recompense the complainant as directed therein.

(*2*) Where the Commission issues a written order approving or modifying a damages computation methodology submitted in accordance with paragraph (c)(5)(iii)(B)(*4*) of this section, the parties shall negotiate in good faith to reach an agreement on the exact amount of damages pursuant to the Commission-mandated methodology.

(B) Within thirty days of the issuance of a paragraph (c)(5)(iii)(B)(*4*) of this section damages methodology order, the parties shall submit jointly to the Commission either:

(*1*) A statement detailing the parties' agreement as to the amount of damages;

(*2*) A statement that the parties are continuing to negotiate in good faith and a request that the parties be given an extension of time to continue negotiations; or

(*3*) A statement detailing the bases for the continuing dispute and the reasons why no agreement can be reached.

(C) (*1*) In cases in which the parties cannot resolve the amount of damages within a reasonable time period, the Commission retains the right to determine the actual amount of damages on its own, or through the procedures described in paragraph (s)(3)(iii)(C)(*2*) of this section.

(*2*) Issues concerning the amount of damages may be designated by the Chief, Cable Services Bureau for hearing before, or, if the parties agree, submitted for mediation to, a Commission Administrative Law Judge.

(D) Interest on the amount of damages awarded will accrue from either the date indicated in the Commission's written order issued pursuant to paragraph (s)(3)(iii)(A)(*1*) of this section or the date agreed upon by the parties as a result of their negotiations pursuant to paragraph (s)(3)(iii)(A)(*2*) of this section. Interest shall be computed at applicable rates published by the Internal Revenue Service for tax refunds.

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 90

[FCC 98–167]

800 MHz SMR Licensees

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Federal Communications Commission (Commission) addresses several petitions filed since the Commission adopted the *Goodman/Chan Order*, published elsewhere in this issue of the **Federal Register**, on May 22, 1995 and addresses certain issues relating to certain General Category Specialized Mobile Radio (SMR) Licenses. Dismissing the outstanding pleadings and addressing these other issues removes the impediments to implementing the relief the *Goodman/Chan Order* granted. Implementing the relief will allow the licensees to construct and/or transfer their licenses and give prospective bidders a clear idea on available spectrum in the upcoming lower band auction.

DATES: Licensees have four months from August 27, 1998 to complete construction of their licenses.

FOR FURTHER INFORMATION CONTACT: Terry Fishel at (717) 338–2602 or Ramona Melson or David Judelsohn at (202) 418–7240.

SUPPLEMENTARY INFORMATION:

1. In this document the Commission addresses several pleadings that have been filed since the adoption of the *Goodman/Chan Order*. The Commission dismisses the Brown and Schwaninger petition for reconsideration of the *Goodman/Chan Order* because the Brown and Schwaninger Petition was filed after the statutory deadline for submission of such petitions. Second, the Commission dismisses a motion for clarification filed by Daniel R. Goodman (Goodman) of the *Goodman/Chan Order* because it similarly was filed after the statutory deadline for such pleadings. Further, the Commission dismisses a petition for reconsideration, filed by Goodman, of the November 20 Staff Letter, discussing the processing of the General Category SMR licenses that received a four-month extension of their construction periods per the *Goodman/Chan Order*. Finally, the Commission addresses certain issues relating to certain General Category SMR Licenses. By dismissing the outstanding pleadings filed against the *Goodman/Chan Order*, dismissing the Receiver's December 1 Petition for Reconsideration of the November 20 Staff Letter and addressing these other issues, this Order removes the impediments to implementing the relief the *Goodman/Chan Order* granted.

2. On January 11, 1994, the Federal Trade Commission (FTC) filed a Complaint for a permanent injunction and other relief against a number of application preparation companies in the United States District Court, Southern District of New York (U.S. District Court). Prior to the FTC action, the application preparation companies used television commercials and telemarketing solicitations to promote SMR licenses as ''investment opportunities'' for individuals with little or no experience in the communications industry. On January 14, 1994, the U.S. District Court issued a preliminary injunction freezing the assets of the application preparation companies, and appointed Goodman as the Receiver (Receiver) for four of these companies (Receivership Companies). The U.S. District Court directed the Receiver to use all reasonable efforts to ensure that the licenses are either (1) constructed and placed in operation in a timely manner, in substantial conformance with our regulations, or (2) assigned to an entity which will use reasonable efforts to do the same.

3. On March 15, 1994, and March 21, 1994, respectively, Dr. Robert Chan (Chan) and the Receiver filed petitions for waiver of § 90.633 of our rules to allow certain SMR licensees additional time to construct facilities and commence operation. The Goodman Petition was brought on behalf of approximately 2500 individuals (Goodman/Chan Receivership) who had obtained approximately 4400 conventional licenses on 800 MHz General Category channels by using the services of one of the Receivership Companies.

4. In his waiver petition, the Receiver requested an eight-month extension of time for the Goodman/Chan Receivership to construct their licensed facilities and commence operations, starting from the petition grant date. The Receiver also requested a Stay of all automatic cancellations of licenses during the pendency of the Goodman Petition. On April 29, 1994, the Receiver filed a supplement to his March 21, 1994 waiver petition, requesting that the PRB refrain from taking any action that would result in the cancellation of the General Category licenses of the licensees who received their licenses through the Receivership Companies during the pendency of the Receiver's waiver request. The Receiver also requested that the PRB suspend the mailing of automated letter inquiries to the affected licensees concerning the construction and loading status of their licenses. In the event that the Receiver's petition for waiver was denied, the Receiver requested that the PRB provide the licensees a period of 120 days from the date of such denial to comply with the provisions of § 90.633 of the rules. In the Supplemental Petition, the Receiver also filed his initial list of approximately 3,100 entities that had obtained their licenses or applications

through the Receivership Companies (April List).

5. On May 22, 1995, the Commission adopted the *Goodman/Chan Order*, providing the General Category licensees who received licenses through the Receivership Companies an additional four months to construct and commence operations of their licenses. The Commission partially granted the Goodman/Chan waiver petitions because during the pendency of the waiver petitions, it had changed the construction period for all new CMRS licenses, including conventional SMR licenses, from eight months to twelve months. Thus, the basis for granting the additional four months to these licensees was to place them in the same posture as part 90 CMRS providers licensed after January 2, 1995, when the new rule took effect. This four-month period was granted to augment their original eight-month construction period to the degree necessary to give them the same twelve-month construction period then applicable to all part 90 CMRS licensees. However, the Commission also emphasized that all other requirements of the rules continued to apply. In particular, the Commission stated that the Order did not waive the loading requirement, and reiterated that licensees on General Category channels would not retain exclusive use of their channels unless they satisfied the loading of seventy mobile stations per channel. To the extent petitioners had less than seventy such stations operating on each of their channels, additional licensees could be licensed to use those channels.

6. The Commission granted both the Receiver's Supplemental Petition and the Receiver's May 31 Reinstatement Request. The Commission also stated that the four-month-period would commence upon publication of the *Goodman/Chan Order* in the **Federal Register**. As discussed below, publication of the *Goodman/Chan Order* has not yet occurred.

7. On June 26, 1995, Brown and Schwaninger filed a petition for reconsideration of the *Goodman/Chan Order*. On July 17, 1995, the Receiver filed both an Opposition to the Brown and Schwaninger Petition and an Emergency Motion for Clarification or Stay of the *Goodman/Chan Order*. In addition, the Receiver and his counsel, over the course of several months following the release of the *Goodman/Chan Order*, alerted our staff to the grant of a number of co-channel and short-spaced licenses concerning 342 of the Goodman/Chan licenses. The 342 licenses include 208 co-channel licenses, 42 short-spaced licenses, and 92 cancelled licenses. Through subsequent requests, the Receiver now also seeks to address issues concerning 296 other licenses licensees voluntarily cancelled. On November 20, 1995, the Wireless Telecommunications Bureau's Office of Operations in Gettysburg issued a letter which addressed the following issues raised by the Receiver: (1) the Commission's granting of co-channel licenses in instances where the Goodman/Chan Receivership had not fully loaded their channel; (2) the Commission's granting of co-channel licenses between fifty-five and seventy miles of a Goodman/Chan Receivership Licensee; (3) voluntary cancellations by members of the Goodman/Chan Receivership; and (4) the Commission's treatment of cases where frequency coordinators made frequency recommendations for other applicants for locations that were the same as, or within fifty-five miles of, a Goodman/Chan Receivership Licensee.

8. Simultaneous with the release of the November 20 Staff Letter, the Bureau submitted the *Goodman/Chan Order* for publication in the **Federal Register**. In response, the Receiver's counsel informed the Bureau that the Receiver would appeal the Nov. 20 Staff Letter and would also seek injunctive relief should the Bureau attempt to publish the *Goodman/Chan Order* in the **Federal Register**. Even though the Commission in the *Goodman/Chan Order* granted an extension of the construction period for approximately 4400 licenses, on November 27, 1995, the Receiver filed a motion with the United States Court of Appeals for the DC Circuit to enjoin **Federal Register** publication of the *Goodman/Chan Order* to obtain additional time to address licensing issues affecting 342 licenses. On December 1, 1995, the Receiver filed its December 1 Petition seeking reconsideration of the November 20 Staff Letter and a request to stay publication of the *Goodman/Chan Order* pending revocation of the overfiled licenses. The court subsequently held in abeyance the motion to enjoin **Federal Register** publication to allow the Receiver and the Commission to seek a resolution of the issues. On April 30, 1996, the DC Circuit ordered that the case continue to be held in abeyance and directed the parties to file a status report sixty days from the date of this order and every sixty days thereafter. In the most recent status report, we indicated that Bureau staff was in the process of drafting the present *Memorandum Opinion and Order and Order on Reconsideration*. The court also directed the parties to file motions to govern further proceedings within thirty days of the conclusion of the settlement negotiations. Since that time, the Receiver has submitted several letters and other filings requesting the resolution of various licensing issues affecting the status of the licenses.

9. Because Brown and Schwaninger did not file its petition until Monday, June 26, 1995, its petition was late and must be dismissed as untimely filed. We find that the Receiver's ''Motion for Clarification'' must be treated as a petition for reconsideration of the *Goodman/Chan Order* because it requests that we reconsider our decision regarding the formulation of the relief provided in the *Goodman/Chan Order*. As such, because the Receiver asked that something in the *Goodman/Chan Order* be changed, the Receiver's Motion for Clarification is subject to section 405 of the Communications Act of 1934, as amended, and our rules regarding the timely filing of petitions for reconsideration, and therefore cannot be considered. Because the Receiver did not file his Motion for Clarification until July 17, 1995, it is an untimely filed petition under the same authority discussed above, thereby precluding its consideration. Therefore, we dismiss the Motion for Clarification as untimely filed.

10. Although we do not grant the Receiver standing, we will use our discretion and resolve these issues on our own motion in this *Memorandum Opinion and Order and Order on Reconsideration*. We believe it is in the public interest to resolve these issues prior to commencement of the 800 MHz SMR Phase II auction scheduled for later this year. Consistent with the Balanced Budget Act of 1997, expeditious resolution of these matters will provide prospective bidders with sufficient information in advance of the auction to prepare business plans, assess market conditions, and evaluate the availability of equipment for the relevant services. Accordingly, because it is in the public interest to resolve all outstanding issues concerning these General Category licenses expeditiously, we will address the licensing issues raised by the Receiver on our own motion. We will also address here the waiver requests of other General Category licensees for an extension of time to construct their facilities. Accordingly, we will provide general guidance on the following issues: (1) the co-channel licensing rules; (2) the short-spacing rules; (3) the license cancellation rules; (4) the license renewal rules; (5) the prohibition on the transfer of unconstructed licenses; and

(6) the waiver requests filed by other General Category Licensees.

11. The Commission granted the Goodman/Chan Receivership licensees an opportunity to avoid license cancellation eight months after license grant through the extraordinary relief of providing additional time to construct and place their facilities in operation. Although it may be ambiguous whether the Receiver either requested or received additional time for licensees to obtain exclusivity, it is clear that each Receivership licensee certified to place seventy mobiles in operation within eight months of license grant, but failed to do so. The Receiver did not seek a stay of further licensing on each affected channel despite the facts that (1) our rules provide that General Category channels are not automatically subject to exclusive use, and (2) the Receivership licensees lost their ability to prevent further licensing on each of their channels when they failed to satisfy their commitment to achieve loading of seventy mobile stations on or before eight months after license grant. Moreover, there is nothing in our *Goodman/Chan Order* that can be read to prevent additional licensing on the channels at issue. While many conventional initial licensees represented that they planned to place seventy mobile stations on their channel by the end of their eight-month, and now one-year, loading period, our rules do not require licensees to load seventy mobiles on their channels and not everyone fulfills this requirement for exclusivity. Some licensees have more modest assessments of what their loading will be, and, prior to the freeze on licensing of General Category channels, we granted co-channel licenses on channels where the incumbent licensee did not fully load. While the Goodman/Chan Receivership claimed to intend to place seventy mobiles on each of their channels, as we have noted, ample facts in the record demonstrate that members of the Goodman/Chan Receivership had no plans to do so, nor were they even aware of the requirement for exclusivity.

12. While the petitions were pending, and prior to the release of the *Goodman/Chan Order*, the Licensing Division, in accordance with its standard procedure, sent out automated inquiries to a number of Goodman/Chan Receivership Licensees to determine the extent to which the licensees had loaded their channels. In 208 instances, Goodman/Chan Receivership licensees responded that they had not loaded their channels with seventy mobile stations, and, as a result, the Licensing Division granted additional licenses to share the channels with these licensees, pursuant to § 90.633(b) of our rules. Because none of these 208 licenses were fully loaded, our staff did not rescind any co-channel licenses already authorized on the same channels with these Goodman/Chan Receivership licensees. However, in an additional thirty-eight instances in which Goodman/Chan Receivership licensees responded that they had not fully loaded their channels, our staff did not process applications for co-channel use and agreed not to grant the thirty-eight pending applications for co-channel use. However, in accordance with our conclusion that these licensees had no entitlement to exclusive use of the channels, we find that the agreement not to review and process the thirty-eight pending applications for co-channel use was in error because the *Goodman/Chan Order* did not freeze new licensing on these channels. Therefore, the Wireless Telecommunications Bureau should have reviewed and processed these applications pursuant to the Commission's rules.

13. Although we granted the Receiver's Supplemental Petition, we find no contradiction between the grant of the Supplemental Petition and our licensing of co-channel licensees on channels licensed to Goodman/Chan licensees. Thus, we affirm the Licensing Division's decision to decline to rescind co-channel licenses granted on channels occupied by Goodman/Chan Receivership Licensees who reported that they had not fully loaded their channels. The Supplemental Petition requested that we (1) issue a stay of any cancellation of the affected General Category licenses during the pendency of the waiver request; (2) suspend the mailing of automated inquiries to the affected General Category licensees; (3) grant the affected licensees a 120-day period to comply with § 90.633 of our rules if we denied the waiver petition; and (4) grant such other relief that is consistent with the relief sought in the Supplemental Petition. The actions of our staff are consistent with the *Goodman/Chan Order* because the Commission did not grant a freeze of additional licensing on these channels, nor did the Goodman/Chan licensees file timely petitions for reconsideration of the additional co-channel license grants. Further, the staff did not cancel any Goodman/Chan licenses through issuance of co-channel licenses to entities who presumably sought to provide service on the same channels licensed to members of the Receivership. We also conclude that the Division's mailing of automated inquiries was proper and did not harm the Goodman/Chan licensees because the information received from the responding licensees indicated that, eight months after license grant, they had not placed into operation the minimum number of seventy mobiles needed to retain exclusivity.

14. The Receiver contends that some new licensees were granted licenses for sites in violation of our mileage separation criteria. We disagree. For conventional systems, the Bureau assigned frequencies in accordance with our applicable loading criteria. Thus, the staff permitted co-channel licensing where the channel was not licensed exclusively to one licensee because the licensee failed to load at least a minimum of seventy mobile stations on the channel. However, when a licensee loaded at least seventy mobile stations on a channel, § 90.621(b) of our rules required that the fixed mileage separation between co-channel systems be a minimum of 113 kilometers (seventy miles). Applicants were permitted to locate co-channel systems closer than seventy miles if (1) the channel was not fully loaded, (2) the applicant complied with either the consensual short-spacing rule, or the technical short-spacing rule, or (3) the applicant received a waiver of the mileage separation rule.

15. The consensual short-spacing rule allowed an applicant to place a co-channel system at any distance within the minimum separation distance as long as each co-channel licensee within the specified separation consented to accept any interference resulting from the reduced separation between the systems. The technical short-spacing rule allowed co-channel licensing between fifty-five and seventy miles, but only if the applicant proposed to operate at reduced power and antenna height pursuant to a table set forth in our rules. Applicants could also request a waiver of the mileage separation rule by submitting an interference analysis that showed the co-channel stations would receive the same or greater interference protection than provided in the technical short-spacing rule.

16. In the November 20 Staff Letter, the staff concluded that the Receiver failed to provide substantiation on the short-spacing issue at the time of its request and there was no evidence that the Licensing Division erred in granting these licenses. The Receiver has not submitted any additional information that would persuade us otherwise. Accordingly, we now decline to cancel or modify any of the short-spaced licenses identified by the Receiver.

17. The Licensing Division found that it granted 188 short-spaced applications for channels licensed to Goodman/Chan licensees, not 318, as argued by the Receiver. Furthermore, the staff found that in 146 of the 188 short-spaced licensing instances, the Goodman/Chan Receivership licensees had, through properly executed short-spacing agreements, consented to sharing a channel with other licensees, and thus the frequency coordinations were proper. Such ''short-spaced'' frequency recommendations are permitted when the requesting applicant submits documentation showing consent from the licensee whose station is to be affected by the short-spacing. Consequently, the licensing decisions with respect to these 146 channels was in full accord with the co-channel and short-spacing rules.

18. In the remaining forty-two instances where no short-spacing agreement existed, the applicant must comply with the technical short-spacing rule or receive a waiver of the mileage separation rule if the licensee licensed on the channel has loaded the channel with at least seventy mobile stations. The staff concluded that although the forty-two remaining instances were apparently granted in error due to lack of short-spacing agreements, the licenses should not be set aside. Our staff concluded that the frequency coordinators should work with the Goodman/Chan Receivership licensees to reach an equitable solution to the mileage separation problem. The staff agreed to closely scrutinize the construction and loading performance of the licensees who received short-spaced licenses to the Goodman/Chan Receivership Licensees and to cancel these licenses, pursuant to our rules, in cases where our construction requirements were not timely met. Through the monitoring of these forty-two licenses, the staff has determined that fourteen have fulfilled their construction requirements. The rest were automatically cancelled pursuant to § 90.633(d) of our rules.

19. The Receiver argues that the Licensing Division's decisions with respect to the fourteen licenses where no short-spacing agreements existed are in direct contravention to the *Goodman/Chan Order*. Technical short-spacing allows applicants to locate their systems closer together than seventy miles upon a technical showing of non-interference. Although the staff believed that the fourteen licenses may have been granted in error because the recommendations of the frequency coordinator could not be substantiated by short spacing agreements, our review of the records shows that the fourteen Goodman/Chan licenses were not fully loaded. A conventional SMR licensee receives eight months to load a minimum of seventy mobile stations on its channel in order to retain exclusivity. However, if the channel does not have a minimum of seventy mobile stations on its channel at the time the eight month period expires, another licensee may be granted on that channel. As a result, even though these fourteen licensees did not agree to be short-spaced, our Licensing Division correctly granted a license within seventy miles because the channels were not exclusive and were not entitled to the standard seventy mile separation between co-channel systems. Therefore, we affirm the decision of the Licensing Division to allow the fourteen non-Goodman/Chan Receivership licenses to remain.

20. The Receiver seeks reinstatement of 106 Goodman/Chan Receivership Licenses where the licenses were cancelled based on the licensees' failure to respond to automated inquiry letters from the staff seeking confirmation that the licensees had constructed their facilities and commenced operations. The Receiver argues that these licenses were improperly cancelled because the *Goodman/Chan Order* granted the Receiver's request that the Commission not send construction inquiries to Goodman/Chan Receivership Licensees after March 21, 1994. The staff was not, however, provided with the data necessary to identify the Receivership licenses, and thereby modify the automated licensing system to prevent sending automated inquiries to Receivership licensees. The *Goodman/Chan Order* expressly provided for reinstatement of fourteen licenses under these circumstances. Thus, these licenses will be reinstated upon publication of the *Goodman/Chan Order* in the **Federal Register**.

21. The Receiver also alerted us to the existence of an additional ninety-two cancelled licenses on February 3, 1998. We will reinstate all of these licenses granted prior to January 2, 1995. We have determined that approximately sixty of the ninety-two licenses were granted after January 2, 1995 and therefore received a twelve-month construction period. Because the basis for the relief granted in the *Goodman/Chan Order* was to place the Goodman/Chan licensees in the same posture as other Part 90 CMRS providers who were given a twelve-month construction period, these sixty licenses are not eligible for relief and therefore will not be reinstated. We agree to reinstate the remaining licenses because they are similarly situated to the original fourteen cancelled licenses that the Commission agreed to reinstate in the *Goodman/Chan Order*. We will not, however, cancel any co-channel license that has since been granted on a channel that we reinstate with this Order for the reasons discussed in para. 41, *supra*.

22. The Receiver also identifies 296 licensees who voluntarily cancelled their licenses while the Goodman Petition was pending, after which they reapplied for and received new licenses at the same locations. As a result, these licensees were not among those licensees who were granted extensions of the construction deadline by the *Goodman/Chan Order*. The Receiver requests that these licensees receive the same extended construction period as other Goodman/Chan Licensees. We deny this request. These licensees affirmatively chose to cancel their licenses while the Goodman Petition was pending because they preferred to obtain new licenses with one-year construction periods, rather than continue to press their extension requests. We conclude that, as a result of their decision to cancel their licenses, these licensees no longer have standing to obtain relief under the *Goodman/Chan Order*. We conclude that their rights as licensees are determined by their subsequent authorizations. Furthermore, these licensees obtained their new licenses after January 2, 1995, and therefore received a twelve-month construction period. Because the purpose of the additional four-month construction period provided for in the *Goodman/Chan Order* was to place the Goodman/Chan Receivership Licensees in the same posture as other part 90 CMRS providers, and thereby give them a total of twelve months to construct, these 296 licensees do not require and are not eligible for such relief. Therefore, we find that these licensees will not be granted an additional four months to construct.

23. The license term of some Goodman/Chan Receivership licenses will likely expire prior to the end of the additional four month construction period. Pursuant to § 90.149(a), the license term for General Category channels is five years. Because our rules do not allow for renewal of unconstructed licenses, the Receiver requests that the terms of such licenses be extended to enable these licensees to complete construction on the same basis as other licensees, so that they will then be eligible for renewal.

24. It is the responsibility of each licensee to apply for renewal of its license prior to the expiration date of the license. According to the Commission's rules, 800 MHz SMR

licensees will receive an Application for Renewal of Private Radio Station License Form (FCC Form 574–R) in the mail from the Commission. If within sixty days before the scheduled expiration of the license, the licensee has not received FCC Form 574–R, the licensee should file a Private Radio Application for Renewal, Reinstatement and/or Notification of Change to License Information Form (FCC Form 405–A) before the expiration date of the license to renew the license. Thus, failure of a licensee to receive a FCC Form 574–R from the Commission is no excuse for failure to file a renewal application. The license renewal application should be filed no more than ninety days nor less than thirty days prior to the end of the license term in accordance with the Commission's rules and the instructions for the appropriate form. In accordance with our rules, failure to file a license renewal application prior to the license expiration date results in the automatic cancellation of the license on its expiration date. However, because of the unique circumstances of this case, if the licensee has timely filed the appropriate license renewal form, we will toll the expiration of the license until the end of the four-month construction period. If at the end of that time, the licensee has fully constructed its authorization and commenced operations, 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 expiration of the four-month period.

25. To assist in the potential recovery by members of the Goodman/Chan Receivership of their monetary losses, the Receiver requests that we facilitate efforts by the Goodman/Chan Receivership to assign their licenses to other SMR operators prior to the expiration of the construction period for such licenses. In the *800 MHz SMR Second Report and Order,* we temporarily waived the provisions of § 90.609(b) of our rules to facilitate the relocation of Incumbent licensees from the upper 200 channels to the lower 230 channels as well as to facilitate geographic licensing. Thus, we allowed the assignment or transfer of unconstructed licenses on the lower 80 and General Category channels ''to encourage [the] rapid migration of incumbent [licensees], preferably through voluntary negotiations, from the upper 200 channels to lower band 800 MHz channels.'' In addition, the Commission stated that relaxing our transfer restrictions facilitates geographic licensing of the lower channels themselves. The Commission also advised incumbents to modify their holdings in advance of the auction through transfers or channel swaps and new entrants to position themselves for the auction by acquiring existing licenses in areas where they intend to bid.

26. Under this waiver, the Bureau accepted transfer applications for unconstructed licenses on these channels until six months after the conclusion of the 800 MHz upper band auction, *i.e.*, until June 8, 1998. We further provided that in the event of a transfer or assignment, the transferee would be subject to the same construction deadline as the transferor, unless the transferee had extended implementation authority. In the latter case, we stated that we would allow licensees to apply their system-wide construction deadlines to licenses acquired by transfer within their pre-existing footprint.

27. We determine that the Goodman/Chan Receivership and similarly situated non-Goodman Chan General Category SMR licensees who have not yet constructed may, during the ninety day period beginning on the day the *Goodman/Chan Order* is published in the **Federal Register**, apply to transfer or assign unconstructed licenses that have received construction extensions pursuant to the *Goodman/Chan Order* and this *Memorandum Opinion and Order and Order on Reconsideration.* We believe the same special circumstances that existed in the *800 MHz SMR Second Report and Order* that facilitated the need to temporarily waive § 90.609(b) of our rules exist here; namely, the need to encourage rapid migration of incumbents, preferably through voluntary negotiations, from the upper 200 channels to lower band 800 MHz channels, and facilitate geographic licensing as set out in the *800 MHz SMR Second Report and Order.* Accordingly, we believe it is in the public interest to allow transfers and assignments that will facilitate the relocation of incumbent licensees from the upper 200 channels to the lower band 800 MHz channels or geographic licensing of the lower channels themselves. All such transfer and assignment requests require prior Commission approval pursuant to section 310(d) of the Communications Act, as amended. All such transfer and assignment requests must be made by the individual licensees, as the Receiver does not have standing to file such requests. If the transfer or assignment is approved, the transferee will be subject to the same construction deadline as the transferor, unless the transferee has pre-existing extended implementation authority and the license to be transferred is within the geographic footprint of the extended implementation system. For purposes of this order, we define the ''footprint'' using the 18 dBμ interference criteria established for lower band systems in the *800 MHz Second Report and Order; i.e.*, any site will be considered in the extended implementation licensee's footprint if it is within the 18 dBμ interference contour of an existing site that is part of the system for which the transferee has received extended implementation authority. In such cases, the transferee may incorporate the transferred license into its extended implementation authorization, and apply the construction deadline applicable to the system as a whole.

28. We recognize that the ninety day period is much shorter than the six month period authorized by the *800 MHz SMR Second Report and Order.* In providing a shorter period, we weighed the competing interests of licensees who desire to bid at auction for the geographic licenses in the lower 230 SMR channels against the interests of the Goodman/Chan Receivership to receive a fair opportunity to construct their channels. Thus, although we will allow the Goodman/Chan Receivership ninety days to transfer and assign unconstructed licenses, we will not accept FCC Form 175s for the Phase II auction before January 15, 1999, which is over five months after release of this Order. This delay in accepting FCC Form 175s will permit the four month construction period to run as intended. We believe that this accommodation for the Goodman/Chan Receivership will allow prospective bidders to obtain accurate and complete information concerning the lower 230 SMR channels while providing the Goodman/Chan Receivership with the full four month period to construct. The Balanced Budget Act of 1997 requires that we provide prospective bidders with sufficient information in advance of an auction to prepare business plans, assess market conditions, and evaluate the availability of equipment for relevant services. Therefore, in order to give prospective bidders sufficient time to prepare in advance of the auction, the present matter needs to be resolved as quickly as possible.

29. If the Goodman/Chan licensee shares the General Category channel, the assignee would acquire the same shared status. To the extent that a Goodman/Chan licensee is the sole occupant of a General Category channel, that licensee has de facto exclusive use: the General Category licensing freeze has been in place now for more than a year, precluding any new licensing.

Moreover, new licensing of General Category channels will not occur for several months, when the Commission conducts an auction to award geographic area licenses. The transferee of this type of Goodman/Chan license thus acquires an expectancy of achieving exclusive channel use. The expectancy would be met provided that the assignee or transferee incorporates the channel into an aggregately loaded system, or demonstrates loading at the constructed site of seventy mobiles.

30. Although the *Goodman/Chan Order* does not extend relief to any licensee other than the Goodman/Chan Receivership, we conclude that similarly situated General Category SMR licensees should receive the same four-month construction period extension granted therein. In the *Goodman/Chan Order,* we based our limited grant of relief on the fact that during the pendency of the petition, we had replaced our eight-month construction requirement with a twelve-month construction requirement for SMR licensees licensed in the General Category. We granted the Goodman/Chan Receivership Licensees a four-month extension to their original eight-month construction period to place them in the same posture as other SMR licensees who had obtained twelve months to construct.

31. We believe the same relief should be extended to similarly situated non-Goodman/Chan General Category SMR licensees. However, in order to be granted this limited relief, these licensees must have originally been granted an eight-month construction period and must have a valid extension request on file with the Commission. Eligible licensees will receive the same four-month period to construct that we granted to the Goodman/Chan Receivership, which is a period of four months to begin upon publication of the *Goodman/Chan Order* in the **Federal Register**.

32. In this *Memorandum Opinion and Order,* we dismiss the Receiver's December 1 Petition. We find that the Receiver, Daniel R. Goodman, does not have standing to file the December 1 Petition. Individual licensees are therefore responsible to address the Bureau with individual licensing problems. We also conclude that both the Goodman/Chan Receivership and other similarly situated General Category Licensees shall have four months to construct and commence operation of their licensed facilities from the date that the *Goodman/Chan Order* is published in the **Federal Register**. We will not cancel any subsequently granted licenses on channels occupied by members of the Goodman/Chan Receivership who reported that they had not fully loaded their channels. We also decline to cancel properly granted co-channel licenses.

33. We direct the Bureau to reinstate the fourteen licenses reinstated by the *Goodman/Chan Order,* as well as thirty-two of the additional ninety-two licenses identified by the Receiver on February 3, 1998. We will allow the Goodman/Chan Receivership and other General Category licensees to transfer unconstructed licenses until ninety days after the release of this *Memorandum Opinion and Order and Order on Reconsideration.* Lastly, on our own motion, for those licensees whose license is scheduled to expire prior to the end of the four-month construction period, we will toll the license term to coincide with the last day of the four-month construction period, so long as the affected licensees previously timely filed a license renewal application. We deny the Receiver's February 3 Reinstatement Petition, to the extent provided in this *Memorandum Opinion and Order and Order on Reconsideration.* We also dismiss both the Brown and Schwaninger Petition and the Receiver's Motion for Clarification as untimely filed. In conjunction with the D.C. Circuit action holding in abeyance the stay request brought by the Receiver, our Office of General Counsel has stated to the Court that the *Goodman/Chan Order* will not be published in the **Federal Register** until the Court has an opportunity to consider the pending Motion for Stay. Accordingly, as a matter of courtesy, we instruct the Secretary not to submit this *Memorandum Opinion and Order and Order on Reconsideration* and the *Goodman/Chan Order* to the Office of the Federal Register for publication in the **Federal Register** until twenty days after the release date of this Order. This twenty-day deferral of submission will afford the Receiver an opportunity to advise the Court of its intention with respect to the stay request and, should the Receiver pursue that litigation, the Court will have an opportunity to rule.

Federal Communications Commission.

Magalie Roman Salas,

Secretary.

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 90

[FCC 95–211]

800 MHz SMR Licensees

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Federal Communications Commission (Commission) addresses petitions for waiver which establishes the maximum period for Specialized Mobile Radio (SMR) licensees to construct their facilities and commence operation. The document grants certain licensees an additional four months to construct and commence operations of their licenses. The Commission partially granted the waiver petitions because during the pendency of the waiver petitions, it had changed the construction period for all new Commercial Mobile Radio Service (CMRS) licenses, including conventional SMR licenses, from eight months to twelve months. Thus, the basis for granting the additional four months to these licensees was to place them in the same posture as CMRS providers licenses after January 2, 1995, when the new rule took effect.

DATES: Licensees have four months from August 27, 1998 to construct and commence operation of their licenses.

FOR FURTHER INFORMATION CONTACT: Terry Fishel at (717) 338–2602 or Ramona Melson or David Judelsohn at (202) 418–7240.

SUPPLEMENTARY INFORMATION:

1. This order addresses petitions for waiver of Section 90.633(c) of the Commission's Rules, which establishes the maximum period for Specialized Mobile Radio (SMR) licensees to construct their facilities and commence operation. The petitions were filed on March 15, 1994 and March 21, 1994, respectively, by Dr. Robert Chan and Daniel R. Goodman. On April 6, 1994, the Private Radio Bureau released a *Public Notice* 59 FR 17547 (April 13, 1994) seeking comments on the Goodman and Chan petitions. Based on the facts set forth in the petitions and the comments filed in this matter, we conclude that the waivers requested by Chan and Goodman should be granted to the extent described below.

2. The Goodman and Chan petitions are brought by or on behalf of approximately 4,000 individuals who have obtained 800 MHz conventional SMR licenses on General Category channels by using the services of one of