commenters point to similar situations in the amateur services and Private Land Mobile Radio Services in the 220-222 MHz band.[307]

99. We conclude that, in general, our specific technical rules are designed for a service model that bears little similarity to the breadth of services envisioned for the 218-219 MHz Service, and that these rules provide a measure of interference protection that may not be necessary in all cases.[308] However, we also believe that we should retain any technical rule that still provides needed interference protection to TV Channel 13 regardless of the specific service being employed by a 218-219 MHz Service licensee. We briefly re-examine each technical rule, and retain those that are still broadly applicable to the 218-219 MHz Service.

1. Duty Cycle Limitations

100. *Background.* Section 95.863 or our rules[309] imposes a maximum duty cycle of five seconds per hour for each RTU, whether fixed or mobile. In the *218-219 MHz Flex NPRM*, we noted that the duty cycle limitation – which applies only to those RTUs operating within the TV Channel 13 predicted Grade B contour – was not designed as "one of the principal ways we intended to minimize

the interference potential of the 218-219 MHz Service," but was instead designed as "an additional safeguard

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304 ISTA Comments at 20. *See also* 218-219 Group Comments at 17; Hughes Comments at 9.

305 *See, e.g.*, Hughes Comments at 9; CRSPI Comments at 3-4; IVDS/RLV Comments at 3; In-Sync Comments at 14; Boston/Houston Comments at 8-9. *See also 218-219 MHz Flex NPRM*, 13 FCC Rcd at 19093-94 (noting that other services are authorized to transmit in frequencies adjacent to or nearby 218-219 MHz with higher power levels than allowed at 218-219 MHz and with no duty cycle restrictions).

306 Community Reply Comments at 5, Hughes Comments at 9. AMTS is authorized for 80 channels from 216.0125 MHz to 229.9875 MHz. 47 C.F.R § 80.385. Several commenters make an additional argument that the 2 MHz "guard" band between TV Channel 13 and the 218-219 MHz Service provides interference protection that makes our technical rules unnecessary. Boston/Houston Comments at 10 and CRSPI Comments at 5-6.

307 Hughes Comments at 9, IVDS Enterprises Comments at 2.

308 Although MKS suggests that, even with a total relaxation of the rules, many licensees may still consider the 218-219 MHz Service a "non-starter," this restriction cannot serve as a basis for the FCC to fail to maintain technical rules that are necessary to provide adequate interference protection. MKS Comments, ¶ 9. *See also* EON Reply Comments at 2 (suggesting that anything short of completely lifting the technical standards would appease only a minority of the commenters and be detrimental to the industry's future).

309 47 C.F.R. § 95.863.

against interference."[310]

101. *Discussion.* Commenters suggest that new uses of the 218-219 MHz Service in conjunction with "substantial improvements in television receiver technology," make the rule unnecessary.[311] Concepts says that allowing the transmitter to only transmit during the blanking intervals will produce signals that are neither visible nor audible to the viewer without the use of the prescribed duty cycles,[312] and other commenters who suggest that we retain a duty cycle limitation in some form see little need for duty cycles for mobile units or those RTUs that operate far away from the television set-top.[313] We conclude that because licensees may design their system to operate in a cycle that will not cause television interference, or they may operate equipment that is sufficiently removed from television receivers to prevent interference, the duty cycle rule no longer has broad applicability and we eliminate it.

2. 100 Milliwatt Power Limitation on Mobile RTUs

102. *Background.* In authorizing mobile RTU operations in the *Mobility Report and Order*, we established a 100 milliwatt mean power limit for mobile RTUs.[314] We concluded that it was appropriate to establish a lower limit than the twenty watts allowed for fixed RTUs and CTSs, because allowing unrestricted mobile operations increases the interference potential with respect to the operations of licensees of other services.[315]

103. *Discussion*. There is support for relaxing the 100 milliwatt limit. For example, Dispatch – whose parent company also owns and operates a Channel 13 TV station – contends that the 100 milliwatt limit can be increased without causing interference to Channel 13 operations.[316] Community, citing a study conducted by the Technology Applications Center of Norfolk and the Engineering Department of Old Dominion University (TAC/ODU) that found no significant interference by one-watt mobile RTUs operating with no duty cycle outside a residence in the Grade B contour of Channel 13, suggests that mobile RTUs should be allowed to operate anywhere outside a residence at one watt, and that we should grant waivers to

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310 *218-219 MHz Flex MO&O*, 13 FCC Rcd at 19077 (citing *Mobility Report and Order*, 11 FCC Rcd at 6618-19).

311 IVDS Enterprises Comments at 1-2.

312 Concepts Comments at 2. Several commenters discussed the use of systems designed to transmit only during the vertical blanking interval of the television wavecast. For example, RTT suggests that such a system would substantially increase data transmission throughput versus the current duty cycle limitation. RTT Comments at 6.

313 Community Comments at 17; Community Reply Comments at 5; Dispatch Comments at 6.

314 *Mobility Report and Order*, 11 FCC Rcd at 6617.

315 *Id.*

316 Dispatch Comments at 6. Dispatch's parent company owns WTHR(TV) Channel 13 in Indianapolis. Dispatch Comments at 1, n.1.

allow operation at higher powers upon a technical showing of no interference.[317] Commenters suggest other limits, including four watts, based on the experiences with low-band FM and TV Channel 6;[318] twenty-five watts and an ERP not exceeding eighteen watts, based on our AMTS rules;[319] and an average power limit at 100 milliwatt or the peak power at twenty watts, whichever is lower.[320] Based on the comments, we conclude that a power limit for mobile RTU operation is still justified to protect against TV Channel 13 interference, but that the studies show that we can relax the 100 milliwatt limitation. We will set the maximum average mobile RTU power at four watts. Although Community's study was based on comprehensive interference predictions but actual tests at one watt, we conclude that a four-watt limit is desirable, given the absolute interference protection provisions and our desire to allow maximum flexibility in the 218-219 MHz Service. However, because mobile RTU use has the potential to cause sporadic interference that may be difficult to trace and resolve – for example, when an RTU-equipped vehicle drives by a household with a TV Channel 13 receiver[321] – we find the four-watt mobile RTU limit as suggested by commenters to be justified, and within the range of power limits the Commission has established for services operating in or in close proximity of the 218-219 MHz band. We emphasize that, in no case, may a 218-219 MHz Service licensee cause interference to TV Channel 13 reception (see § 95.861, 47 C.F.R. § 95.861), and we expect that technical limitations will require licensees, in some applications, to use RTUs that use a lower power than authorized by our rules.

3. Automatic Power Control

104. *Background*. Section 95.855(a) of our rules requires the use of automatic power control for any RTU with power in excess of 100 milliwatts in order to ensure that the RTU uses the minimum effective radiated power necessary for successful communications.[322] As part of our *218-219 MHz Flex Order and NPRM*, and in response to waiver requests pertaining to automatic power control, we re-evaluated whether this rule, designed to mitigate potential interference, is still justified.

105. *Discussion*. Many commenters note that we have previously granted waivers of the automatic power control restrictions.[323] For example, we waived the RTU automatic power control requirement in

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317 Community Comments at 17.

318 CRSPI Comments at 5. *See also* ISTA Comments at 7 (finding a 4 watt limit "justified").

319 Community Reply Comments at 5 (citing 47 C.F.R. § 80.215(i)).

320 RTT Comments at 6.

321 *See* Community Comments at App. A (suggesting that the fact that a vehicle-mounted RTU that causes interference will quickly move away as a basis for concluding that the potential for interference is limited).

322 47 C.F.R. § 95.855.

323 *See, e.g.*, 218-219 Group Comments at 15.

conjunction with an application for type acceptance of equipment proposed by Phoenix Data Communications, Inc.[324] In its petition, Phoenix sought a waiver for a transmitter that was part of a microprocessor-controlled street light photocontroller that uses the 218-219 MHz Service radio frequencies to report the status of a street light to a base radio receiver system.[325] We found that the configuration of the 218-219 MHz system as described by Phoenix differed to such an extent from the systems for which the service was originally designed that there was no possibility that the Phoenix equipment would be in close proximity to television receivers such that there was an increased potential for interference to TV Channel 13 reception.[326] Based on our findings in the Phoenix Waiver, we cannot agree with Dispatch that the automatic power control represents a minimal intrusion on system design.[327] Rather, we conclude that it represents an example of an unnecessary regulatory impediment to the development of applications for the 218-219 MHz Service. We conclude that the automatic power control restriction will not be applicable to all services envisioned in the 218-219 MHz Service, and we eliminate it. As discussed further in Section IV.I.6, *infra*, 218-219 MHz Service licensees remain under the continuing obligation to resolve any interference problems with television broadcast reception or discontinue operations.

4. CTS Antenna Height and Transmitter Power Ratios

106. *Background.* Section 98.859(a) of our Rules sets maximum power limits for CTSs, based on the height of the CTS antenna. The taller the CTS antenna, the less powerful the maximum ERP we permit for the CTS.

107. *Discussion.* The 218-219 MHz Group suggested that we could either allow operations at up to 250 watts ERP as long as the power of the signal remains substantially lower than the Channel 13 signal or, alternately, that we could adopt a standard "colocation exemption" within one-quarter of one mile of a Channel 13 broadcaster.[328] RTT suggests that we allow full-power CTS transmissions in the TV Channel 13 blanking interval as an alternative to the existing height and power limitation ratios,[329] and Concepts supports full-power operations at 500 feet height above average terrain in all cases if signals are only transmitted during the blanking intervals of TV Channel 13.[330] We have previously waived Section 98.859(a)(2) of our Rules for a 218-219 MHz Service system employing vertical blanking technology, after finding that the "new

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324 *Phoenix Waiver*, 13 FCC Rcd 25195.

325 Phoenix Data Communication, Inc., Request for of Section 95.855 of the Commission's Rules, at 3.

326 *Phoenix Waiver*, ¶ 6.

327 Dispatch Comments at 7.

328 218-219 Group Comments at 17.

329 RTT Comments at 6.

330 Concepts Comments at 6.

and innovative technology" being used was unlikely to cause interference.[331] Given the variety of mechanisms licensees have proffered for the elimination of possible interference, we conclude that the current height-power ratios are no longer broadly applicable, and we remove them. We will retain the general restriction in Section 95.859(a) of our Rules that no CTS antenna shall be elevated higher than necessary to assure adequate service.

5. Limits on Transmitter Effective Radiated Power

108. *Background.* In the *Mobility Report and Order* we considered – but rejected – any modifications to the 20-watt maximum power for fixed RTUs after concluding that no party had offered any evidence to show that our choice of a twenty-watt limit for fixed service was ill-advised.[332] Under the provisions in Section 95.855(b) of our Rules, a CTS is required to operate between a one- and twenty-watt ERP, based on its CTS location within a TV Channel 13 service area. We re-examine our maximum twenty-watt rule today.

109. *Discussion.* Concepts suggests that the power limitations should be modified to allow for full twenty-watt ERP in all cases if signals are only transmitted during the blanking interval of TV Channel 13.[333] Several other commenters suggest the elimination of this rule on the basis that higher power limits would allow licensees to use new modulation techniques which would reduce the cost of building systems.[334] Although we want to promote flexibility in the provision of 218-219 MHz Services, we do not believe that a reduction in build-out costs, by itself, can serve as a basis for eliminating the rule. Based on Concept's comments, however, we are convinced that licensees may be able to develop systems that account for the additional potential for interference in the Grade B area that prompted our reduced maximum CTS ERP in Section 95.855(b) of our rules, and we establish a maximum CTS ERP of twenty watts in all cases. This additional flexibility should foster the development of new services in the 218-219 MHz Service.

110. Nevertheless, we conclude that we should retain a twenty-watt maximum ERP because the establishment of a maximum permissible power limit provides an important measure of interference protection and no commenter (except those advocating the complete removal of the technical rules) offered evidence that our specification of a maximum power level for the 218-219 MHz Service is ill-advised. The twenty-watt limit is appropriate because the 218-219 MHz Service is allocated such that there will be other 218-219 MHz Service operations in adjacent MSAs and RSAs to which a 218-219 Mhz Service licensee must provide interference protection. Moreover, unlike automated marine telecommunications system (AMTS) services (in which subsequently authorized TV services do not enjoy interference protection), 218-219 MHz Service licensees have an absolute duty to provide interference protection to TV Channel 13 reception, regardless of when the TV service was authorized. As a general matter, we do not believe that

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331 *1996 Waiver Order*, 11 FCC Rcd at 4670.

332 *Mobility Report and Order*, 13 FCC Rcd at 6617.

333 Concepts Comments at 6.

334 ISTA Comments at 5 (promoting the use of QAM-64 Modulation); IVDS Enterprises Comments at 2 (suggesting a 25 watt power limit).

218-219 MHz Service licensees will propose operations in excess of twenty watts, nor will they be able to afford adequate interference protection for operations greater than twenty watts. In this connection, we note that the pending waiver requests of Jay M. Liberman and Michael R. Walton, dba J&M Partnership, Ronald E. Dowdy, and Raveesh K. Kumra, all involve proposed operations at twenty watts. In the unusual circumstance in which a 218-219 MHz Service provider structures a system that can operate in excess of twenty watts and provide necessary interference protection, we believe that a request for a waiver would be the most appropriate course.

6. General Interference Protection

111. *Background.* We also asked whether the general interference protection afforded by Section 95.861 of our Rules[335] is sufficient to protect broadcast reception.[336] Section 95.861 of our Rules requires, *inter alia*, that 218-219 MHz Service licensees either resolve interference problems to television broadcast reception or discontinue operations.[337] Commenters were divided on whether we should rely on Section 95.861 of our Rules as the sole means of interference protection. Eagle asserts that we should completely remove the technical and operational rules, and instead retain Section 95.861 of our Rules to resolve interference problems to broadcast operations,[338] and In-Sync claims that Section 95.861(e) of our Rules – which requires 218-219 MHz Service licensees to investigate and resolve interference upon written complaint by either a television viewer or broadcast station – provides adequate interference protection by itself.[339] However, other commenters state that the complete removal of technical and operational limitations will result in interference, and thus Section 95.861 of our Rules, on its own, provides inadequate protection.[340]

112. *Discussion*. As an initial matter, we agree with commenters that Section 95.861(e) should be the foundation for resolving interference complaints between 218-219 MHz Service licensees and television stations and viewers.[341] Given the nature of the 218-219 MHz Service, this section provides the most suitable mechanism for resolving interference complaints. The alternative – primary reliance on more specific technical rules – would either undermine this service's flexibility (which we have determined is

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335 47 C.F.R. § 95.861.

336 *218-219 MHz Flex NPRM*, 13 FCC Rcd at 19094-95.

337 Portions of the interference rule requiring a 218-219 MHz Service licensee operating within a TV Channel 13 station Grade B predicted contour to notify households of the potential for interference are subject to petitions on file with the Commission. *See* Third Letter Amendment (attachment 2-3) (seeking clarification that the notification requirements of Section 95.861(c) would not apply to licensees providing one-way emergency transmission to receive-only CTSs); *accord* MKS Petition at 5 (requesting elimination of the notification procedures).

338 Eagle Reply Comments at 2.

339 In-Sync Comments at 14.

340 *See, e.g.*, Hispania Reply Comments at 2.

341 218-219 Group Reply Comments at 7. *See also* ISTA Comments at 14 (also suggesting modifications to the language of this subsection). We also note that § 95.861(a) provides a mechanism for the resolution of interference problems among 218-219 MHz Service licensees.

critical to its success), or lead to frequent waiver requests by those proposing new and innovating uses of the spectrum (an impractical result that would turn the waiver process on its head).[342] Primary reliance on Section 95.861(e) will not, of course, eliminate in advance all potential interference concerns between 218-219 MHz systems and TV Channel 13 reception,[343] but this approach toward interference management will avoid imposing restrictions that may be overprotective or unnecessary in many cases. Concepts, Hispania, and Interactive all state that licensees will most likely have to make trade-offs between specific technical considerations – such as power, antenna height, duty cycle, timing with respect to Channel 13 vertical blanking intervals, distance to an over-the-air TV receiver, and automatic power controls – in order to provide adequate interference protection, and we agree this may the be the case for certain 218-219 MHz Service systems.[344] Such tradeoffs go hand-in-hand with the flexibility we are providing, but we must leave it to the 218-219 MHz Service licensee to determine what tradeoffs will be necessary for a particular system to avoid Section 95.851's ultimate resolution of an interference problem that cannot be corrected by the system – discontinuance of 218-219 MHz Service operations.[345]

113. Concepts notes that after-the-fact resolutions are more expensive than prior planning to avoid interference,[346] and we agree that 218-219 MHz Service licensees who rely solely on the interference correction provisions of Section 95.861(e) of our Rules could cause interference with TV Channel 13 reception that might not be resolved for as long as thirty days. Accordingly, we find merit in Concept's suggestion that licensees should, as part of their planning process, produce an interference control plan detailing the technical parameters and operational information being used to mitigate any identified interference effects.[347] We will therefore retain and expand the requirement in Section 95.815 (d)(3) of our

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342 We previously relied on this approach when the 218-219 MHz Service was designed for a specific application. *See 1992 Allocation Order*, 7 FCC Rcd 1634, ¶ 31 (stating that we would accept requests for waivers of our antenna height limit on a case-by-case basis). *C.f. 1996 Waiver Order*, 11 FCC Rcd at 4670, ¶ 6.

343 For example, some licensees may choose to develop service based on the model originally envisioned in the *1992 Allocation Order*, and may use a set-top RTU that has the potential for Channel 13 interference. *See also, e.g.*, Community reply comments at 6 (concluding that automatic power control should be retained for certain fixed RTUs and for mobile units); RTT Comments at 7 (suggesting that automatic power control may still be necessary for mobile applications utilizing greater power).

344 Hispania Reply Comments at 1-2; Interactive Reply Comments at 2; Concepts Supplemental Filing at 5 (noting that the current technical standards rules are "overprotective if applied simultaneously").

345 Because of the flexibility of services a 218-219 MHz Service licensee may provide, we will not adopt the additional technical rule modifications suggested by commenters in order to allow a licensee to determine what technical tradeoffs are necessary for a particular system. *See, e.g.*, ISTA Comments at 9 (suggesting that a definition of "other than fixed" for mobile RTUs, would allow us to restrict "other than fixed" RTUs to commercial, industrial, or vehicular applications that cannot be used around a household and thus wouldn't cause potential Channel 13 interference); Concepts Comments at 2 and 5 (asking us to specify "a residential dwelling which uses direct reception of TV Channel 13 signals," in order to limit requests to mitigate TV interference to only those viewers using direct reception of TV signals); Dispatch Comments at 6-7 (calling for additional considerations with respect to fixed facilities).

346 Concepts Reply Comments at 1-2.

347 Concepts Reply Comments at 2.

Rules that licensees prepare and submit an interference plan.[348] We clarify that the plan must provide an analysis of a licensee's proposed system and describe the methods being used to eliminate co- and adjacent channel interference. Moreover, the 218-219 MHz Service licensee must update the plan to reflect changes to its system design or construction.

114. More extensive use of the pre-planning requirement can largely replace Section 95.861(c) of our Rules, which requires 218-219 MHz Service licensees to provide notification to households within a TV Channel 13 station Grade B predicted contour of the potential for interference, unless a licensee obtains written consent from the TV Channel 13 station licensee to dispense with the notification. Because we expect 218-219 MHz Service licensees to utilize pre-planning to identify and mitigate any potential interference, the household notification rule is needlessly burdensome. We retain both the requirement in Section 95.861(d) of our Rules that each 218-219 MHz Service licensee must, upon request, install free of charge an interference reduction device to any household that experiences interference, and the absolute interference protection provision of Section 95.861(e) of our Rules. We will also require that the 218-219 MHz Service licensee provide a copy of the interference control plan (and all subsequent modifications) to all TV Channel 13 station licensees whose predicted Grade B contour overlaps with the 218-219 MHz Service licensee's service area.

115. Finally, we recognize that many television viewers will not know that any incremental interference can be eliminated under the rules.[349] However, both the initial design for the 218-219 MHz Service and comments received in this proceeding lead to the conclusion that a particularly strong interference potential exists when 218-219 MHz Service equipment is placed near television receivers. In those cases, it is reasonable to conclude that the 218-219 MHz Service use and the TV Channel 13 viewing will occur in the same household. In the *1992 Allocation Order*, we noted that a 218-219 MHz Service subscriber might experience some interference to its television reception when operating an RTU, but we did not impose additional notification provisions.[350] Instead, we noted that "it might behoove the [218-219 MHz Service] licensee to install an interference reduction device on the television receivers of its subscribers," and concluded that "[i]t will be at the subscriber's discretion as to whether sporadic interference to his own household television reception that might be caused by RTU operation is unacceptable."[351] This analysis is still valid, and we conclude that 218-219 MHz Service licensees who design systems that include RTUs designed for household use will choose to account for any potential interference in order to ensure consumer acceptance of their equipment.

J. Incorporation by Reference of Part 1 Standardized Auction Rules

116. *Background.* In the *Part 1 Third Report and Order*, we amended our uniform set of

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348 47 C.F.R. § 95.815 (d)(3).

349 Dispatch Comments at 7-8.

350 *1992 Allocation Order*, 7 FCC Rcd at 1637, ¶ 49.

351 *Id.*

competitive bidding rules for all auctionable services, which applied generally to the 218-219 MHz Service, incorporating our experience to date and allowing us to conduct future auctions in a more consistent, efficient, and effective manner.[352] These amended procedures, set forth in Part 1, Subpart Q of the Commission's rules, supersede previously adopted service-specific rules, unless the Commission determines that with regard to particular matters, the retention or adoption of service-specific rules is warranted.[353]

117. In the *218-219 MHz Flex NPRM*, we proposed to conduct all future auctions for licenses in the 218-219 MHz Service in conformity with the amended general competitive bidding rules set forth in Part 1, Subpart Q of the Commission's rules. Specifically, we proposed to employ the Part 1 rules governing designated entities, application issues, payment issues, competitive bidding design, procedure and timing issues, and anti-collusion.[354] In this regard, consistent with our decision in the *Part 1 Third Report and Order*, we would no longer offer installment payments as a means of financing small business participation in the 218-219 MHz Service auction. Instead, we proposed to retain the two tiers of small business size standards currently set for 218-219 MHz Service licensees, and utilize the standard schedule of bidding credits set forth in the *Part 1 Third Report and Order* as applied to those two tiers of small businesses, which would allow for somewhat higher bidding credits in light of the suspension of installment payment financing.[355] We sought comment on these proposals and on whether any of our Part 1 rules would be inappropriate in an auction for this service.

118. *Discussion*. Commenters support applying the Part 1 rules to the 218-219 MHz Service.[356] We believe that application of these rules will allow 218-219 MHz Service auction participants to realize the benefits enjoyed by participants in other spectrum auctions of a streamlined, efficient licensing process. Therefore, we will adopt our proposal to follow the competitive bidding rules set forth in Part 1, Subpart Q of the Commission's rules, to conduct all future auctions for licenses in the 218-219 MHz Service. Specifically, we conclude that the Part 1 rules will govern competitive bidding issues in the 218-219 MHz Service, including issues concerning designated entities, application issues, payment issues, competitive bidding design, procedure and timing issues, and anti-collusion.[357]

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352 *Part 1 Third Report and Order*, 13 FCC Rcd at 374.

353 *See id.*, 13 FCC Rcd at 382.

354 *See 218-219 MHz Flex NPRM*, 13 FCC Rcd at 19095-96.

355 *Compare Part 1 Third Report and Order*, 13 FCC Rcd at 404 (establishing standard bidding credits of 35 percent for businesses with average gross revenues not exceeding $3 million for the preceding three years, and 25 percent for businesses with average gross revenues not exceeding $15 million for the preceding three years) *with* 47 C.F.R. § 95.816(d)(1) (service-specific bidding credits of 15 percent for businesses with average gross revenues not exceeding $3 million for the preceding three years, and 10 percent for businesses with average gross revenues not exceeding $15 million for the preceding three years).

356 *See* Hughes Comments at 10; In-Sync Comments at 15; Community Teleplay Comments at 15; ITV Comments at 17; IVDS Affiliates at 17.

357 *See, e.g.*, 47 C.F.R. §§ 1.2110 (designated entities), 1.2105 (bidding application and collusion), 1.2106 (upfront payments), 1.2103 (competitive bidding design), 1.2104 (competitive bidding mechanisms).

119. Accordingly, installment payments will no longer be offered as a means of financing small business winners of licenses in the 218-219 MHz Service auction. We will continue to employ small business size standards and bidding credits to promote designated entity participation in the 218-219 MHz Service.[358] Two commenters support the Commission's application of the small business size standards currently specified for the 218-219 MHz Service,[359] while two other commenters believe that the gross revenue thresholds for determining what constitutes a small business and a very small business should be increased.[360]

120. We believe the current 218-219 MHz Service small business size standards are appropriate for this service. In addition, we have not undertaken any action that would change these capital requirements. Therefore, consistent with our proposals, we will retain the two tiers of small business size standards currently specified for 218-219 MHz Service licensees and will utilize the standard schedule of bidding credits set forth in the *Part 1 Third Report and Order* as applied to those two tiers of small businesses. Accordingly, we will define a small business as an entity that, together with its affiliates and persons or entities that hold interests in such entity and their affiliates, has average annual gross revenues not to exceed $15 million for the preceding three years. A very small business is defined as an entity that, together with its affiliates and persons or entities that hold interests in such entity and their affiliates, has average annual gross revenues not to exceed $3 million for the preceding three years.

121. In-Sync contends that all existing licensees and their affiliates should receive a 15 percent bidding credit on future auctions in light of the controversial history of the IVDS service.[361] In-Sync reasons that any pool of future bidders in the 218-219 MHz Service would be limited to existing licensees and CMRS providers seeking to aggregate spectrum. In-Sync asserts that, since 218-219 MHz Service licensees will be undercapitalized, they will be unable to compete effectively with CMRS aggregators, thereby meriting the extra bidding credit.[362] We do not agree. We believe that our auction and service rules will provide existing licensees with a reasonable opportunity to compete against CMRS aggregators. Accordingly, we will adopt tiered bidding credits for these small business definitions, consistent with levels adopted in the Part 1 proceeding. Small businesses will receive a twenty-five percent bidding credit. Very small businesses will receive a thirty-five percent bidding credit. Bidding credits for small businesses are not cumulative. As noted in the Part 1 proceeding, we believe that this approach will provide adequate opportunities for small

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358 *See* revised 47 C.F.R. § 95.816(c), listed herein under Appendix B. *See also* 47 C.F.R. § 1.2110(e).

359 Community asserts that the 218-219 MHz Service is a service for small businesses, and therefore, the small business definitions should remain at their low levels to prevent businesses considered too small in a broadband service from taking advantage of bidding credits. Community Comments at 21. In-Sync believes such credits will allow it to devote more capital to market development, thereby expediting service to the public. In-Sync Comments at 16.

360 *See* ITV Comments at 17-18. ITV maintains that, because of the lack of operating experience in the industry, 218-219 MHz Service licensees will not have access to bank debt or other sources of lending, and therefore, suggests that the thresholds for "very small business" and "small business" be raised to $5 and $18 million dollars, respectively.

361 In-Sync Comments at 15.

362 In-Sync Comments at 15-16.

businesses of varying sizes to participate in spectrum auctions.[363] We believe that the tiered bidding credits we adopt for the 218-219 MHz Service are reasonable in light of our decision not to use installment payments and expect that they will enable small businesses to compete for spectrum licenses through our auction program.

V. MEMORANDUM OPINION AND ORDER

122. *Introduction.* We have before us a petition for reconsideration of the *Tenth Report and Order*[364] filed by Interactive America Corporation ("IAC").[365] For the reasons discussed below, we dismiss IAC's Petition for Reconsideration.

123. *Background.* IAC was the high bidder on fifteen IVDS licenses in Auction No. 2. IAC, however, failed to make the required initial down payments on the licenses. Instead, IAC requested a waiver, seeking postponement of the initial payment deadline, which the Commission denied.[366] Thereafter, IAC sought appellate review of these decisions.[367] On November 23, 1996, the Commission released the *Tenth Report and Order*, which established rules to govern the then-planned second auction of IVDS licenses (Auction No. 13).[368] On December 4, 1996, the Bureau released a public notice announcing Auction No. 13, scheduled to begin February 18, 1997, and listing as available for auction the fifteen licenses on which IAC defaulted.[369] On December 27, 1996, IAC filed a petition for reconsideration of the *Tenth Report and Order*. In its petition, IAC contends that the Commission did not disclose IAC's pending appeal, thereby failing to disclose all material facts about the licenses subject to auction.[370] IAC further contends that the Commission

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363 *See Part 1 Third Report and Order*, 13 FCC Rcd at 403-04, ¶ 47.

364 *See* Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Tenth Report and Order*, 11 FCC Rcd 19974 (1996) ("*Tenth Report and Order*").

365 IAC Petition for Reconsideration, filed December 27, 1996.

366 *See* Requests for Waivers in the First Auction of 594 Interactive Video and Data Service Licenses, *Order*, 9 FCC Rcd 6384 (Com. Car. Bureau 1994) (request for waiver denied); Requests for Waivers in the First Auction of 594 Interactive Video and Data Service Licenses, *Order*, 10 FCC Rcd 12153 (1995) (petition for reconsideration denied); Requests for Waivers in the First Auction of 594 Interactive Video and Data Service Licenses, *Order*, 11 FCC Rcd 8211 (1996) (application for review denied).

367 *See Interactive America Corp. v. F.C.C.*, No. 96-1320 (D.C. Cir., filed September 6, 1996), consolidated with *Commercial Realty St. Pete, Inc. v. F.C.C.*, No. 96-1271 (D.C. Cir., filed August 7, 1996).

368 *See* Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, *Tenth Report and Order*, 11 FCC Rcd 19974 (1996) ("*Tenth Report and Order*"). The *Tenth Report and Order* established competitive bidding rules governing the second auction of the Interactive Video and Data Service (Auction No. 13).

369 *See* "Auction of Interactive Video and Data Service (IVDS) – Auction Notice and Filing Requirements for 981 IVDS Licenses Scheduled for February 18, 1997," *Public Notice*, 11 FCC Rcd 20950 (1996).

370 IAC Petition for Reconsideration at 2-3.

should postpone any IVDS auction until adoption of final rules.[371]

124. *Discussion.* Intervening circumstances have made IAC's Petition for Reconsideration moot. First, on January 29, 1997, the Bureau postponed Auction No. 13 "to give the Commission an opportunity to consider [various] requests of potential bidders and license holders seeking to obtain additional flexibility for the service."[372] In addition, on May 22, 1997, the United States Court of Appeals for the District of Columbia Circuit denied on the merits IAC's petition for review, thereby rendering moot IAC's argument on reconsideration that the Commission should provide full disclosure of pending proceedings that may affect the licenses to be auctioned.[373]

125. IAC's argument that the Commission should not hold an auction until final rules are adopted is rendered moot by today's action. Since the filing of IAC's petition, we have undertaken a comprehensive examination and modification of our regulations governing the licensing and use of the 218-219 MHz Service (*see* Section III., *supra*),[374] finalized our service rules,[375] and determined that our Part 1 competitive bidding rules will be applicable to the 218-219 MHz Service (*see* Section IV.H., *supra*). Accordingly, IAC's petition for reconsideration is dismissed.

VI. PROCEDURAL MATTERS

A. Regulatory Flexibility Act

126. A Final Regulatory Flexibility Analysis, pursuant to the Regulatory Flexibility Act, 5 U.S.C. § 604, is contained in Appendix C.

B. Final Paperwork Reduction Act of 1995 Analysis

127. This *Report and Order* contains a modified information collection, which has been submitted to the Office of Management and Budget (OMB) for approval. As part of our continuing effort to reduce

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371 *Id. at* 3.

372 "Wireless Telecommunications Bureau Postpones February 18, 1997 Auction Date for 981 Interactive Video and Data Service (IVDS) Licenses," *Public Notice*, 12 FCC Rcd 1389 (1997).

373 *See Commercial Realty St. Pete, Inc. v. F.C.C.*, 116 F.3d 941 (D.C. Cir., May 22, 1997) (unpublished opinion available at 1997 WL 358223), *reh'g denied* (D.C. Cir. Aug. 6, 1997), *cert. denied*, 118 S. Ct. 445 (Nov. 17, 1997) *and cert. denied*, 118 S. Ct. 629 (Dec. 15, 1997). We note that in every auction, we caution bidders that the Commission makes no representations or warranties about the use of spectrum for particular purposes and that applicants should perform their own due diligence. *See, e.g.*, "Auction of Local Multipoint Distribution Service; Auction Notice and Filing Requirements for 986 Basic Trading Area ("BTA") Licenses in the 28 GHz and 31 GHz Bands, Scheduled for December 10, 1997," *Public Notice*, 13 FCC Rcd 7754 (1997); *see also* Local Multipoint Distribution Service Bidder Information Package at 94.

374 *See also 218-219 MHz Flex Order*, 13 FCC Rcd at 19080-96.

375 *See* Final Rules attached hereto as Appendix B.

paperwork burdens, we invite the public and other government agencies to take this opportunity to comment on the information collection contained in this *Report and Order*, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due 30 days from publication of this Report and Order in the Federal Register. Comments should address the following: (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. A copy of any comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, room 1-C804, 445 12th Street S.W., Washington, D.C. 20554, or via the Internet to jboley@fcc.gov.

C. Further Information

128. For further information concerning this *Report and Order*, contact Jamison Prime, Shellie Blakeney, or Nick Kolovos of the Policy and Rules Branch, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau at (202) 418-0680 (voice), (202) 418-7233 (TTY); or Robert Allen of the Auctions and Industry Analysis Division, Wireless Telecommunications Bureau at (202) 418-0660 (voice), (202) 418-7233 (TTY).

VII. ORDERING CLAUSES

129. Accordingly, IT IS ORDERED that, pursuant to the authority of sections 4(i), 257, 303(b), 303(g), 303(h), 303(q), 303(r), 309(j) and 332(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 257, 303(b), 303(g), 303(h), 303(q), 303(r), 309(j) and 332(a), that 47 C.F.R Parts 20 and 95 of the Commission's Rules ARE AMENDED as set forth in Appendix B, effective sixty days after publication in the *Federal Register*, following OMB approval, unless a notice is published in the *Federal Register* stating otherwise.

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

131. IT IS FURTHER ORDERED that the waiver requests of Jay M. Liberman and Michael R. Walton, dba J&M Partnership, Ronald E. Dowdy, and Raveesh K. Kumra ARE GRANTED insofar as the proposed waivers are consistent with the new rules we adopt herein and ARE DENIED in all other respects.

132. IT IS FURTHER ORDERED that Rulemaking docket number RM-8951, established in response to the Petition for Rulemaking and associated amendments filed by Euphemia Banas, *et al*, IS TERMINATED.

133. IT IS FURTHER ORDERED that the Emergency Motion for Stay of Community Teleplay, Inc. IS DISMISSED as moot.

134. IT IS FURTHER ORDERED that, pursuant to 47 U.S.C. § 155(c), 47 C.F.R. § 0.331, and 47 C.F.R. § 0.11(a)(8), the Chief of the Wireless Telecommunications Bureau, and the Managing Director, ARE GRANTED DELEGATED AUTHORITY to prescribe and set forth procedures for the implementation of the provisions adopted herein.

135. IT IS FURTHER ORDERED that, in light of the remedial action ordered above, the Application for Review of Community Teleplay, Inc., *et al.* IS DISMISSED in part as moot and DENIED in all other respects.

136. IT IS FURTHER ORDERED that the Motion for Leave to File Supplement to Emergency Petition for Relief and Request for Expedited Consideration of Graceba Total Communications, Inc. IS GRANTED.

137. IT IS FURTHER ORDERED that the Emergency Petition for Relief and Request for Expedited Consideration of Graceba Total Communications, Inc., and the Petition for Action on Remand and Supplement to Emergency Petition for Relief and Request for Expedited Consideration of Graceba Total Communications, Inc. ARE GRANTED in part to the extent described above and ARE DENIED in all other respects.

138. IT IS FURTHER ORDERED that all pending grace period requests filed by current or former

218-219 MHz Service licensees ARE DISMISSED.

139. IT IS FURTHER ORDERED that the Petition for Reconsideration of Interactive America Corporation IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

APPENDIX A - Commenters and Reply Commenters

Appendix A, Part 1: List of Commenters

Comment Filer's Name	Abbreviation
218-219 MHz Licensees	218-219 Group
AirTouch Paging	AirTouch
Bay Area 218-219 MHz Group	Bay Area
Boston Spectrum Associates, LLC, and Houston Spectrum Associates, LLC	Boston/Houston
Concepts to Operations, Inc. (Stanley Cohn)	Concepts
Commercial Realty St. Pete, Inc.	CRSPI
Community Teleplay, Inc.	Community
Dispatch Interactive Television Company	Dispatch
EON Corporation	EON
Hughes, Kingdon R.	Hughes
In-Sync Interactive Corporation	In-Sync
Interactive Services Trade Association	ISTA
ITV, Inc. and IVDS Affiliates, LLC	ITV
IVDS Enterprises Joint Venture	IVDS Enterprises
IVDS/RLV, L.L.C. and Friends of IVDS, Inc.	IVDS/RLV
MKS Interactive, Inc.	MKS
Petty, Gary L.	Petty
Radio Telecom & Technology Inc.	RTT
Rand McNally & Company	Rand McNally
Two Way TV, Inc.	Two Way

Appendix A, Part 2: List of Reply Commenters

Reply Comment Filer's Name	Abbreviation
218-219 MHz Licensees	218-219 Group
Boston Spectrum Associates, LLC, and Houston Spectrum Associates, LLC	Boston/Houston
Commercial Realty St. Pete, Inc.	CRSPI
Community Teleplay, Inc.	Community
Concepts to Operations, Inc.	Concepts
Dispatch Interactive Television Company	Dispatch
Eagle Interactive Partner, Inc.	Eagle
EON Corporation	EON
Hispania & Associates, Inc. (Alejandro Calderon)	Hispania
Hughes, Kingdon R.	Hughes
In-Sync Interactive Corporation	In-Sync
Interactive Innovations, Inc.	Interactive
Interactive Video Data Service Trade Association	ISTA
IVDS Coalition	Coalition

Phoenix Data Communication, Inc.	Phoenix
Two Way TV, Inc.	Two Way

APPENDIX B - FINAL RULES

Parts 1, 20 and 95 of Chapter I of Title 47 of the Code of Federal Regulations are amended as follows:

A. PART 1 — PRACTICE AND PROCEDURE

1. Section 1.2105 is amended to revise paragraph (a)(2)(xi) is to read as follows:

§ 1.2105 Bidding application and certification procedures; prohibition of collusion.

(a) * * *

(2) * * *

(xi) For C block and 218-219 MHz Service applicants, an attached statement made under penalty of perjury indicating whether or not the applicant has ever been in default on any Commission licenses or has ever been delinquent on any non-tax debt owed to any Federal agency.

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B. PART 20 — COMMERCIAL MOBILE RADIO SERVICES

1. The authority citation for Part 20 is revised to read as follows:

AUTHORITY: Secs. 4, 251, 252, 303, and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 251, 252, 303, and 332, unless otherwise noted.

2. Section 20.9 is amended by redesignating paragraph (a)(12) as (a)(13), redesignating (a)(13) as (a)(14), and inserting a new paragraph (a)(12) as follows:

§ 20.9 Commercial mobile radio services.

(a) * * *

(12) Mobile operations in the 218-219 MHz Service (part 95, subpart F of this chapter) that provide for-profit interconnected service to the public;

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C. PART 95 — PERSONAL RADIO SERVICES

1. The authority citation for Part 95 is revised to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted.

2. Section 95.1 is amended to revise paragraph (b) to read as follows:

GENERAL PROVISIONS

§ 95.1 The General Mobile Radio Service (GMRS).

(a) * * *

(b) The 218-219 MHz Service is a two-way radio service authorized for system licensees to provide communication service to subscribers in a specific service area. The rules for this service are contained in subpart F of this part.

* * * * *

3. Section 95.801 is amended to read as follows:

Subpart F - 218-219 MHz Service

GENERAL PROVISIONS

§ 95.801 Scope.

This subpart sets out the regulations governing the licensing and operation of a 218-219 MHz system. This subpart supplements Part 1, Subpart F of this chapter, which establishes the requirements and conditions under which commercial and private radio stations may be licensed and used in the Wireless Telecommunications Services. The provisions of this subpart contain additional pertinent information for current and prospective licensees specific to the services governed by this Part 95.

4. Section 95.803 is amended to read as follows:

§ 95.803 218-219 MHz Service description.

(a) The 218-219 MHz Service is a two-way radio service authorized for system licensees to provide communication service to subscribers in a specific service area.

(b) The components of each 218-219 MHz Service system are its administrative apparatus, its

response transmitter units (RTUs), and one or more cell transmitter stations (CTSs). RTUs may be used in any location within the service area

5. Section 95.805 is amended to read as follows:

§ 95.805 Permissible communications.

A 218-219 MHz Service system may provide any fixed or mobile communications service to subscribers within its service area on its assigned spectrum, consistent with the Commission's rules and the regulatory status of the system to provide services on a common carrier or private basis.

6. Section 95.807 is added to read as follows:

§ 95.807 Requesting regulatory status.

(a) Authorizations for systems in the 218-219 MHz Service will be granted to provide services on a common carrier basis or a private basis, or on both a common carrier and private basis in a single authorization.

(1) Initial applications. An applicant will specify on FCC Form 601 if it is requesting authorization to provide services on a common carrier basis, a private basis, or on both a common carrier and private basis.

(2) Amendment of pending applications. Any pending application may be amended to: (i) change the carrier status requested; or (ii) add to the pending request in order to obtain both common carrier and private status in a single license.

(3) Modification of license. A licensee may modify a license to: (i) change the carrier status authorized; or (ii) add to the status authorized in order to obtain both common carrier and private status in a single license. Applications to change, or add to, carrier status in a license must be submitted on FCC Form 601 in accordance with Section 1.1102 of this chapter.

(4) Pre-existing licenses. Licenses issued before [effective date of rules] are authorized to provide services on a private basis. Licensees may modify this initial status pursuant to Paragraph (a)(3) of this Section.

(b) An applicant or licensee may submit a petition at any time requesting clarification of the regulatory status required to provide a specific communications service.

* * * * *

7. Section 95.811 is revised to modify paragraphs (b), (c), and (d) to read as follows:

SYSTEM LICENSE REQUIREMENTS

§ 95.811 License requirements.

(a) * * *

(b) A CTS must be individually licensed to the 218-219 MHz Service licensee for the service area in which the CTS is located in accordance with Part 1, Subpart F of this chapter if it:

(1) is in the vicinity of certain receiving locations (see § 1.924 of this chapter);

(2) may have significant environmental effect (see part 1, subpart I of this chapter);

(3) is part of an antenna structure that requires notification to the Federal Aviation Administration (see part 17, subpart B of this chapter); or

(4) has an antenna the tip of which exceeds:

(i) 6.1 meters (20 feet) above ground level; or

(ii) 6.1 meters (20 feet) above the top of an existing man-made structure (other than an antenna structure) on which it is mounted.

(c) All CTSs not meeting the licensing criteria under paragraph (b) of this Section are authorized under the 218-219 MHz Service system license.

(d) Each component RTU in a 218-219 MHz Service system is authorized under the system license or if associated with an individually licensed CTS, under that CTS license.

8. Section 95.812 is added to read as follows:

§ 95.812 License term.

(a) The term of each 218-219 MHz Service system license is ten years from the date of original issuance or renewal.

(b) Licenses for individually licensed CTSs will be issued for a period running concurrently with the license of the associated 218-219 MHz Service system with which it is licensed.

9. Section 95.813 is revised to modify paragraph (b) and to remove paragraph (c) to read as follows:

§ 95.813 License eligibility.

(a) * * *

(b) An entity that loses its 218-219 MHz Service authorization due to failure to meet the construction requirements specified in § 95.833 of this part may not apply for a 218-219 MHz Service system license for three years from the date the Commission takes final action affirming that the 218-219 MHz Service license has been canceled.

10. Section 95.815 is revised to modify paragraph (a) and (b) to read as follows:

§ 95.815 License application.

(a) In addition to the requirements of part 1, subpart F of this chapter, each application for a 218-219 MHz Service system license must include a plan analyzing the co- and adjacent channel interference potential of the proposed system, identifying methods being used to minimize this interference, and showing how the proposed system will meet the service requirements set forth in § 95.831 of this part. This plan must be updated to reflect changes to the 218-219 MHz Service system design or construction.

(b) In addition to the requirements of part 1, subpart F of this chapter, each request by a 218-219 MHz Service system licensee to add, delete, or modify technical information of an individually licensed CTS (*see* § 95.811 (b) of this part) * * *

11. Section 95.816 is revised to read as follows:

§ 95.816 Competitive bidding proceedings.

(a) Mutually exclusive initial applications for 218-219 MHz Service system licenses are subject to competitive bidding procedures. The procedures set forth in Part 1, Subpart Q of this chapter will apply unless otherwise provided in this part.

(b) *Installment payments*. Eligible Licensees that elect resumption pursuant to Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, *Report and Order and Memorandum Opinion and Order*, FCC 99-239 (released September 10, 1999) may continue to participate in the installment payment program. Eligible Licensees are those that were current in installment payments (*i.e.* less than ninety days delinquent) as of March 16, 1998, or those that had properly filed grace period requests under the former installment payment rules. All unpaid interest from grant date through election date will be capitalized into the principal as of Election Day creating a new principal amount. Installment payments must be made on a quarterly basis. Installment payments will be calculated based on new principal amount as of Election Day and will fully amortize over the remaining term of the license. The interest rate will equal the rate for five-year U.S. Treasury obligations at the time of licensing.

(c) *Eligibility for small business provisions.*

(1) A small business is an entity that, together with its affiliates and controlling interests, has

average gross revenues not to exceed $15 million for the preceding three years.

(2) A very small business is an entity that, together with its affiliates and controlling interests, has average gross revenues not to exceed $3 million for the preceding three years.

(3) For purposes of determining whether an entity meets either of the definitions set forth in paragraph (b)(1) or (b)(2) of this section, the gross revenues of the entity, its affiliates, and controlling interests shall be considered on a cumulative basis and aggregated.

(4) Where an applicant (or licensee) cannot identify controlling interests under the standards set forth in this section, the gross revenues of all interest holders in the applicant, and their affiliates, will be attributable.

(5) A consortium of small businesses (or a consortium of very 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 in paragraph (b)(1) of this section (or each of which individually satisfies the definition in paragraph (b)(2) of this section). Where an applicant or licensee is a consortium of small businesses (or very small businesses), the gross revenues of each small business (or very small business) shall not be aggregated.

(d) *Controlling interest.*

(1) For purposes of this section, controlling interests includes individuals or entities with *de jure* and *de facto* control of the applicant. *De jure* control is greater than 50 percent of the voting stock of a corporation, or in the case of a partnership, the general partner. *De facto* control is determined on a case-by-case basis. An entity must disclose its equity interest and demonstrate at least the following indicia of control to establish that it retains *de facto* control of the applicant:

(A) the entity constitutes or appoints more than 50 percent of the board of directors or management committee;

(B) the entity has authority to appoint, promote, demote, and fire senior executives that control the day-to-day activities of the licensee; and

(C) the entity plays an integral role in management decisions.

(2) *Calculation of certain interests.*

(A) Ownership interests shall be calculated on a fully diluted basis; all agreements such as warrants, stock options and convertible debentures will generally be treated as if the rights thereunder already have been fully exercised.

(B) Partnership and other ownership interests and any stock interest equity, or outstanding stock, or outstanding voting stock shall be attributed as specified below.

(C) Stock interests held in trust shall be attributed to any person who holds or shares the power to vote such stock, to any person who has the sole power to sell such stock, and, to any person who has the right to revoke the trust at will or to replace the trustee at will. If the trustee has a familial, personal, or extra-trust business relationship to the grantor or the beneficiary, the grantor or beneficiary, as appropriate, will be attributed with the stock interests held in trust.

(D) Non-voting stock shall be attributed as an interest in the issuing entity.

(E) Limited partnership interests shall be attributed to limited partners and shall be calculated according to both the percentage of equity paid in and the percentage of distribution of profits and losses.

(F) Officers and directors of an entity shall be considered to have an attributable interest in the entity. The officers and directors of an entity that controls a licensee or applicant shall be considered to have an attributable interest in the licensee or applicant.

(G) Ownership interests that are held indirectly by any party through one or more intervening corporations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, except that if the ownership percentage for an interest in any link in the chain exceeds 50 percent or represents actual control, it shall be treated as if it were a 100 percent interest.

(H) Any person who manages the operations of an applicant or licensee pursuant to a management agreement shall be considered to have an attributable interest in such applicant or licensee if such person, or its affiliate pursuant to § 1.2110(b)(4) of this chapter, has authority to make decisions or otherwise engage in practices or activities that determine, or significantly influence:

(i) The nature or types of services offered by such an applicant or licensee;

(ii) The terms upon which such services are offered; or

(iii) The prices charged for such services.

(I) Any licensee or its affiliate who enters into a joint marketing arrangement with an applicant or licensee, or its affiliate, shall be considered to have an attributable interest, if such applicant or licensee, or its affiliate, has authority to make decisions or otherwise engage in practices or activities that determine, or significantly influence:

(i) The nature or types of services offered by such an applicant or licensee;

(ii) The terms upon which such services are offered; or

(iii) The prices charged for such services.

(f) *Bidding credits*. A winning bidder that qualifies as a small business or a consortium of small businesses as defined in this subsection may use the bidding credit specified in § 1.2110(e)(2)(ii) of this

chapter. A winning bidder that qualifies as a very small business or a consortium of very small businesses as defined in this subsection may use the bidding credit specified in accordance to § 1.2110(e)(2)(i) of this chapter.

(g) Winning bidders in Auction No. 1, which took place on July 28-29, 1994, that, at the time of that auction, met the qualifications under the Commission's rules then in effect, for small business status will receive a twenty-five percent bidding credit pursuant to Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, *Report and Order and Memorandum Opinion and Order*, FCC 99-239 (released September 10, 1999).

12. Section 95.819 is revised to read as follows:

§ 95.819 License transferability.

(a) A 218-219 MHz Service system license acquired through competitive bidding procedures (including licenses obtained in cases of no mutual exclusivity), together with all of its component CTS licenses, may be transferred, assigned, sold, or given away only in accordance with the provisions and procedures set forth in 47 C.F.R. § 1.2111.

(b) A 218-219 MHz Service system license obtained through random selection procedures, together with all of its component CTS licenses, may be transferred, assigned, sold, or given away, to any other entity in accordance with the provisions and procedures set forth in § 1.948 of this chapter.

(c) If the transfer, assignment, sale, or gift of a license is approved, the new licensee is held to the construction requirements set forth in § 95.833 of this part.

13. Section 95.823 is added to read as follows:

§ 95.823 Geographic partitioning and spectrum disaggregation.

(a) *Eligibility.* Parties seeking Commission approval of geographic partitioning or spectrum disaggregation of 218-219 MHz Service system licenses shall request an authorization for partial assignment of license pursuant to § 1.948 of this chapter.

(b) *Technical standards.*

(1) *Partitioning.* In the case of partitioning, requests for authorization of partial assignment of a license must include, as attachments, a description of the partitioned service area and a calculation

of the population of the partitioned service area and the licensed geographic service area. The partitioned service area shall be defined by coordinate points at every 3 seconds along the partitioned service area unless an FCC-recognized service area (*i.e.* Economic Areas) is utilized or county lines are followed. The geographic coordinates must be specified in degrees, minutes, and seconds, to the nearest second of latitude

and longitude, and must be based upon the 1983 North American Datum (NAD83). In the case where an FCC-recognized service area or county lines are utilized, applicants need only list the specific area(s) (through use of FCC designations or county names) that constitute the partitioned area.

(2) *Disaggregation.* Spectrum maybe disaggregated in any amount.

(3) *Combined partitioning and disaggregation.* The Commission will consider requests for partial assignments of licenses that propose combinations of partitioning and disaggregation.

(c) *Provisions applicable to designated entities.*

(1) *Unjust Enrichment. See* § 1.2111(e) of this chapter.

(2) *Parties Not Qualified For Installment Payment Plans.*

(i) When a winning bidder (partitionor or disaggregator) that elected to pay for its license through an installment payment plan partitions its license or disaggregates spectrum to another party (partitionee or disaggregatee) that would not qualify for an installment payment plan, or elects not to pay for its share of the license through installment payments, the outstanding principal balance owed by the partitionor or disaggregator shall be apportioned according to § 1.2111(e)(3) of this chapter. The partitionor or disaggregator is responsible for accrued and unpaid interest through and including the consummation date.

(ii) The partitionee or disaggregatee shall, as a condition of the approval of the partial assignment application, pay its entire *pro rata* amount of the outstanding principal balance on or before the consummation date. Failure to meet this condition will result in cancellation of the grant of the partial assignment application.

(iii) The partitionor or disaggregator shall be permitted to continue to pay its *pro rata* share of the outstanding balance and, if applicable, shall receive loan documents evidencing the partitioning and disaggregation. The original interest rate, established pursuant to § 1.2110(f)(3)(i) of this chapter at the time of the grant of the initial license in the market, shall continue to be applied to the partitionor's or disaggregator's portion of the remaining government obligation.

(iv) A default on the partitionor's or disaggregator's payment obligation will affect only the partitionor's or disaggregator's portion of the market.

(3) *Parties Qualified For Installment Payment Plans.*

(i) Where both parties to a partitioning or disaggregation agreement qualify for installment payments, the partitionee or disaggregatee will be permitted to make installment payments on its portion of the remaining government obligation.

(ii) Each party may be required, as a condition to approval of the partial assignment application, to execute loan documents agreeing to pay its *pro rata* portion of the outstanding principal balance due, as apportioned according to § 1.2111(e)(3) of this chapter, based upon the installment payment terms for which it qualifies under the rules. Failure by either party to meet this condition will result in the automatic cancellation of the grant of the partial assignment application. The interest rate, established pursuant to § 1.2110(f)(3)(i) of this chapter at the time of the grant of the initial license in the market, shall continue to be applied to both parties' portion of the balance due. Each party will receive a license for its portion of the partitioned market.

(iii) A default on an obligation will affect only that portion of the market area held by the defaulting party.

(d) *Construction Requirements.*

(1) *Partitioning.* Partial assignors and assignees for license partitioning have two options to meet construction requirements. Under the first option, the partitionor and partitionee would each certify that they will independently satisfy the applicable construction requirements set forth in § 95.833 of this part for their respective partitioned areas. If either licensee failed to meet its requirement in § 95.833 of this part, only the non-performing licensee's renewal application would be subject to dismissal. Under the second option, the partitionor certifies that it has met or will meet the requirement in § 95.833 of this part for the entire market. If the partitionor fails to meet the requirement in § 95.833 of this part, however, only its renewal application would be subject to forfeiture at renewal.

(2) *Disaggregation.* Partial assignors and assignees for license disaggregation have two options to meet construction requirements. Under the first option, the disaggregator and disaggregatee would certify that they each will share responsibility for meeting the applicable construction requirements set forth in § 95.833 of this part for the geographic service area. If parties choose this option and either party fails to do so, both licenses would be subject to forfeiture at renewal. The second option would allow the parties to agree that either the disaggregator or the disaggregatee would be responsible for meeting the requirement in § 95.833 of this part for the geographic service area. If parties choose this option, and the party responsible for meeting the construction requirement fails to do so, only the license of the non-performing party would be subject to forfeiture at renewal.

(3) All applications requesting partial assignments of license for partitioning or disaggregation must include the above-referenced certification as to which of the construction options is selected.

(4) Responsible parties must submit supporting documents showing compliance with the respective construction requirements within the appropriate construction benchmarks set forth in § 95.833 of this part.

14. Section 95.831 is revised to read as follows:

SYSTEM REQUIREMENTS

§ 95.831 Service requirements.

Subject to the initial construction requirements of § 95.833 of this subpart, each 218-219 MHz Service system license must demonstrate that it provides substantial service within the service area. Substantial service is defined as a service that is sound, favorable, and substantially above a level of service which might minimally warrant renewal.

15. Section 95.833 is revised to read as follows:

§ 95.833 Construction requirements.

(a) Each 218-219 MHz Service licensee must make a showing of "substantial service" within ten years of the license grant. A "substantial service" assessment will be made at renewal pursuant to the provisions and procedures contained in § 1.949 of this chapter.

(b) Each 218-219 MHz Service licensee must file a report to be submitted to inform the Commission of the service status of its system. The report must be labeled as an exhibit to the renewal application. At minimum, the report must include:

(1) A description of its current service in terms of geographic coverage and population served;

(2) An explanation of its record of expansion, including a timetable of new construction to meet changes in demand for service;

(3) A description of its investments in its 218-219 MHz Service systems;

(4) A list, including addresses, of all component CTSs constructed; and

(5) Copies of all FCC orders finding the licensee to have violated the Communications Act or any FCC rule or policy; and a list of any pending proceedings that relate to any matter described in this paragraph.

(c) Failure to demonstrate that substantial service is being provided in the service area will result in forfeiture of the license, and will result in the licensee's ineligibility to apply for 218-219

MHz Service licenses for three years from the date the Commission takes final action affirming that the 218-219 MHz Service license has been canceled pursuant to § 95.813 of this part.

16. Section 95.853 is revised to read as follows:

§ 95.853 Frequency segments.

There are two frequency segments available for assignment to the 218-219 MHz Service in each service area. Frequency segment A is 218.000-218.500 MHz. Frequency segment B is 218.501-219.000

MHz.

17. Section 95.855 is revised to read as follows:

§ 95.855 Transmitter effective radiated power.

The effective radiated power (ERP) of each CTS and RTU shall be limited to the minimum necessary for successful communications. No CTS or fixed RTU may transmit with an ERP exceeding 20 watts. No mobile RTU may transmit with an ERP exceeding 4 watts.

18. Section 95.859 is revised to modify paragraph (a) and to remove and reserve paragraph (b) to read as follows:

§ 95.859 Antennas.

(a) The overall height from ground to topmost tip of the CTS antenna shall not exceed the height necessary to assure adequate service. Certain CTS antennas must be individually licensed to the 218-219 MHz System licensee (*see* § 95.811(b) of this part) and the antenna structures of which they are a part must be registered with the Commission (*see* part 17 of this chapter).

(b) [Removed and reserved]

(c) * * *

19. Section 95.861 is revised to read as follows:

§ 95.861 Interference.

(a) When a 218-219 MHz Service system suffers harmful interference within its service area or causes harmful interference to another 218-219 MHz Service system, the licensees of both systems must cooperate and resolve the problem by mutually satisfactory arrangements. If the licensees are

unable to do so, the Commission may impose restrictions including, but not limited to, specifying the transmitter power, antenna height or area, duty cycle, or hours of operation for the stations concerned.

(b) The use of any frequency segment (or portion thereof) at a given geographical location may be denied when, in the judgment of the Commission, its use in that location is not in the public interest; the use of a frequency segment (or portion thereof) specified for the 218-219 MHz Service system may be restricted as to specified geographical areas, maximum power, or other operating conditions.

(c) A 218-219 MHz Service licensee must provide a copy of the plan required by § 95.815 (b) of this part to every TV Channel 13 station whose Grade B predicted contour overlaps the licensed service area for

the 218-219 MHz Service system. The 218-219 MHz Service licensee must send the plan to the TV Channel 13 licensee(s) within 10 days from the date the 218-219 MHz Service licensee submits the plan to the Commission, and the 218-219 MHz Service licensee must send updates to this plan to the TV Channel 13 licensee(s) within 10 days from the date that such updates are filed with the Commission pursuant to § 95.815 (b) of this part.

(d) Each 218-219 MHz Service system licensee must provide upon request, and install free of charge, an interference reduction device to any household within a TV Channel 13 station Grade B predicted contour that experiences interference due to a component CTS or RTU.

(e) Each 218-219 MHz Service system licensee must investigate and eliminate harmful interference to television broadcasting and reception, from its component CTSs and RTSs, within 30 days of the time it is notified in writing, by either an affected television station, an affected viewer, or the Commission, of an interference complaint. Should the licensee fail to eliminate the interference within the 30-day period, the CTS(s) or RTU(s) causing the problem(s) must discontinue operation.

(f) The boundary of the 218-219 MHz Service system, as defined in its authorization, is the limit of interference protection for that 218-219 MHz Service system.

20. Section 95.863 is removed.

APPENDIX C
FINAL REGULATORY FLEXIBILITY ANALYSIS

Report and Order

As required by the Regulatory Flexibility Act (RFA),[1] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service and Amendment of Part 95 of the Commission's Rules to Allow Interactive Video and Data Service Licensees to Provide Mobile Services, Order, Memorandum Opinion and Order, and Notice of Proposed Rulemaking.*[2] The Commission sought written public comment on the proposals in the *218-219 MHz Flex NPRM*, including comment on the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.[3]

I. Need for, and Objectives of, the Report and Order:

This rulemaking proceeding was initiated to secure public comment on proposals to maximize the efficient and effective use of spectrum in the 218-219 MHz band, allocated in 1992 to the Interactive Video and Data Service (IVDS) in the Personal Radio Services, now redesignated as the 218-219 MHz Service. In attempting to maximize the use of the 218-219 MHz band, we continue our efforts to improve the efficiency of spectrum use, reduce the regulatory burden on spectrum users, facilitate technological innovation, and provide opportunities for development of competitive new service offerings. The rules adopted in this *Report and Order* are also designed to implement Congress' goal of giving small businesses the opportunity to participate in the provision of spectrum-based services in accordance with Section 309(j) of the Communications Act of 1934, as amended (the Communications Act).[4]

II. Summary of Significant Issues Raised by Public Comments in Response to the Initial Regulatory Flexibility Analysis:

No petitions were filed in direct response to the IRFA. In general, commenters and reply commenters supported our proposals to provide additional flexibility in the 218-219 MHz Service. Moreover, many of the commenters and reply commenters were existing 218-219 MHz Service licensees many of whom, as discussed *infra*, qualify as small businesses. These commenters overwhelmingly supported proposals that would permit (1) acquisitions by partitioning or disaggregation; (2) 218-219 MHz Service licensees and

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[1] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

[2] *Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service and Amendment of Part 95 of the Commission's Rules to Allow Interactive Video and Data Service Licensees to Provide Mobile Services (proceeding terminated), Order, Memorandum Opinion and Order, and Notice of Proposed Rulemaking*, 13 FCC Rcd 19064, 19101 (1998) (*218-219 MHz Flex NPRM*).

[3] *See* 5 U.S.C. § 604.

[4] 47 U.S.C. §§ 257, 309(j).

applicants to choose regulatory status; and (3) non-defaulting 218-219 MHz Service licensees currently participating in the installment payment plan to elect one of three restructuring plans concerning their outstanding payments, despite the increased reporting requirements that these proposals may entail.

III. Description and Estimate of the Number of Small Entities to which the Rules Apply:

The Regulatory Flexibility Act directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted. The Regulatory Flexibility Act generally defines the term "small entity " as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act, unless the Commission has developed one or more definitions that are appropriate for its activities.[5] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[6] A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."[7] Below, we further describe and estimate the number of small entity licensees and regulatees that may be affected by the proposed rules, if adopted.

The rules adopted in this *Report and Order* affect a number of small entities who are either licensees, or who may choose to become applicants for licenses, in the 218-219 MHz Service. Such entities fall into two categories: (1) those using the 218-219 MHz Service for providing interactivity capabilities in conjunction with broadcast services; and (2) those using the 218-219 MHz Service to operate other types of wireless communications services with a wide variety of uses, such as commercial data applications and two-way telemetry services. Theoretically, an entity could fall into both categories. The spectrum uses in the two categories differ markedly.

With respect to the first category, the provision of interactivity capabilities in conjunction with broadcast services could be described as a wireless provider of subscription television service. The SBA's rules applicable to subscription television services define small entities as those with annual gross revenues of $11 million or less.[8] In the *Competitive Bidding Tenth Report and Order*, we extended special competitive bidding provisions to small businesses with annual gross revenues that are not more than $15 million, and

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[5] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[6] Small Business Act, 15 U.S.C. § 632 (1996).

[7] 5 U.S.C. § 601(4).

[8] 13 C.F.R. § 121.201, SIC Code 4841.

additional benefits to very small businesses with annual gross revenues that are not more than $3 million.[9] On January 6, 1998, the SBA approved of the small business size standards established in the *Competitive Bidding Tenth Report and Order*.[10]

The Commission's estimate of the number of small business entities operating in the 218-219 MHz band for interactivity capabilities with television viewers begins with the 1992 Bureau of Census report on businesses listed under SIC Code 4841, subscription television services, which is the most recent information available. The total number of entities under this category is 1,788.[11] There are 1,463 companies in the 1992 Census Bureau report which are categorized as small businesses providing cable and pay TV services.[12] We know that many of these businesses are cable and television service businesses, rather than businesses operating in the 218-219 MHz band. We also know that, to date, we have issued 612 licenses in the 218-219 MHz Service. Therefore, the number of small entities currently providing interactivity capability to television viewers in the 218-219 MHz Service which will be subject to the rules will be less than 612.

With respect to the second category, neither the Commission nor the SBA has developed a specific definition of small entities applicable to 218-219 MHz band licensees that would provide wireless communications services other than that described above. Generally, the applicable definition of a small entity in this instance appears to be the definition under the SBA rules applicable to establishments primarily engaged in furnishing telegraph and other message communications, SIC Code 4822. This definition provides that a small entity is an entity with annual receipts of $5 million or

less.[13] The 1992 Census data, which is the most recent information available, indicates that of the 286 firms under this category, 247 had annual receipts of $4.999 million or less.[14]

The first auction of 218-219 MHz spectrum resulted in 170 entities winning licenses for 594 Metropolitan Statistical Area (MSA) licenses. Of the 594 licenses, 557 were won by entities qualifying as a

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[9] Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Tenth Report and Order*, 11 FCC Rcd 19974, 19981-85 (1996) (*Competitive Bidding Tenth Report and Order*), *recon. pending*.

[10] *See* Letter to Daniel B. Phythyon, Chief, WTB, from Aida Alverez, Administrator, SBA, Dated Jan. 6, 1998.

[11] U.S. Small Business Administration 1992 Economic Census Industry and Enterprise Report, Table 2D, SIC Code 4841 (Bureau of the Census data adapted by the Office of Advocacy of the U.S. Small Business Administration).

[12] The Census table divides those companies by the amount of annual receipts. There is a dividing point at companies with annual receipts of $10 million. The next increment is annual receipts of $17 million, a category that greatly exceeds the SBA definition of small businesses that provide subscription television services. However, there are 17 firms in this category, with revenues between $10-$17 million. Approximately 1,480 SIC Code 4841 category firms have annual gross receipts of $15 million or less. Only a small fraction of those 1,480 firms provide IVDS.

[13] 13 C.F.R. § 121.201, SIC Code 4822.

[14] 1992 Economic Census Industry and Enterprise Receipts Size Report, U.S. Bureau of the Census, U.S. Department of Commerce, Table 2D, SIC Code 4822 (industry data prepared by the Census Bureau under contract to the U.S. SBA Office of Advocacy).

small business. For that auction, we defined a small business as an entity, together with its affiliates, that has no more than a $6 million net worth and, after federal income taxes (excluding any carry over losses), has no more than $2 million in annual profits each year for the previous two years.[15] We cannot estimate, however, the number of licenses that will be won by entities qualifying as small or very small businesses under our rules in future auctions of 218-219 MHz spectrum. Given the success of small businesses in the previous auction, and the above discussion regarding the prevalence of small businesses in the subscription television services and message communications industries, we assume for purposes of this FRFA that in future auctions, all of the licenses may be awarded to small businesses, which would be affected by the rule changes we propose.

IV. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements:

The final rules adopted in this *Report and Order* alter the reporting and recordkeeping requirements for a number of small business entities. Specifically, (1) 218-219 MHz Service licensees will not be required to file a license renewal application after five years from the date of grant of the license, but will be required to file a license renewal application after ten years after the date of grant of the license; (2) 218-219 MHz Service licensees will not be required to file construction reports at specified intervals after initial licensure, but will be obligated to demonstrate that they are providing "substantial service" as a condition for renewal of their license; and (3) acquisitions by partitioning or disaggregation will be treated as assignments of a license and parties will be required to comply with the 218-219 MHz Service licensing requirements. In addition small business may make elections under the final rules that will alter their reporting and recordkeeping requirements. Specifically, (1) 218-219 MHz Service licensees and applicants may choose to elect regulatory status (common carrier, private, commercial mobile radio service, private mobile radio service) and file appropriate documentation coincident with the regulatory status elected; (2) non-defaulting 218-219 MHz Service licensees currently participating in the installment payment plan may elect one of three restructuring plans concerning their outstanding payments; and (3) 218-219 MHz Service licensees electing to continue making installment payments may be required to execute loan documents as a condition of the reamortization of its installment payment plan under the revised ten-year term.

V. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered:

In response to general comments filed in this proceeding we have adopted final rules designed to maximize opportunities for participation by, and growth of, small businesses in providing wireless services. Specifically, we expect that the extension of license terms from five to ten years and allowing partitioning and disaggregation of licenses, will specifically assist small businesses. We adopted a plan that provided for a reamortization of installment payment debt in conjunction with the extension of license term that differed from our original proposal in specific response to concerns raised in comments and reply comments. Commenters noted that our original proposal would have required licensees to pay two years worth of principal payments, as well as the accrued interest, in a lump sum, within ninety days of the *Report and Order* to retain their licenses, and claimed that such a plan would not allow licensees – in particular, small

[15] Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Fourth Report and Order*, 9 FCC Rcd 2330, 2336 (1994).

businesses – sufficient time to make new capital arrangements.[16] Commenters proposed a variety of means of providing relief beyond that which we proposed in the *218-219 MHz Flex NPRM*. We note that some of these proposals – such as a ten-year payout schedule that would be entirely interest-free[17] – may have resulted in greater relief than that provided by the reamortization procedures adopted in the *Report and Order*.

We also believe that our proposals regarding permissible uses of 218-219 MHz Service, liberalization of construction requirements and technical restrictions, and elimination of the cross-ownership restriction, will make expansion of 218-219 MHz Service operations easier, and this flexibility assists all licensees, including small business licensees. We considered proposals by small business interests to eliminate (instead of liberalize) technical restrictions for the service,[18] but concluded that limited technical restrictions are still necessary in order to protect other licensees offering services (such as TV Channel 13 broadcasting) operating in or in close proximity of the 218-219 MHz band. We further believe that by retroactively applying a bidding credit for small businesses to the IVDS auction and by adopting our general auction rules that provide for small business bidding credits, we will maximize opportunities for participation by, and growth of, small businesses in the 218-219 MHz Service. For these reasons, we did not consider any significant alternatives to our proposals to minimize significant economic impact on small entities, nor were any significant alternatives of this nature proposed by commenters and reply commenters.

Report to Congress: The Commission will send a copy of the *Report and Order*, including this FRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, *see* 5 U.S.C. § 801(a)(1)(A). In addition, the Commission will send a copy of the *Report and Order*, including FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *Report and Order* and FRFA (or summaries thereof) will also be published in the Federal Register. *See* 5 U.S.C. § 604(b).

16 *See supra*, para. 42.

17 *See* CRSPI Reply Comments at 2.

18 *See, e.g.*, Petty Comments at 1.