

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

In the Matter of	)	
	)	
Amendment of Part 1 of the Commission's	)	WT Docket No. 97-82
Rules – Competitive Bidding Procedures	)	

**ORDER ON RECONSIDERATION OF THE THIRD REPORT AND ORDER,  
FIFTH REPORT AND ORDER,  
AND FOURTH FURTHER NOTICE OF PROPOSED RULE MAKING**

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By the Commission:

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## I. OVERVIEW

1. This *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making* ("Order on Reconsideration," "Fifth Report and Order" and "Fourth Notice") clarifies and amends our general competitive bidding rules for all auctionable services.<sup>1</sup> These modifications are intended to increase the efficiency of the competitive bidding process and provide more specific guidance to auction participants. In the past, the Commission adopted separate competitive bidding rules for each auctionable service.<sup>2</sup> This rule making is part of our ongoing effort to establish a uniform and streamlined set of general competitive bidding rules for all auctionable services and to reduce the burden on both the Commission and the public of conducting service-specific auction rule makings.

2. In 1994, in implementing the Omnibus Budget Reconciliation Act of 1993, the Commission prescribed certain general competitive bidding rules and procedures, indicating that it would use these general rules and procedures as a basis for adopting specific competitive bidding rules for each auctionable service.<sup>3</sup> In 1997, after completing 15 spectrum auctions and adopting service-specific bidding rules for each such auction, we initiated a proceeding to expand the general competitive bidding rules, contained in Part 1, Subpart Q of our rules, and replace any inconsistent or repetitive service-specific auction rules.<sup>4</sup> The most recent comprehensive order in this proceeding was the *Third Report and Order and Second Further Notice of Proposed Rule Making* ("Part 1 Third Report and Order" and

<sup>1</sup> The general competitive bidding rules are codified at 47 C.F.R. §§ 1.2101-1.2113.

<sup>2</sup> See, e.g., 47 C.F.R §§ 21.921-21.961 (Multipoint Distribution Service (MDS)); 47 C.F.R §§ 24.301-24.320 (narrowband Personal Communications Service (PCS)); 47 C.F.R. §§ 24.701-24.720 (broadband PCS); 47 C.F.R §§ 90.901-90.913 (800 MHz Specialized Mobile Radio Service (SMR)); 47 C.F.R §§ 90.1001-90.1025 (220 MHz Service); 47 C.F.R §§ 100.71-100.80 (Direct Broadcast Satellite (DBS)).

<sup>3</sup> See Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Second Report and Order*, 9 FCC Rcd 2348 (1994) ("*Competitive Bidding Second Report and Order*"). See also Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Second Memorandum Opinion and Order*, 9 FCC Rcd 7245 (1994).

<sup>4</sup> See Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Proceeding, WT Docket No. 97-82, *Order, Memorandum Opinion and Order and Notice of Proposed Rule Making*, 12 FCC Rcd 5686 (1997) ("*Part 1 Notice of Proposed Rule Making*").

"*Second Notice*").<sup>5</sup> In this *Order on Reconsideration*, we address petitions for reconsideration and comments filed in response to the *Part 1 Third Report and Order*. The *Fifth Report and Order* addresses comments filed in response to the *Second Notice*, and the *Fourth Notice* adopted herein seeks comment on additional proposals relating to the general competitive bidding rules.

## II. EXECUTIVE SUMMARY

3. In this *Order on Reconsideration* we:

- Amend Section 1.2105(c)(1) of our rules to clarify that the prohibition on collusion begins on the filing deadline for short-form applications and ends on the down payment deadline.
- Clarify and correct the ownership disclosure requirements contained in Section 1.2112 of our rules. In particular, with respect to entities not seeking designated entity status, we eliminate the requirement to include debt and instruments such as warrants, convertible debentures, options and other debt interests in reporting their ownership interests.
- Amend Section 1.2104(g)(1) of our rules to clarify that in the case of multiple bid withdrawals on a single license, within the same or subsequent auction(s), the payment for each bid withdrawal will be calculated based on the sequence of bid withdrawals and the amounts withdrawn. We further clarify that no withdrawal payment will be assessed for a withdrawn bid if either the subsequent winning bid or any of the intervening subsequent withdrawn bids, in either the same or subsequent auction(s), equals or exceeds that withdrawn bid. In addition, we amend Section 1.2104(g)(1) of our rules to provide that in instances in which bids have been withdrawn on a license that is not won in the same auction, the Commission will assess an interim withdrawal payment equal to 3 percent of the amount of the bid withdrawals.
- Retain, for the most part, the installment payment grace period and late payment fee provisions adopted in the *Part 1 Third Report and Order*, but adopt a slight modification to the payment due dates for late installment payments and associated late fees.
- Clarify that licensees continue to have the opportunity to seek restructuring of installment payments. There is, however, no longer a procedure for requesting a grace period to stay installment payment deadlines pending such restructuring. Rather, licensees will be subject to the automatic late payment provisions of Section 1.2110(g) as adopted herein.
- Clarify that the assignee or transferee of a license paid for through installment payments is not responsible for the license debt until the assignment of license or transfer of control has been consummated.

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<sup>5</sup> 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*" and "*Second Notice*"). In this same proceeding, on December 13, 1999, the Commission released Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Procedures, *Third Further Notice of Proposed Rulemaking*, WT Docket No. 97-82, 14 FCC Rcd 21558 (1999) (seeking comment on proposed amendments to Section 1.2105(c)(1) of the Commission's rules, which prohibits collusion between competing bidders).

- Clarify that the unjust enrichment rules for bidding credits (Section 1.2111(d) of the Commission's rules) do not apply to assignments or transfers of C and F block licenses to non-entrepreneurs. We further clarify that pursuant to Sections 1.2111(c) and (d) of our rules, Commission approval of assignments of licenses and transfers of control that result in unjust enrichment with respect to bidding credits and installment payments is conditioned upon full payment of the required unjust enrichment payments on or before the consummation date.

- Clarify that licensees defaulting on installment payments are subject to the default provisions of Section 1.2110(f)(4) of our rules (redesignated herein as Section 1.2110(g)(4)), and not to Section 1.2104(g).

- Incorporate into the Part 1 general competitive bidding rules the "former defaulter" policies adopted with respect to C block auction applicants. Specifically, we: (1) allow "former defaulters," *i.e.*, applicants that have defaulted or been delinquent in the past, but have since paid all of their outstanding non-tax debts and all associated charges or penalties, to certify on FCC Form 175 that they are not in default and are, therefore, eligible for auction participation; and (2) require "former defaulters" to pay an upfront payment amount of 1.5 times the normal amount set by the Bureau for any given license in a Commission auction.

- Clarify that licensees defaulting on installment payments will be permitted to participate in future Commission spectrum auctions if they have either (1) paid all of their outstanding non-tax debt, along with all associated charges and penalties; or (2) been relieved of such obligations pursuant to otherwise applicable law. In all instances, installment payment defaulters eligible to participate in future auctions will be required to pay an upfront payment amount of 1.5 times the normal amount set by the Bureau for any given license in a Commission auction to assure their future financial soundness.

4. In this *Fifth Report and Order* we:

- Decline, at this time, to adopt special provisions for minority- and women-owned businesses pending completion of a series of market studies to determine whether, and under what circumstances, targeted preferences for minorities and women are appropriate. We note, however, that minority- and women-owned businesses that qualify as small businesses may take advantage of the provisions we have adopted for small businesses.

- Decline, at this time, to adopt special provisions for rural telephone companies, such as bidding preferences or an unserved area fill-in policy. We note, however, that we will continue to provide rural telephone companies with bidding credits should such entities qualify as small businesses.

- Adhere to our previous decision to suspend the installment payment program. We will, however, continue to provide small businesses with bidding credits as we have done in auctions for a number of services, *e.g.*, the Local Multipoint Distribution Service ("LMDS"), Location and Monitoring Service ("LMS"), 220 MHz and VHF Public Coast services.

- Adopt as our general attribution rule a controlling interest standard for determining which applicants qualify as small businesses. Under this standard, we will attribute to the applicant the gross revenues of its controlling interests and their affiliates in assessing whether the applicant qualifies for our small business provisions, such as bidding credits. We do not adopt a minimum equity threshold. Rather, applicants will be required to identify controlling interests based on the principles of either *de jure* or *de facto* control. Current C and F block licensees will continue to be eligible to hold their licenses regardless of whether or not they would qualify under the newly established attribution rules adopted herein. As to

future C and F block auctions, however, all applicants, including existing C and F block licensees, will be subject to the attribution rules in effect at the time of filing their short-form applications.

- Maintain our rule of calculating default payment amounts on a license-by-license basis and implement the Balanced Budget Act provisions regarding administrative filing periods as set forth below.
- Delegate to the Wireless Telecommunications Bureau the authority to make any revisions to the Code of Federal Regulations that are necessary to conform the service-specific auction rules to the Part 1 general competitive bidding rules.

5. In this *Fourth Notice* we:

- Seek comment on whether to use a total assets test in conjunction with the gross revenues measure already employed to determine business size.
- Seek comment on proposed exceptions to the requirement in the Part 1 attribution rules that certain stock interests be calculated on a "fully diluted" basis.

### III. ORDER ON RECONSIDERATION OF THE THIRD REPORT AND ORDER

#### A. Introduction

6. In response to the *Part 1 Third Report and Order*, we received seven petitions for reconsideration and two comments in support of the petitions for reconsideration.<sup>6</sup> The petitioners raise various issues regarding installment payments for auction-won licenses.<sup>7</sup> For the reasons discussed below, we clarify certain rules at petitioners' request and dismiss or deny these petitions in all other respects. Further, we address comments filed in response to the *ULS Notice* that relate to aspects of our auction rules.<sup>8</sup> In addition, we take this opportunity to clarify, on our own motion, certain aspects of the *Part 1 Third Report and Order*.

#### B. Clarification of Prohibition on Collusion

7. Background. Section 1.2105(c)(1) of the Commission's rules generally prohibits collusion between competing bidders from "after the filing of short-form applications . . . until after the high bidder makes the required down payment . . ."<sup>9</sup> Our bidder information packages generally state that "[t]his prohibition begins with the filing of short-form applications, and ends on the down payment

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<sup>6</sup> A list of the parties that filed pleadings in response to the *Part 1 Third Report and Order*, and the abbreviations used to refer to such parties, is attached at Appendix B.

<sup>7</sup> The installment payment rules are generally codified at 47 C.F.R. § 1.2110.

<sup>8</sup> See Biennial Regulatory Review -- 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 Services, WT Docket No. 98-20, *Notice of Proposed Rulemaking*, 13 FCC Rcd 9672 (1998) ("*ULS Notice*").

<sup>9</sup> 47 C.F.R. § 1.2105(c)(1).

due date."<sup>10</sup> Our Public Notices specifically provide that the collusion prohibition becomes effective on the "filing deadline of short-form applications" and ends on the "post-auction down payment due date."<sup>11</sup> To avoid any confusion regarding when the prohibition on collusion begins and ends, we believe it is necessary to amend Section 1.2105(c)(1) of our rules.<sup>12</sup>

8. Discussion. On our own motion, we amend Section 1.2105(c)(1) of our rules to provide that applicants are prohibited from communicating with each other about bids, bidding strategies, or settlements from "after the short-form application filing deadline . . . until after the down payment deadline . . . ." This rule change makes clear that competing bidders may not engage in communications prohibited by the rule from the date that short-form applications are due to the Commission until after the down payment deadline has passed. The amendment affirms that there is a uniform date for all bidders on which restrictions on communications begin and end. Our clarification conforms Section 1.2105(c)(1) to our practice of applying the collusion prohibition to applicants beginning on the due date for the submission of short-form applications.<sup>13</sup> In addition, it is consistent with our policy of not permitting individual bidders to abbreviate the period during which the collusion prohibition is in effect by submitting down payments prior to the down payment due date.

### C. Clarification of Section 1.2112

9. Background. In the *Part 1 Third Report and Order*, we concluded that detailed ownership information is necessary to ensure that applicants claiming designated entity status qualify for such status and that all applicants comply with spectrum caps and other ownership limits.<sup>14</sup> We also stated that disclosure of ownership information helps bidders identify entities that are subject to our anti-collusion rules.<sup>15</sup> To these ends, we promulgated Section 1.2112,<sup>16</sup> based on our broadband PCS rules,<sup>17</sup> to serve as a uniform ownership disclosure rule for all auctionable services.<sup>18</sup>

<sup>10</sup> See, e.g., C, D, E, & F Broadband PCS Auction, March 23, 1999, Bidder Information Package at 109; Location and Monitoring Service Auction, December 15, 1998, Bidder Information Package at 61; The Phase II 220 MHz Service Auction, September 15, 1998, Bidder Information Package at 65.

<sup>11</sup> See, e.g., "Auction of 168 Local Multipoint Distribution Service Licenses; Status of Applications to Participate in the Auction," *Public Notice*, DA 99-639 (rel. April 5, 1999); "Auction of C, D, E, and F Block Broadband PCS Licenses; Status of Applications to Participate in the Auction," *Public Notice*, DA 99-375 (rel. February 24, 1999); "Auction of 528 Multilateration Location and Monitoring Service Licenses; Status of Applications to Participate in the Auction," *Public Notice*, DA 99-249 (rel. January 29, 1999); Auction of 156-162 MHz VHF Public Coast Station Licenses; Status of Applications to Participate in the Auction," *Public Notice*, DA 98-2248 (rel. November 6, 1998).

<sup>12</sup> See Letter to Ari Fitzgerald, Federal Communications Commission, from Louis Gurman, dated April 14, 1999. The Commission is also seeking comment in a separate proceeding on other proposed amendments to Section 1.2105(c)(1) of the Commission's rules. See Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Procedures, *Third Further Notice of Proposed Rulemaking*, WT Docket No. 97-82, 14 FCC Rcd 21558 (1999).

<sup>13</sup> See "Wireless Telecommunications Bureau Responds to Questions About Local Multipoint Distribution Service Auction," *Public Notice*, DA 98-37 (rel. January 9, 1998) (stating that "[a]fter the deadline for submission of the FCC Form 175, applicants may not discuss the substance of their bids or bidding strategies with other bidders . . .").

<sup>14</sup> *Part 1 Third Report and Order*, 13 FCC Rcd at 417, ¶ 73. The majority of commenters supported our ownership disclosure requirements. *Id.* at 418, ¶ 74.

<sup>15</sup> *Id.* at 417-18, ¶ 73.

10. Discussion. Because a number of applicants in the Phase II 220 MHz auction found Section 1.2112 confusing, we have decided, on reconsideration, to reorganize the rule in a more logical, straightforward manner. We first revise Section 1.2112(b)(1) to use the term "controlling interest" to describe the parties whose connection or relationship with another FCC-regulated business must be reported under (b)(1).<sup>19</sup> Then, because identification of controlling interests is significant only for applicants claiming designated entity status, we include those reporting requirements related to such status in paragraph (b), which applies only to applicants claiming eligibility for small business provisions.<sup>20</sup> We also correct the rule to indicate that gross revenues must be reported not only on the long-form application, but also on the short-form application.<sup>21</sup>

11. In addition, we correct Section 1.2112(a)(3) in which we used language that was overly broad. Section 1.2112(a)(3) states erroneously that an applicant must provide: "[a] list of any party holding a 10 percent or greater interest in any entity holding or applying for any FCC-regulated business in which a 10 percent or more interest is held by another party which holds a 10 percent or more interest in the applicant."<sup>22</sup> This language has the unintended effect of requiring the reporting of parties with a distant relationship to the applicant. Section 1.2112(a)(3), however, also provides the following example: "If Company A owns 10 percent of Company B (the applicant) and 10 percent of Company C then Companies A and C must be listed on Company B's application."<sup>23</sup> The rule's example accurately reflects which parties we intended the applicant to report. That is, when a company (Company A) that must be reported under the rule because of its ownership interest in the applicant (Company B) also owns at least 10 percent of another company that is an FCC-licensed entity or applicant for an FCC license (Company C), Company C must be reported. Our intent was to require that FCC-regulated entities be reported when there is a connection between such an entity and the applicant at issue through a common owner. We therefore amend Section 1.2112 to better reflect our intent and comport with the example provided in the rule.<sup>24</sup> In addition, we amend Section 1.2112 to require applicants to disclose, in the case of a limited

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<sup>16</sup> 47 C.F.R. § 1.2112.

<sup>17</sup> See 47 C.F.R. § 24.813 (1997). This section was subsequently removed from the Code of Federal Regulations. See Biennial Regulatory Review -- 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 Services, WT Docket No. 98-20, *Report and Order*, 13 FCC Rcd 21027 (1998).

<sup>18</sup> See *Part 1 Third Report and Order*, 13 FCC Rcd at 418-19, ¶ 75.

<sup>19</sup> A "controlling interest" includes individuals or entities, or groups of individuals or entities, that have control of the applicant under the principles of either *de jure* or *de facto* control. See *infra* ¶¶ 58-67 (discussing the "controlling interest" standard).

<sup>20</sup> By limiting the reporting requirement in (b)(1) to only those applicants claiming designated entity status, this revision responds to AT&T's argument that the requirement is overly burdensome for large publicly-held corporations that may have hundreds of officers and directors. See AT&T Comments at 4.

<sup>21</sup> See *Part 1 Third Report and Order*, 13 FCC Rcd at 418, 420, ¶¶ 75, 77.

<sup>22</sup> 47 C.F.R. § 1.2112(a)(3) as adopted in the *Part 1 Third Report and Order*.

<sup>23</sup> *Id.*

<sup>24</sup> See 47 C.F.R. § 1.2112(a)(6) as adopted herein. Note that (a)(3) is renumbered as (a)(6) in the revised rule.

liability company, only those members that hold a 10 percent or greater interest in the applicant.<sup>25</sup> Section 1.2112(a)(8), as adopted in the *Part 1 Third Report and Order*, required applicants to disclose all members of a limited liability company, regardless of their ownership interest in the applicant. We now revise the disclosure requirement pertaining to limited liability companies to be consistent with those regarding limited partnerships. Finally, we change other aspects of the sequencing so that the revised rule begins by seeking general information in Sections 1.2112(a)(1) through (a)(4) and becomes progressively more detailed in (a)(5) and (a)(6).<sup>26</sup> This "building block" approach is intended to provide applicants with a clearer understanding regarding the information that must be disclosed.

12. We also take this opportunity to address relevant comments that were filed separately in response to the *ULS Notice*.<sup>27</sup> In their comments on the *ULS Notice*, AT&T, BAM, and FCBA object to the breadth of information collected in Section 1.2112.<sup>28</sup> In particular, they argue that the requirement to identify direct and indirect owners with an interest of 10 percent or greater is burdensome and overly broad.<sup>29</sup> We disagree. We believe that the 10 percent reporting requirement helps competing bidders accurately assess the legitimacy of their auction opponents and their respective bids.<sup>30</sup> As discussed in the *Part 1 Third Report and Order*, the collection of detailed ownership information is necessary for ensuring compliance with ownership limits, such as spectrum caps.<sup>31</sup> Disclosure of ownership information also aids bidders by providing them with information about their auction competitors and alerting them to entities subject to our anti-collusion rules.<sup>32</sup> We agree with commenters, however, that Section 1.2112 could be less burdensome in certain regards. Therefore, except for entities claiming special eligibility or designated entity status, we will not require applicants to include information regarding warrants, convertible debentures, stock options, debt securities or other debt interests as part of the 10 percent reporting requirement unless and until conversion of such interests is effected. Generally, the Commission has not included such interests in calculating ownership interests under rules establishing various ownership limits.<sup>33</sup> We agree with FCBA and AT&T that the current reporting burden imposed

<sup>25</sup> See 47 C.F.R. § 1.2112(a)(4) as adopted herein.

<sup>26</sup> See 47 C.F.R. § 1.2112(a) as adopted herein.

<sup>27</sup> *ULS Notice*, 13 FCC Rcd 9672 (1998).

<sup>28</sup> AT&T Comments at 4-5; BAM Comments at 12; FCBA Comments at 28-29; FCBA Reply Comments at 19-22.

<sup>29</sup> AT&T Comments at 5; BAM Comments at 12; FCBA Reply Comments at 20-21. Section 1.2112(a) of our rules requires applicants to disclose various stock interests of 10 percent or greater. 47 C.F.R. § 1.2112(a). Note that for purposes of determining ownership interests, stock interests held in trust shall be attributed to (1) any person who holds or shares the power to vote such stock; (2) any person who has the sole power to sell such stock; and (3) in the case of stock held in trust, 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. See *Part 1 Third Report and Order*, 13 FCC Rcd at 419 n.207.

<sup>30</sup> See *id.* at 418, ¶ 74.

<sup>31</sup> *Part 1 Third Report and Order*, 13 FCC Rcd at 417, ¶ 73.

<sup>32</sup> *Id.* at 417-18, ¶ 73. For purposes of our anti-collusion rules, the term "applicant" is defined to include entities that have a 10 percent or greater interest in the applicant. 47 C.F.R. § 1.2105(c)(6)(i).

<sup>33</sup> See, e.g., 47 C.F.R. §§ 20.6(d) (CMRS spectrum cap), 22.942(d) (cellular cross-interest), 73.3555 Note 2 (broadcast multiple ownership), 76.501 Note 2 (cable cross-ownership).



on applicants may exceed the benefit of requiring disclosure of these interests.<sup>34</sup> We continue to believe, however, that in calculating ownership interests for the purpose of determining designated entity status and eligibility for bidding credits, warrants, convertible debentures, options and other debt interests must be treated as having been exercised and must be reported as part of the applicant's disclosure.<sup>35</sup> In the case of applicants seeking special eligibility or designated entity status, the Commission has traditionally treated these interests as being fully diluted because it is reaching determinations regarding the bona fide nature of the applicant.<sup>36</sup> Thus, we agree with AT&T that it is reasonable for the Commission to require more ownership information from these entities where such information is designed to show that the special eligibility and/or bidding credit is both legitimate and warranted.<sup>37</sup>

#### D. Computation of Bid Withdrawal Payments Under Section 1.2104

13. Background. Section 1.2104(g)(1) of the Commission's rules sets forth the payment obligations of a bidder that withdraws a high bid on a license during the course of an auction.<sup>38</sup> Specifically, it provides that a bidder that withdraws a standing high bid is subject to a payment equal to the difference between the amount of the withdrawn bid and the amount of the subsequent winning bid the next time the license is offered by the Commission.<sup>39</sup> As the auctions program has evolved, however, the Commission has encountered situations involving multiple bid withdrawals on a single license, which are not specifically addressed by Section 1.2104(g)(1) of the Commission's rules. We, therefore, believe it is necessary to broaden our rule to clarify its application to this particular contingency. In addition, we wish to modify Section 1.2104(g)(1) to more specifically articulate our policy of assessing interim bid withdrawal payments.

14. Discussion. On our own motion, we clarify a policy that the Bureau has relied on in the past. If a bidder withdraws its bid and there is no higher bid in the same or subsequent auction(s), the bidder that withdrew its bid is responsible for the difference between its withdrawn bid and the net high bid in the same or subsequent auction(s). In the case of multiple bid withdrawals on a single license, within the same or subsequent auction(s), the payment for each bid withdrawal will be calculated based on the sequence of bid withdrawals and the amounts withdrawn.<sup>40</sup> No withdrawal payment will be assessed for a withdrawn bid if either the subsequent winning bid or any of the intervening subsequent withdrawn bids, in either the same or subsequent auction(s), equals or exceeds that withdrawn bid. Thus, a bidder that withdraws a bid will not be responsible for any withdrawal payments if there is a subsequent

<sup>34</sup> FCBA Reply Comments at 21; AT&T Comments at 5.

<sup>35</sup> See 47 C.F.R. § 1.2112(b); compare 47 C.F.R. § 1.2112(a) with § 1.2112(b).

<sup>36</sup> See 47 C.F.R. § 24.813 (1997). This section was subsequently removed from the Code of Federal Regulations. See Biennial Regulatory Review -- 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 Services, WT Docket No. 98-20, *Report and Order*, 13 FCC Rcd 21027 (1998).

<sup>37</sup> See AT&T Comments at 5.

<sup>38</sup> 47 C.F.R. § 1.2104(g)(1).

<sup>39</sup> *Id.*

<sup>40</sup> See, e.g., "VHF Public Coast Service Auction Closes," *Public Notice*, DA 98-2542, Attachment C, (rel. December 16, 1998); "Phase II 220 MHz Service Auction Closes," *Public Notice*, DA 98-2143, Attachment C, (rel. October 23, 1998); "LMDS Auction Closes," *Public Notice*, DA 98-572, Attachment C, (rel. March 26, 1998); "D, E, and F Block Auction Closes," *Public Notice*, DA 97-81, Attachment B, (rel. January 15, 1997).

higher bid in the same or subsequent auction(s). This policy allows bidders to most efficiently allocate their resources as well as to evaluate their bidding strategies and business plans during an auction while, at the same time, maintaining the integrity of the auction process. The Bureau retains the discretion to scrutinize multiple bid withdrawals on a single license for evidence of anti-competitive strategic behavior and take appropriate action when deemed necessary.

15. We also wish to modify Section 1.2104(g)(1) of our rules to state more specifically our policy of assessing interim bid withdrawal payments. We amend Section 1.2104(g)(1) to provide that in instances in which bids have been withdrawn on a license that is not won in the same auction, the Commission will assess an interim withdrawal payment equal to 3 percent of the amount of the bid withdrawals. The 3 percent interim payment will be applied toward any final bid withdrawal payment that will be assessed at the close of the subsequent auction of the license. Assessing an interim bid withdrawal payment ensures that the Commission receives a minimal withdrawal payment pending assessment of any final withdrawal payment. Below are some examples showing application of the bid withdrawal payment rule:

(1) Bidder A withdraws a bid of \$100. Subsequently, Bidder B places a bid of \$90 and withdraws. In that same auction, Bidder C wins the license at a bid of \$95. Withdrawal payments are assessed as follows: Bidder A owes \$5 (\$100 - \$95). Bidder B owes nothing.

(2) Bidder A withdraws a bid of \$100. Subsequently, Bidder B places a bid of \$95 and withdraws. In that same auction, Bidder C wins the license at a bid of \$90. Withdrawal payments are assessed as follows: Bidder A owes \$5 (\$100 - \$95). Bidder B owes \$5 (\$95 - \$90).

(3) Bidder A withdraws a bid of \$100. Subsequently, in that same auction, Bidder B places a bid of \$90 and withdraws. In a subsequent auction, Bidder C places a bid of \$95 and withdraws. Bidder D wins the license in that auction at a bid of \$80. Withdrawal payments are assessed as follows: At the end of the first auction, Bidder A and Bidder B are each assessed an interim withdrawal payment equal to 3 percent of their withdrawn bids pending Commission assessment of a final withdrawal payment (Bidder A would owe 3% of \$100, or \$3, and Bidder B would owe 3% of \$90, or \$2.70). At the end of the second auction, Bidder A would owe \$5 (\$100 - \$95) less the \$3 interim withdrawal payment for a total of \$2. Because Bidder C placed a subsequent bid that was higher than Bidder B's \$90 bid, Bidder B would owe nothing. Bidder C would owe \$15 (\$95 - \$80).

#### **E. Installment Payment Grace Periods and Imposition of Late Payment Fees**

16. Background. The installment payment rules, adopted in the *Competitive Bidding Second Report and Order*, permitted a licensee to make an installment payment up to 90 days after the due date without a late payment charge and without being considered in default.<sup>41</sup> A licensee whose installment payment was more than 90 days past due, however, was in default, unless a "grace period" request was filed prior to the payment due date.<sup>42</sup> Specifically, in anticipation of default on one or more installment payments, a licensee could request that the Commission grant a three to six month grace period during

<sup>41</sup> *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2389-91, ¶¶ 231-240.

<sup>42</sup> 47 C.F.R. § 1.2110(b)(4)(x)(E)(4)(i) and (ii) (1994). See also Public Notice, "Reminder to Licensees with Installment Payment Plans: Availability of Grace Periods," 12 FCC Rcd 7971 (1997).

which no installment payments need be made.<sup>43</sup> The licensee would not be declared in default during the pendency of such request. Grant of the request would result in the licensee not being considered in default during the grace period, and the interest that accrued while no payments were made would be amortized over the remaining term of the license.<sup>44</sup> Following the expiration of any grace period without successful resumption of payment, or upon denial of a grace period request, or default with no such request submitted, the license would cancel automatically.<sup>45</sup>

17. In the *Part 1 Third Report and Order*, we modified the grace period provisions as applied to all licensees participating in an installment payment plan at that time.<sup>46</sup> These provisions took effect on March 16, 1998, 60 days after their publication in the Federal Register.<sup>47</sup> Thus, beginning with installment payments due on or after March 16, 1998, a licensee that did not make an installment payment when due automatically had an additional 90 days in which to submit its required payment without being considered delinquent, but was assessed a late payment fee equal to 5 percent of the amount of the past due installment payment.<sup>48</sup> If the licensee failed to make the required payment within the first 90-day period, the licensee was automatically provided a subsequent 90 days to submit its required payment without being considered delinquent, this time subject to a second, additional late payment fee equal to 10 percent of the amount of the past due installment payment.<sup>49</sup> The licensee was not required to submit a request to take advantage of these provisions. A licensee that failed to make payment within 180 days after an installment payment due date sufficient to pay all past due late payment fees, interest, and principal, was deemed to have failed to make full payment of its obligation and the license was automatically cancelled without further Commission action.<sup>50</sup> The late payment fee and automatic cancellation provisions described above did not apply to licensees with grace period requests that were properly filed prior to the effective date of the *Part 1 Third Report and Order* until such time as the Commission (or the Bureau upon delegated authority) addressed these grace period requests.<sup>51</sup>

<sup>43</sup> 47 C.F.R. § 1.2110(b)(4)(x)(E)(4)(ii) (1994). In determining whether to grant a request for a grace period, the Commission (or Wireless Telecommunications Bureau upon delegated authority) considered, among other things, the licensee's financial condition and payment history, including whether the licensee had previously defaulted. *Id.*

<sup>44</sup> 47 C.F.R. § 1.2110(b)(4)(x)(E)(4)(ii) (1994).

<sup>45</sup> 47 C.F.R. § 1.2110(b)(4)(x)(E)(4)(iii) (1994).

<sup>46</sup> *Part 1 Third Report and Order*, 13 FCC Rcd at 434-42, ¶¶ 103-113.

<sup>47</sup> A summary of the *Part 1 Third Report and Order* appeared in the Federal Register on January 15, 1998. See 63 Fed. Reg. 2315 (1998).

<sup>48</sup> *Part 1 Third Report and Order*, 13 FCC Rcd at 436, ¶ 106; 47 C.F.R. § 1.2110(f)(4)(i).

<sup>49</sup> *Part 1 Third Report and Order*, 13 FCC Rcd at 436, ¶ 106; 47 C.F.R. § 1.2110(f)(4)(ii).

<sup>50</sup> *Part 1 Third Report and Order*, 13 FCC Rcd at 438, ¶ 107; 47 C.F.R. § 1.2110(f)(4)(iii), (iv).

<sup>51</sup> See *Part 1 Third Report and Order*, 13 FCC Rcd at 441-442, ¶ 113 (stating that "[w]e further clarify that such licensees are not deemed to be in default on these licenses until such time as the Bureau issues a decision on these grace period requests"). See also Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, WT Docket No. 98-169, *Order, Memorandum Opinion and Order and Notice of Proposed Rulemaking*, 13 FCC Rcd 19064, 19072, ¶ 11 (1998) (*218-219 MHz Service Order and NPRM*); Public Notice, "Wireless Telecommunications Bureau Provides Guidance on Grace Period and Installment Payment Rules," DA 98-1897, at 3 (rel. Sept. 18, 1998).

18. Discussion. All petitioners oppose some aspect of the modified provisions relating to the submission of late installment payments. Specifically, Alpine PCS and CONXUS seek repeal of the rules requiring late payment fees;<sup>52</sup> DiGiPH and Houston 936 object to the imposition of late payment fees and request that the Commission retain the 90-day non-delinquency period with no late fee imposed;<sup>53</sup> NextWave proffers a 270-day late payment window consisting of a 90-day non-delinquency period, followed by two automatic 90-day periods in which a monthly late payment fee would apply;<sup>54</sup> and CTI and Loli request that the Commission allow licensees in the 218-219 MHz Service (formerly, Interactive Video and Data Service) to continue submitting grace period requests.<sup>55</sup> In challenging the modified late payment provisions, petitioners generally argue that: (1) they are unfair, punitive, and commercially unreasonable; (2) they constitute impermissible retroactive rulemaking as applied to licensees currently participating in the installment payment plan; and (3) they violate basic contract principles. We address each of these arguments in turn.

19. While installment payments must be timely, the Commission's grace period provisions provide limited relief for entities that find themselves in financial distress.<sup>56</sup> Petitioners claim that the revised late payment provisions are unfair because, in determining auction and construction strategies, petitioners had relied on the availability of a 90-day non-delinquency period and deferral of payment obligations while grace period requests remained pending.<sup>57</sup> The Commission's late payment provisions, however, were not intended to serve as a tool that licensees might use in their normal course of planning auction strategy and build-out. These provisions are provided for extraordinary circumstances --

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<sup>52</sup> See generally Alpine PCS Petition; CONXUS Petition.

<sup>53</sup> See generally DiGiPH Petition; Houston 936 Petition.

<sup>54</sup> See NextWave Petition at 3. We specifically considered, and declined to adopt, such an alternative late payment structure in the *Part 1 Third Report and Order*, 13 FCC Rcd at 438-439, ¶¶ 108-109 (in response to comments filed by Airadigm (270-day window) and GWI (pro-rated late payment fees)).

<sup>55</sup> See generally CTI Petition and Loli Petition. *Accord* In-Sync Comments at 1; Bellingham Comments at 3. On a related matter, the Loli Petition at 3-7 requests that the Commission (1) suspend all payment obligations of 218-219 MHz Service licensees until resolution of the proposals set forth in the Petition for Rulemaking of Euphemia Banas, *et al.* (filed September 4, 1996, amended January 28, 1997, February 26, 1997, and March 13, 1998) ("RM-8951"); and (2) give licensees in the 218-219 MHz Service a range of options for alleviating financial difficulties similar to those given to broadband PCS C block licensees (*see* 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, ¶¶ 34-37 (1998) ("*C Block Order on Reconsideration*"). *Accord* In-Sync Comments at 3-6; Bellingham Comments at 3-4. Although the Commission did not suspend the payment obligations of 218-219 MHz Service licensees, it decided not to assess late payment fees or cancel 218-219 MHz Service licenses for which a properly filed grace period request was pending, or for which adequate installment payments were made as of the effective date of the new Part 1 grace period rules (*i.e.*, March 16, 1998), until resolution of the issues raised in RM-8951. *See 218-219 MHz Service Order and NPRM*, 13 FCC Rcd at 19073, ¶ 13. In light of these actions, Loli's requests described above are moot. *See also* Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, WT Docket No. 98-169, RM-8951, *Report and Order and Memorandum Opinion and Order*, 15 FCC Rcd 1497 (1999) (adopting a restructuring plan for existing 218-219 MHz Service 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).

<sup>56</sup> See 47 C.F.R. § 1.2110(f)(4) (redesignated herein as § 1.2110(g)(4)).

<sup>57</sup> See, *e.g.*, DiGiPH Petition at 2, 4-5; In-Sync Comments at 6.

instances of financial distress -- for which temporary relief is appropriate. Petitioners' assertions of reliance on such provisions for any other purpose are misplaced. Petitioners also claim that it is punitive and commercially unreasonable to impose the same late payment fee amount whether the payment arrives one day late or ninety days late.<sup>58</sup> We disagree. Our fundamental goal in adopting the late payment provisions is to encourage payment by the due date. Achievement of this goal is best attainable by adhering to the 5 percent and 10 percent late payment fee schedule we have adopted. A prorated approach towards late fees could serve as a disincentive to licensees to pay on time and, thereby, undermine achievement of our basic goal. As we stated in the *Part 1 Third Report and Order*, our "approach is consistent with the standard commercial practice of establishing late payment fees and developing financial incentives for licensees to resolve capital issues *before payment due dates*."<sup>59</sup> Further, the approach we have taken is a commercially reasonable debt management practice used with respect to a variety of debt instruments from credit cards to mortgages. Therefore, we disagree with petitioners' claims that the revised late payment provisions are unfair, punitive, and commercially unreasonable.

20. Petitioners also contend that the regulatory changes to the installment payment program adopted in the *Part 1 Third Report and Order* are unlawfully retroactive, insofar as they could have an adverse effect on the previously established installment payment obligations.<sup>60</sup> For example, CTI claims that the revised late payment rules unsettle the expectations of licensees that opted to pay for licenses in installments.<sup>61</sup> CONXUS argues that a "rule" under the Administrative Procedure Act ("APA") is supposed to embody "the whole or a part of any agency statement of general or particular applicability and *future effect* . . . ." <sup>62</sup> These arguments do not withstand analysis.

21. Our new Part 1 rules do not violate the prohibitions on "primary retroactivity" under the APA as set forth in Supreme Court cases such as *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204 (1988). We have *not*, for example, gone back to past transactions and imposed new penalties for conduct which was previously allowed by our rules. Rather, the Commission here merely prescribed rules for the future, *i.e.*, prospective procedures by which licensees remit installment payments after March 16, 1998, the effective date of the new rules, that deal with past transactions, *i.e.*, the previously established installment payment obligations. Such a rule change does not constitute unlawful retroactive rulemaking under the APA.<sup>63</sup>

<sup>58</sup> Alpine PCS Petition at 2-3; CONXUS Petition at 3; NextWave Petition at 2-3.

<sup>59</sup> *Part 1 Third Report and Order*, 13 FCC Rcd at 440, ¶ 110 (citing, *e.g.*, Eldon H. Reiley, Guidebook to Security Interests in Personal Property § 4.02(iii) (1989)) (emphasis added).

<sup>60</sup> See CTI Petition at 5-11. See also Alpine PCS Petition at 3-5; CONXUS Petition at 3-7; DiGiPH Petition at 2; Houston 936 Petition at 3-4. *Accord* In-Sync Comments at 6-7.

<sup>61</sup> CTI Petition at 5-9.

<sup>62</sup> CONXUS Petition at 4 (citing 5 U.S.C. § 551(4)) (emphasis added).

<sup>63</sup> For example, in *Bowen v. Georgetown University Hospital*, 488 U.S. 209, 219-20 (1988), Justice Scalia gave the following illustration of a regulation that was *not* improperly retroactive under the APA:

The Treasury Department might prescribe, for example, that for purposes of assessing future income tax liability, income from certain trusts that has previously been considered nontaxable will be taxable -- whether those trusts were established before or after the effective date of the regulation. That is not retroactivity in the sense at issue here, *i.e.*, in the sense of altering the past legal consequences of past actions. Rather, it is what has been characterized as "secondary" . . . A rule with exclusively future effect . . . can unquestionably *affect* past transactions (rendering

(continued....)

22. Further, the fact that the new rules may unsettle expectations about the economic benefits of participating in the installment payment plan does not make the new rules unlawfully retroactive. In that regard, the U.S. Court of Appeals for the D.C. Circuit has explained: "[A] new rule or law is not retroactive 'merely because it . . . upsets expectations based on prior law.'"<sup>64</sup> This type of "secondary" retroactivity is an entirely lawful consequence of much agency rulemaking and does not by itself render a rule invalid.<sup>65</sup> Commission licensees, in particular, have no vested right to an unchanged regulatory scheme throughout their license term.<sup>66</sup> Therefore, petitioners' claim that the revised late payment provisions are unlawfully retroactive fails.

23. Finally, petitioners contend that contract law precludes application of the new late payment procedures to licensees paying for their licenses in installments prior to the effective date of the *Part 1 Third Report and Order*. Houston 936, for example, challenges the Commission's elimination of the 90-day non-delinquency period, which was incorporated as a term of the existing promissory notes executed by 900 MHz Specialized Mobile Radio service (900 MHz SMR) licensees.<sup>67</sup> CONXUS and CTI argue that adoption of the new late payment procedures constitutes unilateral modification (*i.e.*,

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previously established trusts less desirable in the future), but it does not for that reason cease to be a rule under the APA.

*Accord Bell Atlantic Tel. Cos. v. FCC*, 79 F.3d 1195 (D.C. Cir. 1996) (upholding FCC rule changes that did not require carriers to refund sums previously collected, but which used past facts in setting the carriers' sharing obligations for the future period).

<sup>64</sup> *DirectTV, Inc. v. FCC*, 110 F.3d 816, 826 (D.C. Cir. 1997) (quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 269, 114 S. Ct. 1483, 1499 (1994)). "Even uncontroversially prospective statutes may unsettle expectations and impose burdens on past conduct: a new property tax or zoning regulation may upset the reasonable expectations that prompted those affected to acquire property; . . ." *Id.* (quoting *Landgraf*, 511 U.S. at 270 n.24).

<sup>65</sup> *See, e.g., Chemical Manufacturers Ass'n v. EPA*, 869 F.2d 1526, 1536 (D.C. Cir. 1989):

It is often the case that a business will undertake a certain course of conduct based on the current law, and will then find its expectations frustrated when the law changes. This has never been thought to constitute retroactive rulemaking, and indeed most economic regulation would be unworkable if all laws disrupting prior expectations were deemed suspect.

<sup>66</sup> *See FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978) (upholding prospective regulations limiting multi-media ownership under the FCC's general rulemaking powers, including requirement for divestiture as a condition to license renewal); *Committee for Effective Cellular Rules v. FCC*, 53 F.3d 1309, 1316-17 (D.C. Cir. 1995) (in upholding FCC rules amending the technical standards for determining reliable cellular service, resulting in restrictions on the areas served by existing cellular providers, the court sustained the Commission's right to modify license provisions through a notice and comment rulemaking); *WBEN, Inc. v. United States*, 396 F.2d 601, *cert. denied*, 393 U.S. 914 (1968) (upholding license modifications that limited predawn AM broadcasting rights of "daytimer" licensees that previously had some of the more ample privileges granted to "fulltimer" licensees).

<sup>67</sup> *See* Houston 936 Petition at 1-3. *See also* DiGiPH Petition at 5 (referencing C block notes); Alpine PCS Petition at 6-7 (same). *Cf.* NextWave Petition at 5-7 (Commission should reconcile its seemingly conflicting roles of regulator and party to commercial contract).

breach) of a contract between the Commission and the licensees for payment of licenses under specified payment terms even without a signed promissory note.<sup>68</sup>

24. Installment payment programs currently exist in the following services: the 218-219 MHz Service,<sup>69</sup> broadband Personal Communications Services (PCS) frequency block C,<sup>70</sup> broadband PCS frequency block F,<sup>71</sup> broadband PCS frequency block A (pioneers' preference licensees only),<sup>72</sup> regional narrowband PCS,<sup>73</sup> 900 MHz SMR,<sup>74</sup> and the Multipoint Distribution Service (MDS).<sup>75</sup> For some services in which we have offered installment payments, far from being punitive and unreasonable, we have afforded extraordinary relief regarding installment payment obligations. Specifically, we suspended the effect of the new late payment provisions as applied to any license in the 218-219 MHz Service for which a properly filed grace period request was pending or for which adequate installment payments were made as of March 16, 1998, pending Commission resolution of issues raised in the *218-219 MHz Service Order and NPRM*.<sup>76</sup> Most recently, we offered restructuring to certain 218-219 MHz Service licensees.<sup>77</sup> Further, licensees in the broadband PCS frequency blocks C and F that are participating in the installment payment program have signed note modifications that incorporate the late payment provisions described in 47 C.F.R. § 1.2110(f)(4) (redesignated herein as 47 C.F.R. § 1.2110(g)(4)).<sup>78</sup> Regarding these licensees, therefore, there is no conflict between the application of the new late payment procedures and contract law.

25. Among the remaining licensees that have benefitted from Commission installment payment plans, licensees in broadband PCS frequency block A and regional narrowband PCS did not sign separate loan documents. The payment terms and conditions with respect to these licenses, therefore,

<sup>68</sup> See CONXUS Petition at 7-8; CTI Petition at 8-9. See also In-Sync Comments at 6.

<sup>69</sup> 47 C.F.R. § 95.816.

<sup>70</sup> 47 C.F.R. § 24.711.

<sup>71</sup> 47 C.F.R. § 24.716.

<sup>72</sup> See American Personal Communications Washington-Baltimore MTA #10 Frequency Block A, File No. 15000-CW-L-94, Call Sign: KNLF200, *Order*, 11 FCC Rcd 12384 (1996).

<sup>73</sup> 47 C.F.R. § 24.309.

<sup>74</sup> 47 C.F.R. § 90.812.

<sup>75</sup> 47 C.F.R. § 21.960.

<sup>76</sup> *218-219 MHz Service Order and NPRM*, 13 FCC Rcd at 19072-19074, ¶¶ 12-14.

<sup>77</sup> Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, WT Docket No. 98-169, RM-8951, *Report and Order and Memorandum Opinion and Order*, 15 FCC Rcd 1497 (adopting a restructuring plan for existing 218-219 MHz Service 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).

<sup>78</sup> See 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, 8373, ¶ 65 (1998); see also Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Service (PCS) Licenses, *Second Report and Order and Further Notice of Proposed Rulemaking*, WT Docket No. 97-82, 12 FCC Rcd 16436 (1997).

have always been a matter of Commission regulation through the Part 1 rules. In this regard, the following language appears on the licenses themselves: "This authorization is subject to the condition that the remaining balance of the winning bid amount will be paid in accordance with Part 1 of the Commission's rules, 47 C.F.R. Part 1." These licensees were aware, or should have been aware, that the terms and conditions of Part 1 or other aspects of the license can be modified by the Commission by rulemaking, and that such changes have been uniformly upheld by the courts as lawful.<sup>79</sup> The Part 1 rules at issue in this proceeding were modified subject to APA-consistent administrative rulemaking procedures and are intended to provide greater flexibility to licensees in determining their use of grace periods and late payment provisions. The application of our modified late payment provisions does not constitute a breach of contract as argued by these petitioners.

26. Some SMR and MDS licensees argue that the Promissory Note and Security Agreements executed by these licensees bound the Commission to the rules in place at the time of the license grant. This is demonstrably incorrect. The Commission did not promise these licensees, or any other licensees, that the Part 1 rules would remain unchanged during the license term. Rather, the Note and Security Agreement provide that the licensee must comply with "all Commission orders and regulations applicable to the licensee,"<sup>80</sup> without regard to the time in which those applicable rules were promulgated or amended.<sup>81</sup> The SMR and MDS notes emphasized that the Commission's rules, as amended, would take precedence over the terms of the notes in case of any conflict.<sup>82</sup> Moreover, when addressing *future* events, such as the making of installment payments, applications for grace periods and incidents of default, the Note and Security Agreement refer to the "then-applicable" rules of the Commission,<sup>83</sup> a clear

<sup>79</sup> See *Stein, Mitchell & Mezines*, ADMINISTRATIVE LAW § 41.04 at page 41-66 (observing that the lower courts have unanimously permitted agencies to modify existing licenses through APA rulemakings).

<sup>80</sup> MDS and SMR Security Agreements at ¶ 11.

<sup>81</sup> See *Association of Accredited Cosmetology v. Alexander*, 979 F.2d 859, 863-66 (D.C. Cir. 1992):

Member schools have no "vested right" to future eligibility to participate in the GSL program. Although we do not doubt AACCS's submission that the schools expected to be eligible in the future, such an expectation did not constitute a vested interest. *Nowhere in the Program Participation Agreements are member schools promised or even led to believe that there will be no background changes in the federal law.* The Agreements explicitly provide that participating schools must "comply will all relevant program statutes and regulations." (Emphasis added.)

<sup>82</sup> MDS and SMR Notes at p. 5

The enforceability of the Note and/or the Security Agreement do not alter the rights and obligations of the Maker and Payee under the Communications Act of 1934, as amended, or under the then-applicable orders and regulations of the Commission, as amended.

\* \* \*

This Note shall be governed by and construed in accordance with the Communications Act of 1934, as amended, the then-applicable orders and regulations of the Commission, and federal law. Nothing in this Note shall be deemed to modify any then-applicable orders and regulations of the Commission, and *nothing in this Note shall be deemed to release the Maker from compliance therewith.* (Emphasis added.)

<sup>83</sup> For example, the MDS and SMR Notes provide at p. 2:

(continued....)



reference to the rules that would be applicable at the time of such events. Specifically with respect to "grace periods" which were modified by the revision of Part 1, the SMR and MDS Notes are worded conditionally -- "if any such grace period or extension of payments is provided for in the then-applicable orders and regulations of the Commission."<sup>84</sup> This conditional language confirms that the "then-applicable" grace period rules referred to in the Note are those rules that may exist at the time in the future when a grace period is sought, and not necessarily the rules that were in place at the time of the license grant; otherwise, the sentence would not have been phrased as a contingency, but would have cited whatever grace period rules were in effect at the time of the Note. Given these provisions, the last paragraph in the Note -- which states that the Note may not be changed except by an agreement in writing executed by the party against whom enforcement of such change is sought<sup>85</sup> -- means that individual modifications to any particular agreement must be made in writing by mutual consent. Significantly, however, this clause does not preclude service-wide changes of the governing rules by the agency's public notice and comment rulemaking process. Specifically, the Payee, by signing such Note, has already agreed to be bound by the Commission's rules as they may be amended from time to time in the provisions of the Note and Security Agreement referencing the "then-applicable" rules of Commission.<sup>86</sup>

We, therefore, retain the modified grace period and late payment fee provisions adopted in the *Part 1 Third Report and Order*.<sup>87</sup>

27. As discussed above, we conclude that the revised late payment rules are not commercially unreasonable, do not constitute impermissible retroactive rulemaking, and do not violate basic contract principles. We believe, however, that a slight modification to the payment due dates for late installment payments and associated late fees would benefit licensees. Under the *Part 1 Third Report*

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All payments shall be made during normal business hours at the Commission's designated lockbox location as set forth from time to time in the Commission's then-applicable orders and regulations and/or public notices.

<sup>84</sup> MDS and SMR Notes at p. 2.

<sup>85</sup> MDS and SMR Notes at p. 5.

<sup>86</sup> Some petitioners argue that the Supreme Court decision in *United States v. Winstar Corp.*, 518 U.S. 839 (1996), precludes the unilateral modifications of the terms of the Note and Security Agreement. See, e.g., Alpine PCS Petition at 6; CONXUS Petition at 7. *Winstar* addressed an entirely different regulatory scheme, and one in which the Court found that the government agreed to protect private parties from the risk of changing regulations. Here, in contrast, the Note and Security Agreement put the licensees on notice that they must continue to comply with the Commission's regulations, as they may be amended. Alpine PCS, CONXUS and other petitioners do not, and cannot, point to any provision in the Notes and Security Agreements in which the government affirmatively promised not to make any regulatory changes that would affect the licensees during the 10-year life of the licenses. Accordingly, the *Winstar* decision has no application to the circumstances here.

<sup>87</sup> While the instant reconsideration petitions were under consideration, we informally allowed SMR and MDS licensees to make installment payments under a modified regime in which licensees in these services were not charged a late fee if the payment was made within 90-days of the due date (as provided for in the text of the SMR and MDS Notes), and in which a 10 percent late fee was imposed for payments that were made within the 90-180 day period (as provided for in the new Part 1 rules). We did this as an accommodation to these licensees so as not to prejudice their argument that the Note and Security Agreement provisions restricted the Commission to the old Part 1 rules, at least for the first 90-day period. Now that we have completed our review on reconsideration, we see no reason to continue that special procedure, since we have concluded that the Note and Security Agreements do not preclude the adoption of new grace period and payment rules for the future. While we will not seek to recover the amounts that might otherwise have been due for late payments under our Part 1 rules during this reconsideration period, we will commence applying the Part 1 rules uniformly to all services, including SMR and MDS, beginning with the first installment payment due after the effective date of this rule making.

and Order, licensees that miss an installment payment are given up to two 90-day periods in which to submit the installment payment and associated late fee without being considered delinquent.<sup>88</sup> Regularly scheduled installment payments, on the other hand, are due quarterly (*i.e.*, every 3 months), which may provide a licensee with up to 92 calendar days to make timely payment depending upon the month in which the payment is due. This discrepancy in payment due dates may cause confusion for licensees. For example, a late installment payment and associated late fee may be due a day or two before the next regularly scheduled quarterly installment payment. Because these due dates are so proximate, licensees may mistakenly assume that they can pay their late installment payment and late fee on the due date of the next regularly scheduled quarterly installment payment without incurring an additional late payment fee or being considered delinquent.

28. In order to avoid any confusion as to when late installment payments and accompanying late fees are due, we will amend the due dates for late installment payments to comport with quarterly due dates. Specifically, rather than providing licensees that fail to make timely installment payments with two 90-day periods in which to satisfy their payment obligations, we will provide such licensees with two quarters (two 3-month periods) in which to submit their late installment payments and required late fees without being considered delinquent. Thus, due dates for late installment payments and associated late fees will coincide with quarterly due dates for regularly scheduled installment payments. Although we modify the due dates for submitting late installment payments, we do not change the associated late fee provisions. We, therefore, amend Section 1.2110(f)(4) (redesignated herein as Section 1.2110(g)(4)) of our rules to provide that a licensee that fails to make an installment payment when due will be permitted to make its required payment by the end of the next quarter (a 3-month period) without being considered delinquent, but will be assessed a late payment fee equal to 5 percent of the amount of the past due installment payment.<sup>89</sup> If the licensee fails to make the required payment within the first quarter after the regularly scheduled due date, the licensee will be allowed to make its required payment by the end of the subsequent quarter without being considered delinquent, this time subject to a second, additional late payment fee equal to 10 percent of the amount of the past due installment payment.<sup>90</sup> The licensee is not required to submit a request to take advantage of these provisions. A licensee that fails to make payment within two quarters (or 6 months) after an installment payment due date sufficient to pay all past due late payment fees, interest, and principal, will be deemed to have failed to make full payment of its obligation and, as has been the case since the inception of our competitive bidding and auction specific installment payment rules, the license will automatically cancel without further Commission action.<sup>91</sup>

## F. Installment Payment Restructuring

<sup>88</sup> *Part 1 Third Report and Order*, 13 FCC Rcd at 436, ¶ 106; 47 C.F.R. § 1.2110(f)(4) (redesignated herein as § 1.2110(g)(4)).

<sup>89</sup> *See* 47 C.F.R. § 1.2110(g)(4) as adopted herein.

<sup>90</sup> *See* 47 C.F.R. § 1.2110(g)(4) as adopted herein. These amendments of the due dates for late installment payments and associated late fees do not apply to C and F block licensees that were provided a single 90-day non-delinquency period for remittance of the initial resumption payment that was due on July 31, 1998. *See* 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 at 8355, ¶ 26.

<sup>91</sup> *See* 47 C.F.R. § 1.2110(g)(4) as adopted herein. These late payment fee and automatic cancellation provisions do not apply to licensees with grace period requests that were properly filed prior to the effective date of the *Part 1 Third Report and Order* (March 16, 1998) until such time as the Commission (or the Bureau upon delegated authority) addresses those grace period requests.

29. Background. In the *Competitive Bidding Second Report and Order*, the Commission stated that once it granted a grace period request, "a defaulting licensee could maintain its construction efforts and/or operations while seeking funds to continue payments *or seek from the Commission a restructured payment plan*."<sup>92</sup> Reference to a restructured payment plan also appeared in the former grace period rule, Section 1.2110(e)(4)(ii), which permitted licensees to temporarily suspend their installment payments pending the restructuring of such payment obligations.<sup>93</sup> In amending Section 1.2110 to be consistent with our decision in the *Part 1 Third Report and Order* to revise the late payment provisions and eliminate the grace payment procedure, we removed language that referred to a restructured payment schedule.

30. Discussion. NextWave objects to the elimination of language in Section 1.2110 referring to a restructuring of installment payments.<sup>94</sup> NextWave contends that the Commission eliminated the option to restructure without providing notice and comment or any rationale for the elimination in violation of the APA.<sup>95</sup> By removing language in Section 1.2110(e)(4)(ii) that referenced a restructured payment schedule, we did not intend to eliminate a licensee's option to request restructuring of its installment payment obligations. We simply sought to amend the rule to provide for automatic grace periods rather than requiring a showing of financial need to support a grace period request. Licensees in the installment payment program may still submit requests for payment restructuring or workouts. There is, however, no longer a procedure for requesting a grace period to stay installment payment deadlines pending such restructuring. Rather, licensees will be subject to the automatic late payment provisions of Section 1.2110(g) as adopted herein.<sup>96</sup> Because licensees continue to have the opportunity to seek restructuring of installment payments, the Commission was not required under the APA to seek comment on the elimination of that option. Moreover, the reference to a "restructured payment schedule" in Section 1.2110(e)(4)(ii) was part and parcel of our rule section that provided for individual grace period requests and financial distress showings.<sup>97</sup> We proposed to amend that rule section in its entirety and adopt automatic grace periods in the *Part 1 Notice of Proposed Rule Making*.<sup>98</sup> Interested parties could reasonably have anticipated that our proposal to amend the grace period request rule could result in the amendment of language in that rule referencing restructuring. Thus, omitting a reference to a restructured payment schedule is within the specific scope of the *Part 1 Notice of Proposed Rule Making*<sup>99</sup> to adopt automatic grace periods and eliminate the requirement to file financial distress showings and, therefore, is not violative of the APA.

<sup>92</sup> *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2391, ¶ 240 (emphasis added).

<sup>93</sup> Section 1.2110(e)(4)(ii) provided in part: "If the Commission grants a request for a grace period, or otherwise approves a restructured payment schedule . . . ." 47 C.F.R. § 1.2110(e)(4)(ii) (1997).

<sup>94</sup> NextWave Petition at 4. *See also* Loli Petition at 7-8 (requesting that 218-219 MHz Service licensees be allowed to continue filing requests for "work-outs").

<sup>95</sup> NextWave Petition at 5.

<sup>96</sup> *See* 47 C.F.R. § 1.2110(g) as adopted herein.

<sup>97</sup> 47 C.F.R. § 1.2110(e)(4)(ii) (1997).

<sup>98</sup> *See Part 1 Notice of Proposed Rule Making*, 12 FCC Rcd at 5723-5726, ¶¶ 71-74.

<sup>99</sup> *See Part 1 Notice of Proposed Rule Making*, 12 FCC Rcd at 5723-5726, ¶¶ 69-78.

## G. Installment Payment Obligations Under Assignments of Licenses and Transfers of Control

31. Background. The Communications Act of 1934 ("Communications Act"), as amended, requires the Commission to approve assignments of licenses and transfers of control.<sup>100</sup> Prior to the adoption of the *Universal Licensing System (ULS) Report and Order*,<sup>101</sup> upon approval of an assignment or transfer, the Bureau amended its licensing database for certain private and microwave services.<sup>102</sup> If an assignment or transfer was not consummated, we required the filing of a second transfer application that reflected the "return" of the license from the putative transferee to the original licensee.<sup>103</sup> The ULS rules, however, now require parties to assignments of licenses or transfers of control in all wireless services only to file a notice that they have consummated the underlying transaction, at which point the Bureau amends its licensing database.<sup>104</sup>

32. Discussion. In-Sync seeks clarification regarding an assignee's or transferee's responsibility for installment payment debt in the event of default by an assignor or transferor in cases where the Bureau amended its database simply upon approval of the assignment or transfer.<sup>105</sup> Specifically, In-Sync believes that the assignee or transferee should not be responsible for licensee debt until the transaction is consummated.<sup>106</sup> As an initial matter, we emphasize that the consummation date of an assignment of license or transfer of control governs debt obligations irrespective of the post-consummation notification requirement. Therefore, regarding an assignment of license, we clarify that the assignee of a license paid for through installment payments is not responsible for the license debt until the transaction is consummated. As a practical matter, for services where licensees have signed promissory notes (*i.e.*, C block, F block, MDS and 900 MHz SMR) assignees must execute loan documents and consummation does not occur until the execution of such documents. In these instances, the assignee will, of course, be aware that consummation has occurred. However, for services where licensees did not sign promissory notes (*i.e.*, 218-219 MHz, regional narrowband PCS and broadband PCS frequency block A (pioneers' preference licenses)), if a default occurs prior to consummation, and the Commission mistakenly initiates debt collection procedures against the assignee that is not the actual licensee, that party should notify the Commission in writing that the underlying transaction was not consummated and the Commission will initiate debt collection procedures against the assignor that is the licensee.

33. In contrast to an assignment of license, with transfers of control the licensee does not change and, therefore, remains liable for the debt irrespective of consummation. In such cases, the

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<sup>100</sup> 47 U.S.C. § 310(d).

<sup>101</sup> Biennial Regulatory Review -- 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 Services, WT Docket No. 98-20, *Report and Order*, 13 FCC Rcd 21027 (1998) ("*ULS Report and Order*").

<sup>102</sup> *See, e.g.*, 47 C.F.R. § 95.821 (1997) (218-219 MHz service).

<sup>103</sup> *See, e.g.*, *ULS Report and Order*, 13 FCC Rcd at 21081, ¶ 118.

<sup>104</sup> *Id.* at 21081-21082, ¶¶ 118-119 and Appendix G (final rule 47 C.F.R. § 1.948(d)). The ULS rules became effective on February 16, 1999, 60 days after their date of publication in the Federal Register.

<sup>105</sup> In-Sync Comments at 7.

<sup>106</sup> *Id.*

Commission generally looks to the licensee for repayment of the debt. We recognize, however, that there may be unusual circumstances in which the Commission might look beyond the licensee for repayment of the debt, *e.g.*, pierce the corporate veil, and a new party to the licensing entity could become subject to debt collection at consummation. We reiterate that the consummation date governs the debt obligations irrespective of the post-notification requirements. Therefore, if the Commission inadvertently initiates debt collection procedures against a party that is not part of the licensing entity because the transfer of control was not consummated, the party should notify the Commission in writing that the underlying transaction was not consummated and the Commission will stop its debt collection proceedings against the party that is not part of the licensing entity.

## H. Clarification of Unjust Enrichment Rules

34. Background. In the *Part 1 Third Report and Order*, the Commission revised the Part 1 unjust enrichment rules as applied to assignments and transfers of control of licenses acquired using bidding credits and/or installment payments.<sup>107</sup> Specifically, if a licensee seeks to assign or transfer control of its license to an entity not meeting the same eligibility standards for installment payments at any time during the initial license term, the licensee must make full payment of the remaining unpaid principal and any unpaid interest accrued through the date of assignment or transfer as a condition of Commission approval.<sup>108</sup> Similarly, if a licensee seeks to assign or transfer control of its license to an entity not meeting the same eligibility standards for bidding credits, the licensee must reimburse the government for the amount of the bidding credit, plus interest based on the rate for United States Treasury obligations applicable on the date the license is granted, as a condition of Commission approval.<sup>109</sup> Unlike the unjust enrichment payment for installment payments, however, the unjust enrichment payment for bidding credits decreases based on the amount of time the initial license has been held, with no unjust enrichment payment due after the fifth year of initial licensing.<sup>110</sup> In making these changes to the unjust enrichment rules in the *Part 1 Third Report and Order*, we specifically superseded the existing service-specific unjust enrichment provisions, replacing each of those rules with a cross-reference to the new Part 1 unjust enrichment rule, 47 C.F.R. § 1.2111.<sup>111</sup>

35. Discussion. NextWave seeks clarification regarding the application of the revised unjust enrichment rules for bidding credits (Section 1.2111(d) of the Commission's rules) and the broadband PCS entrepreneurs' block prohibition on assignments and transfers to non-entrepreneurs during the first five years of initial licensing (Section 24.839 of the Commission's rules).<sup>112</sup> As a practical matter, under the Part 1 rules as modified in the *Part 1 Third Report and Order*, bidding credit unjust enrichment payments are not required for assignments or transfers of control of C and F block licenses to non-entrepreneurs because, as NextWave points out, Section 24.839 bars such assignments or transfers until five years after the date of the initial license grant, at which point the bidding credit unjust enrichment

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<sup>107</sup> *Part 1 Third Report and Order*, 13 FCC Rcd at 405-409, ¶¶ 49-56.

<sup>108</sup> See 47 C.F.R. § 1.2111(c).

<sup>109</sup> See 47 C.F.R. § 1.2111(d).

<sup>110</sup> See 47 C.F.R. § 1.2111(d)(2).

<sup>111</sup> See 47 C.F.R. §§ 24.309(f) (narrowband PCS), 24.711 (C block), 24.716(d) (F block), 27.209(d)(1), (2) (WCS), 90.812(b) (900 MHz), 95.816(e) (IVDS); *Part 1 Third Report and Order*, 13 FCC Rcd at 407, ¶ 53.

<sup>112</sup> NextWave Petition at 8-10. 47 C.F.R. §§ 1.2111(d), 24.839.

penalties of Section 1.2111 lapse.<sup>113</sup> The proscription of Section 24.839, however, does not apply if an entrepreneur proposes to assign or transfer its C or F block license to another qualifying entrepreneur.<sup>114</sup> In such a case, Section 1.2111 provides for unjust enrichment payments with respect to assignments and transfers between entities qualifying for different tiers of bidding credits.<sup>115</sup>

36. NextWave further argues that the Commission has not adequately explained why PCS entrepreneur block licensees are subject to a five-year transfer restriction when licensees in other services are allowed to assign or transfer licenses during the first five years of the license term, subject to the repayment of bidding credits.<sup>116</sup> In order to fulfill our statutory duty to give opportunities to small businesses, we set aside the PCS C and F blocks for participation only by smaller entities, in this case, entrepreneurs.<sup>117</sup> To ensure that licenses in these blocks are used exclusively by smaller entities, we adopted a rule to preclude the trafficking of entrepreneur block licenses to non-entrepreneurs for the first five years of licensing.<sup>118</sup> In adopting this transfer restriction, we explained that allowing parties to take advantage of bidding in the entrepreneurs' blocks and immediately assign or transfer control of the authorizations to non-entrepreneurs would undermine our goal of giving entrepreneurs the opportunity to provide PCS.<sup>119</sup> Since these entrepreneur blocks are the only spectrum set aside specifically for smaller entities, these are the only licenses subject to the five-year anti-trafficking provision. In contrast, with respect to services in which all entities, large and small, are permitted to acquire licenses, our objective is to ensure that, irrespective of entity size, the license is awarded to the entity that values it most. In such cases, we may offer bidding credits or other incentives to afford small entities an opportunity to acquire licenses. In these instances, we are not concerned with ensuring that a block of spectrum is used exclusively by smaller entities and, therefore, permit the transfer of licenses early in the license term subject to repayment under our unjust enrichment rules for bidding credits and installment payments.<sup>120</sup>

37. We further clarify that pursuant to Sections 1.2111(c) and (d) of our rules, Commission approval of assignments of licenses and transfers of control that result in unjust enrichment with respect to bidding credits and installment payments is conditioned upon full payment of the required unjust enrichment payments on or before the consummation date.<sup>121</sup> In other words, consummation of an assignment of license or transfer of control will not be valid unless the Commission first receives the required unjust enrichment payment in full. We believe that this clarification will ensure efficiency in the processing and consummation of assignments of licenses and transfers of control.

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<sup>113</sup> NextWave Petition at 8-10. 47 C.F.R. §§ 1.2111(d), 24.839.

<sup>114</sup> See 47 C.F.R. § 24.839.

<sup>115</sup> See 47 C.F.R. § 1.2111(d).

<sup>116</sup> Nextwave Petition at 10.

<sup>117</sup> Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Fifth Report and Order*, 9 FCC Rcd 5532, 5580-5589, ¶¶ 113-129 (1994).

<sup>118</sup> See 47 C.F.R. § 24.839.

<sup>119</sup> See Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Fifth Report and Order*, 9 FCC Rcd at 5588, ¶ 128.

<sup>120</sup> See 47 C.F.R. § 1.2111(c) and (d).

<sup>121</sup> 47 C.F.R. § 1.2111(c) and (d).

## I. Inapplicability of Section 1.2104 to Installment Payment Defaults

38. Background. In the *Part 1 Third Report and Order*, we addressed matters relating to defaults on payment obligations by winning bidders in spectrum auctions.<sup>122</sup> Under Section 1.2104(g), winning bidders that default on a down payment or full payment after the close of an auction are subject to a payment equal to the difference between the amount of the defaulted bid and the amount of the winning bid the next time the license is auctioned, plus 3 percent of the lesser of these amounts.<sup>123</sup> We considered whether a licensee failing to make a timely *installment* payment should be subjected to these same provisions. In paragraphs 115 and 116 of the *Part 1 Third Report and Order*, we decided against imposing the default provisions of Section 1.2104(g) with respect to defaults on installment payments.<sup>124</sup> We found that without such additional payments, our other rules and installment payment terms are adequate to discourage defaults. Despite the clear statement on this point in paragraphs 115 and 116, we believe that paragraph 122 of the *Part 1 Third Report and Order* may still have left some ambiguity in this matter.<sup>125</sup> Specifically, the latter paragraph may be construed as stating that the additional payment requirements of Section 1.2104(g)(2) relating to down payment and full payment defaulters are also applicable to installment payment defaulters.<sup>126</sup>

39. Discussion. We clarify that licensees defaulting on installment payments ("installment payment defaulters") are not subject to Section 1.2104(g)(2).<sup>127</sup> The automatic default provisions of Section 1.2110(f)(4) (redesignated herein as 1.2110(g)(4)) are adequate to discourage untimely installment payments.<sup>128</sup> We note that while Section 1.2109(c) identifies types of defaulters that are subject to Section 1.2104(g)(2), the rule does not reference installment payment defaulters.<sup>129</sup> Instead, installment payment defaults are covered by Section 1.2110(g)(4), as designated herein, which does not incorporate Section 1.2104(g)(2). As we noted in the *Part 1 Third Report and Order*, the risk of losing a license should provide most licensees with a strong incentive to avoid default.<sup>130</sup> Accordingly, we conclude that Section 1.2104(g)(2) does not apply to installment payment defaulters.<sup>131</sup> Rather, pursuant

<sup>122</sup> *Part 1 Third Report and Order*, 13 FCC Rcd at 432-434, ¶¶ 100-102.

<sup>123</sup> 47 C.F.R. § 1.2104(g).

<sup>124</sup> *Part 1 Third Report and Order*, 13 FCC Rcd at 443, ¶¶ 115-116; 47 C.F.R. § 1.2104(g).

<sup>125</sup> *Part 1 Third Report and Order*, 13 FCC Rcd at 446, ¶ 122. See Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Procedures, WT Docket No. 97-82, *Erratum to Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 4621, 4625, ¶ 8 (amending ¶ 122 of the *Part 1 Third Report and Order*). See also NextWave Petition at 7-8.

<sup>126</sup> *Part 1 Third Report and Order*, 13 FCC Rcd at 446, ¶ 122; 47 C.F.R. § 1.2104(g)(2).

<sup>127</sup> 47 C.F.R. § 1.2104(g)(2). But note that licensees in the installment payment program that default on down payments are subject to Section 1.2104(g)(2). See 47 C.F.R. §§ 1.2104(g)(2), 1.2110(g)(1) (as designated herein).

<sup>128</sup> 47 C.F.R. § 1.2110(f)(4) (redesignated herein as § 1.2110(g)(4)).

<sup>129</sup> 47 C.F.R. §§ 1.2109(c), 1.2104(g)(2).

<sup>130</sup> *Part 1 Third Report and Order*, 13 FCC Rcd at 443, ¶ 116.

<sup>131</sup> 47 C.F.R. § 1.2104(g)(2).

to Section 1.2110(g)(4)(iv), as designated herein, licensees that default on installment payment obligations will automatically lose their licenses and be subject to debt collection procedures.<sup>132</sup>

## J. Eligibility for Participation

40. Background. The Commission's FCC Form 175 short-form application for all auctions requires applicants to certify that they are not in default on any Commission licenses and that they are not delinquent on any non-tax debt owed to any Federal agency.<sup>133</sup> The purpose of this rule is to preserve the integrity of the auction process and to ensure that bidders are capable of meeting their financial commitments to the Commission. In the *C Block Fourth Report and Order*, the Commission determined that "former defaulters," *i.e.*, applicants that have defaulted or been delinquent in the past, but have since paid all of their outstanding non-Internal Revenue Service Federal debts and all associated charges or penalties, are eligible to participate in future auctions of C block spectrum, provided that they are otherwise qualified.<sup>134</sup> In addition, the Commission adopted a special upfront payment policy for "former defaulters" seeking to participate in C block auctions.<sup>135</sup> It required that "former defaulters" make an upfront payment of 50 percent more than the normal amount set by the Bureau for any given license in a C block auction.<sup>136</sup> The Commission applied these policies in the broadband PCS auction that concluded on April 15, 1999 (Auction No. 22).

41. Discussion. On our own motion, we hereby incorporate into the Part 1 general competitive bidding rules the "former defaulter" policies adopted with respect to C block auction applicants. While we have determined that it is necessary to limit participation in Commission auctions to entities that can certify that they are not in default on certain debts, we also believe that past business misfortunes do not inevitably preclude an entity from being able to meet its present and future responsibilities as a Commission licensee.<sup>137</sup> Therefore, we will allow "former defaulters," *i.e.*, applicants that have defaulted or been delinquent in the past, but have since paid all of their outstanding non-tax debts and all associated charges or penalties, to certify on Form 175 that they are not in default and are, therefore, eligible for auction participation. Thus, a bidder that has defaulted on its down or final payment obligation, but has paid, by the short-form application deadline, any default payments assessed by the Commission (*e.g.*, the initial default payment of 3 percent of the defaulted bid amount pursuant to 47 C.F.R. § 1.2104(g)(2)) is qualified to certify on Form 175 that it is not in default and is eligible to participate in Commission auctions. Such bidder, however, remains subject to any as yet unassessed payment obligations pursuant to Section 1.2104(g) of our rules, unless otherwise relieved from such obligations under applicable law.<sup>138</sup>

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<sup>132</sup> 47 C.F.R. § 1.2110(g)(4)(iv) (formerly § 1.2110(f)(4)(iv)).

<sup>133</sup> See 47 C.F.R. § 1.2105(a)(2)(x).

<sup>134</sup> Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, *Fourth Report and Order*, 13 FCC Rcd 15743, 15753-15754, ¶ 18 (1998).

<sup>135</sup> *Id.* at 15761-15762, ¶ 34.

<sup>136</sup> *Id.* at 15761, ¶ 34.

<sup>137</sup> See *id.* at 15754, ¶ 18.

<sup>138</sup> See 47 C.F.R. § 1.2104(g).



42. In determining the upfront payment amounts required by "former defaulters" seeking to participate in future C block auctions, the Commission reasoned that "the integrity of the auctions program and the licensing process dictates requiring a more stringent financial showing from applicants with a poor Federal financial track record."<sup>139</sup> We believe that this reasoning applies with equal force to "former defaulters" seeking to participate in any Commission auction. Consequently, we will amend Section 1.2106(a) of our general competitive bidding rules to require that "former defaulters" pay an upfront payment amount of 1.5 times the normal amount set by the Bureau for any given license in a Commission auction.<sup>140</sup> So that the Bureau may implement this rule, we will require applicants to make an additional certification revealing whether they have ever been in default on any Commission license or have ever been delinquent on any non-tax debt owed to any Federal agency.<sup>141</sup> If any one of an applicant's controlling interests or their affiliates as defined by Section 1.2110 of the Commission's rules (as adopted herein) has ever been in default on Commission licenses or has ever been delinquent on any non-tax debt owed to any Federal agency, but has made the requisite payment, the applicant will be eligible to participate in Commission auctions but will be considered a "former defaulter" for purposes of the upfront payment requirements.<sup>142</sup> We may use credit information concerning the applicant, its controlling interests and their affiliates to verify any certified statements regarding the history of payments made to the Federal government by such entities.

43. Under Section 1.2110(g)(4), as designated herein, when a licensee defaults on an installment payment, its license automatically cancels without any action by the Commission, and the entire outstanding debt obligation becomes subject to debt collection procedures.<sup>143</sup> A licensee that has previously defaulted on an installment payment will be permitted to participate in future Commission spectrum auctions under certain conditions. In order to be eligible for participation in a future auction, an installment payment defaulter must have either (1) paid all of its outstanding non-tax debt, along with all associated charges and penalties;<sup>144</sup> or (2) been relieved of such obligations pursuant to otherwise applicable law.<sup>145</sup> In all instances, installment payment defaulters eligible to participate in future auctions

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<sup>139</sup> Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, *Fourth Report and Order*, 13 FCC Rcd at 15761, ¶ 34.

<sup>140</sup> See 47 C.F.R. § 1.2106(a) as adopted herein.

<sup>141</sup> See 47 C.F.R. § 1.2105(a)(2)(xi) as adopted herein.

<sup>142</sup> See 47 C.F.R. § 1.2110 as adopted herein. If any one of an applicant's controlling interests or their affiliates as defined by Section 1.2110 of the Commission's rules (as adopted herein) is in default on any Commission licenses or is delinquent on any non-tax debt owed to any Federal agency at the time the applicant files its Form 175, the applicant will not be able to make the certification required by Section 1.2105(a)(2)(x) of the Commission's rules and will not be eligible to participate in Commission auctions. 47 C.F.R. §§ 1.2110 (as adopted herein), 1.2105(a)(2)(x).

<sup>143</sup> 47 C.F.R. § 1.2110(g)(4) (formerly § 1.2110(f)(4)).

<sup>144</sup> See 47 C.F.R. § 1.2105(a)(2)(x).

<sup>145</sup> For example, under the Debt Collection Improvement Act of 1996 (DCIA), the Government may agree to a compromise of the claim. 31 U.S.C. § 3711 *et seq.*; see also 4 C.F.R. § 103.1 *et seq.* Similarly, financial obligations due to the Government after license cancellation may be subject to the provisions of the Bankruptcy Code. *In re NextWave Personal Comms., Inc.*, 200 F.3d 43, 59 at n.15 (2d Cir. Dec. 22, 1999).

will be required to pay an upfront payment amount of 1.5 times the normal amount set by the Bureau for any given license in a Commission auction to assure their future financial soundness.<sup>146</sup>

#### IV. FIFTH REPORT AND ORDER

##### A. Introduction

44. In the *Part 1 Third Report and Order*, we established a uniform set of bidding rules for all auctionable services to increase the efficiency of our licensing process.<sup>147</sup> In the *Second Notice*, we sought comment on a variety of additional proposals relating to the general competitive bidding rules.<sup>148</sup> In particular, we sought comment on whether a sufficient evidentiary basis exists for creating bidding preferences for minority- and women-owned businesses, and whether there are mechanisms we should employ to further the opportunities for rural telephone companies to participate in the provision of spectrum-based services. In addition, we asked whether the Commission should continue its installment payment program for small businesses and, if not, whether appropriate alternatives exist that would further the goals of Section 309(j) of the Communications Act.<sup>149</sup> Next, we requested comment on what uniform attribution standard we should adopt for determining whether entities seeking bidding credits qualify as small businesses. Finally, we sought comment on a number of payment and administrative issues, including the appropriate formula for calculating default payments. In response to the *Second Notice*, we received six comments and one reply comment.<sup>150</sup>

##### B. Rules Governing Designated Entities

###### 1. Designated Entities

45. Background. In *Adarand Constructors, Inc. v. Pena*, the Supreme Court held that "all racial classifications . . . must be analyzed by a reviewing court under strict scrutiny."<sup>151</sup> Under the *Adarand* decision, any federal program that uses race as a basis for decisionmaking must serve a compelling governmental interest and must be narrowly tailored to serve that interest in order to pass constitutional muster.<sup>152</sup> In *United States v. Virginia, et al.*, the Supreme Court determined that gender-based programs are subject to intermediate scrutiny.<sup>153</sup> Under this standard of review, there must be an "exceedingly persuasive justification" for a program in which gender is a determining factor in

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<sup>146</sup> A non-discriminatory requirement that installment payment defaulters must demonstrate future financial viability through a higher upfront payment does not violate the prohibitions in Section 525 of the Bankruptcy Code. 11 U.S.C. § 525(a).

<sup>147</sup> *Part 1 Third Report and Order*, 13 FCC Rcd 374.

<sup>148</sup> *Second Notice*, 13 FCC Rcd at 471-481, ¶¶ 170-194.

<sup>149</sup> 47 U.S.C. § 309(j).

<sup>150</sup> A list of the parties that filed comments in response to the *Second Notice*, and the abbreviations used to refer to such parties, is attached at Appendix B.

<sup>151</sup> *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).

<sup>152</sup> *Id.* at 227.

<sup>153</sup> *United States v. Virginia, et al.*, 518 U.S. 515 (1996).

decisionmaking.<sup>154</sup> Further, a gender-based government action is constitutional only if it serves an important governmental objective and is substantially related to the achievement of that objective.<sup>155</sup>

46. In the *Second Notice*, the Commission sought comment on whether there is a compelling governmental interest that would justify the use of preferences for minority-owned businesses or an exceedingly persuasive justification to support gender-based preferences for women-owned businesses.<sup>156</sup> In addition, we asked commenters to provide evidence in support of their positions and to indicate what measures, if any, could be narrowly tailored to withstand judicial review.<sup>157</sup> What specifically tailored tools, we asked, such as bidding credits, might be appropriate or should preferences be given to minority-owned or women-owned businesses that also qualify as small businesses.<sup>158</sup>

47. Finally, we noted that the Office of Management and Budget ("OMB") modified its standards for the classification of federal data on race and ethnicity.<sup>159</sup> Specifically, OMB: (1) separated the category for Asian and Pacific Islander into two categories -- "Asian" and "Native Hawaiian or Other Pacific Islander;" and (2) changed the term "Hispanic" to "Hispanic or Latino."<sup>160</sup> We sought comment on whether we should amend the designated entity provisions of the Part 1 rules to reflect this change.<sup>161</sup>

48. Discussion. We did not receive any comments on these issues. Because the record is sparse, we conclude that it is not appropriate to adopt special provisions for minority-owned and women-owned businesses at this time. We have said that minority- and women-owned businesses that qualify as small businesses may take advantage of the special provisions we have adopted for small businesses.<sup>162</sup>

49. We note, too, that the Commission's Office of Communications Business Opportunities (OCBO) has initiated several studies to gather information regarding barriers to entry faced by minority- and women-owned firms that wish to participate, or have participated, in Commission auctions. Further,

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<sup>154</sup> *Id.* at 531-534. See also *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994); *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982).

<sup>155</sup> *United States v. Virginia, et al.*, 518 U.S. 515, 531-534.

<sup>156</sup> *Second Notice*, 13 FCC Rcd at 471, ¶ 172.

<sup>157</sup> *Id.* at 471-472, ¶ 172.

<sup>158</sup> *Id.* at 472, ¶ 174.

<sup>159</sup> *Id.* at 474, ¶ 176 (citing Office of Management and Budget, Revisions to the Standards for the Classification of Federal Data on Race Ethnicity, *Notice of Decision*, 62 Fed. Reg. 58782 (Oct. 30, 1997)).

<sup>160</sup> Office of Management and Budget, Revisions to the Standards for the Classification of Federal Data on Race Ethnicity, *Notice of Decision*, 62 Fed. Reg. 58782 (October 30, 1997).

<sup>161</sup> *Second Notice*, 13 FCC Rcd at 474, ¶ 176.

<sup>162</sup> Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, Amendment of the Commission's Cellular/PCS Cross-Ownership Rule, WT Docket No. 96-59, GN Docket No. 90-314, *Report and Order*, 11 FCC Rcd 7824, 7833, ¶ 16 (1996); Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Amendment of the Commission's Cellular PCS Cross-Ownership Rule, Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services, PP Docket No. 93-253, GN Docket No. 90-314, GN Docket No. 93-252, *Sixth Report and Order*, 11 FCC Rcd 136, 143, ¶ 11 (1995).

we have recently commenced several new studies to explore additional entry barriers and to seek further evidence of racial and gender discrimination against potential licensees. In addition, we will continue to track the rate of participation in our auctions by minority- and women-owned firms and evaluate this information with other data gathered to determine whether provisions to promote participation by minorities and women can satisfy judicial scrutiny. If a sufficient record can be adduced, we will consider race- and gender-based provisions for future auctions.

50. Finally, having received no comments on the issue, we will amend our definition of the term "minority" in Section 1.2110 of the general competitive bidding rules to reflect the changes identified above.<sup>163</sup> This will conform our definition of the term "minority" to that currently used by OMB.

## 2. Rural Telephone Company Provisions

51. Background. In the *Second Notice*, we noted that auctions have generally provided rural telephone companies with favorable opportunities.<sup>164</sup> We have also observed that the percentage of rural telephone companies that have won rural geographic area licenses in the United States is significant.<sup>165</sup> We sought comment on whether there were additional mechanisms that might increase opportunities for rural telephone companies to provide spectrum-based services to the public.<sup>166</sup>

52. Discussion. Based on the limited record before us, we will not, at this time, adopt mechanisms, such as bidding preferences or an unserved area fill-in policy, specifically for rural telephone companies.<sup>167</sup> We will, however, continue to provide rural telephone companies with bidding credits should such entities qualify as small businesses. The Commission has great interest in ensuring that rural and underserved areas have access to competitive advanced telecommunications services.<sup>168</sup>

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<sup>163</sup> See *Second Notice*, 13 FCC Rcd at 474, ¶ 176; 47 C.F.R. § 1.2110(c)(3) as amended herein.

<sup>164</sup> *Second Notice*, 13 FCC Rcd at 475, ¶ 179 (citing "The FCC Report to Congress on Spectrum Auctions," WT Docket No. 97-150, at p. 25 (rel. October 9, 1997)). The term "rural telephone company" is defined in 47 U.S.C. § 153(37) and in 47 C.F.R. § 1.2110(c) as adopted herein.

<sup>165</sup> Specifically, in "The FCC Report to Congress on Spectrum Auctions," WT Docket No. 97-150, at p. 25 (rel. October 9, 1997), we noted that rural telephone companies had won about 44 percent of the 123 rural Basic Trading Area ("BTA") licenses in the United States. These statistics were based on auctions completed as of the date of the report, i.e., Auction Nos. 1-15. See also *Second Notice*, 13 FCC Rcd at 475, ¶ 179.

<sup>166</sup> *Second Notice*, 13 FCC Rcd at 475, ¶ 179.

<sup>167</sup> See RTG Comments at 12-17.

<sup>168</sup> See 47 U.S.C. § 309(j)(3)(A). In addition, the Preamble to the Telecommunications Act of 1996 provides that its purpose is to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies. See Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996). See also Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes, FCC 00-207 (rel. June 23, 2000); Virginia Tech Foundation, Inc. Petition for Reconsideration of Request for Waiver of Section 101.23 -- Auction No. 17, Local Multipoint Distribution Service, *Order*, 13 FCC Rcd 4535 (1998) and Requests for Waiver of Section 101.1003(a) of the Commission's Rules Establishing Eligibility Restrictions on Incumbent LECs and Cable Operators in the Local Multipoint Distribution Service, *Order*, 13 FCC Rcd 18694 (1998).

Indeed, the Commission has implemented a number of initiatives toward achieving that goal.<sup>169</sup> We will address issues affecting rural communities and underserved areas in other upcoming proceedings and believe a more extensive record can be developed at that time. We plan to consider methods for enhancing the delivery of spectrum-based services in areas that traditionally have been underserved by telecommunications providers. We encourage commenters to participate in such future proceedings. The record developed here will be made part of those proceedings.

53. We do, however, want to highlight one issue raised by commenters. RTG proposes that we establish geographic area licenses no larger than BTAs in all future auctions.<sup>170</sup> RTG argues that the use of small areas facilitates the delivery of service to rural areas by increasing the opportunity for rural small businesses and rural telephone companies to acquire licenses.<sup>171</sup> RTG also contends that authorizing smaller geographic areas increases the number of licenses available and the diversity of licenses, and facilitates the buildout of networks.<sup>172</sup> Section 309(j) of the Communications Act requires the Commission to disseminate licenses to a wide variety of applicants, including small businesses and rural telephone companies, and to promote the development and rapid deployment of new technologies to the public, including those residing in rural areas.<sup>173</sup> The Commission can best satisfy this mandate by establishing license areas that promote these goals on a service-specific basis. Although we have used small license areas in several services (*e.g.*, broadband PCS D, E and F blocks and LMDS) and may do so in specific services in the future, we are unwilling to limit our flexibility by adopting an ironclad rule against large service areas. We anticipate, for example, that certain satellite-based services may not be particularly suited to small geographic area licensing, while other services may indeed be more suitable for this type of license category (*i.e.*, the broadband PCS C block auction). We always invite comment on these issues so as to tailor our rules for specific services in ways that afford opportunities to a wide variety of entities.

### 3. Installment Payments

54. Background. In the *Part 1 Third Report and Order*, we suspended the installment payment program.<sup>174</sup> Because, however, small businesses have been successful in the auctions in which

<sup>169</sup> See, *e.g.*, Extending Wireless Telecommunications Services to Tribal Lands, WT Docket No. 99-266, *Report and Order and Further Notice of Proposed Rulemaking*, FCC 00-209 (rel. June 30, 2000); Federal-State Joint Board on Universal Service: Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas, CC Docket No. 96-45, *Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking*, FCC 00-208 (rel. June 30, 2000). In particular, in the Tribal Lands proceeding, we established bidding credits that will be available in future auctions in markets that contain qualifying tribal areas that have a telephone service penetration rate below 70 percent. To qualify for the credit, winning bidders must commit to use the license to deploy facilities and offer service to qualifying tribal areas, and must obtain tribal consent to such deployment. We also sought comment on whether to award bidding credits to carriers that commit to serve non-tribal areas with low penetration rates, whether to award transferable credits for use in future auctions to licensees in already-established wireless services that deploy facilities and provide service to unserved tribal communities, and whether to make credits available to licensees that enter into partitioning agreements with tribal authorities.

<sup>170</sup> RTG Comments at 14-15.

<sup>171</sup> *Id.* at 15.

<sup>172</sup> *Id.*

<sup>173</sup> 47 U.S.C. § 309(j)

<sup>174</sup> *Part 1 Third Report and Order*, 13 FCC Rcd at 397, ¶ 38.

installment payment plans were offered, we sought comment on ways the Commission could provide an effective installment payment program while at the same time minimizing the concerns (*e.g.*, licensee default or difficulty meeting financial obligations to the Commission) that led to the suspension of installment payment plans for small businesses.<sup>175</sup> We also sought comment on how the Commission could create an installment payment plan that would encourage only serious, financially qualified small business applicants to apply for licenses while ensuring the rapid provision of service to the public and guaranteeing that the American public is reasonably compensated for use of the spectrum.<sup>176</sup> In addition, we sought comment on how the Commission might fashion an installment payment program that would meet the statutory requirement that all payments of principal and interest for covered auctions be deposited in the United States Treasury by the statutory deadline (September 30, 2002) for collection.<sup>177</sup> We further requested comment on means other than bidding credits and installment payments by which the Commission might facilitate the participation of small businesses and other designated entities in our spectrum auction program.<sup>178</sup> Finally, we asked whether we should establish the interest rate for installment payments (if the program is reinstituted) based upon the rate of United States Treasury obligations on the date of the close of the auction.<sup>179</sup>

55. Discussion. Having received no comments regarding reinstitution of our installment payment program or alternatives thereto, we will adhere to our previous decision to suspend the installment payment program.<sup>180</sup> In suspending the installment payment program, we concluded that small businesses need not receive installment payments to successfully participate in our spectrum auctions.<sup>181</sup> We noted, for example, that in the cellular auction for unserved areas, which had no installment payment plans, 36 percent of the licenses went to small or very small businesses.<sup>182</sup> In addition, we stated that requiring payment in full within a short time after the close of the auction ensures greater financial accountability from applicants.<sup>183</sup> Finally, experience has shown that licensees filing for bankruptcy may impede the Commission's processes, resulting in delayed deployment of service.<sup>184</sup>

56. We believe that Section 309(j) of the Communications Act requires us to explore ways of responding to the investment capital needs of small, minority-owned and women-owned businesses.<sup>185</sup>

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<sup>175</sup> *Second Notice*, 13 FCC Rcd at 475-476, ¶ 181.

<sup>176</sup> *Id.* at 476, ¶ 181.

<sup>177</sup> *Id.* See Section 3007 of the Balanced Budget Act of 1997, Pub. L. 105-33, Title III, 111 Stat. 251 (1997) ("Balanced Budget Act").

<sup>178</sup> *Second Notice*, 13 FCC Rcd at 476, ¶ 181.

<sup>179</sup> *Id.* at 476, ¶ 182.

<sup>180</sup> See *Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 971 (upholding Commission's decision to eliminate installment payment program with respect to 800 MHz SMR licenses).

<sup>181</sup> *Part 1 Third Report and Order*, 13 FCC Rcd at 397-398, ¶ 38.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 398, ¶ 38.

<sup>184</sup> See, *e.g.*, *In re GWI PCS1, Inc.*, No. 397-39676-SAF-11 (Bankr. N.D. Tex.); *In re NextWave Personal Communications, Inc.*, No. 98 B 21529 (ASH) (Bankr. S.D.N.Y.).

<sup>185</sup> See 47 U.S.C. § 309(j)(4)(D).

Accordingly, while we believe our decision to offer bidding credits has been extremely helpful in allowing these designated entities a foothold in many of our auctionable wireless services, we remain open to proposals that would result in even greater participation by these entities.

57. The Commission will, as it has done in the LMDS, LMS, 220 MHz Service, and VHF Public Coast Service auctions, continue to provide small businesses with bidding credits. In light of this decision, we need not address the method of establishing interest rates for such installment payments. If we reinstate an installment payment plan in the future, we will revisit this issue.

#### 4. Attribution of Gross Revenues of Investors and Affiliates

58. Background. In the *Second Notice*, we discussed our earlier proposal to adopt a general attribution rule for determining small business eligibility for all future auctions.<sup>186</sup> Specifically, we sought further comment on whether to adopt a "controlling interest" standard for attributing to an applicant the gross revenues of its investors and affiliates in determining whether the applicant qualifies as a small business.<sup>187</sup> We explained that, in the past, the Commission adopted service-specific attribution rules with varying standards of attribution.<sup>188</sup> In addition, we asked whether a "controlling interest" standard is sufficient to calculate size so that only those entities truly meriting small business status qualify for bidding credits.<sup>189</sup> We also sought comment on whether alternate standards for attributing the gross revenues of investors and affiliates in an applicant would better meet our goals.<sup>190</sup> We further requested comment on whether or not the controlling interest standard would be strengthened by imposing a minimum equity requirement (e.g., 15 percent) that any person or entity identified as controlling must hold.<sup>191</sup>

59. Discussion. We will adopt as our general attribution rule a "controlling interest" standard for determining which applicants qualify as small businesses. Under this standard, we will attribute to the applicant the gross revenues of its controlling interests and their affiliates in assessing whether the applicant is qualified to take advantage of our small business provisions, such as bidding credits. We note that operation of our definition of "affiliate" will cause all affiliates of controlling interests to be affiliates of the applicant.<sup>192</sup> We believe that this approach is simpler and more flexible than the previously used control group approach,<sup>193</sup> and thus will be more straightforward to implement. Moreover, application of the "controlling interest" standard will ensure that only those entities truly meriting small business status

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<sup>186</sup> *Second Notice*, 13 FCC Rcd at 476-478, ¶¶ 183-187. The Commission initially proposed to adopt a general attribution rule for determining small business eligibility in the *Part I Notice of Proposed Rule Making*, 12 FCC Rcd at 5703, ¶ 28.

<sup>187</sup> *Second Notice*, 13 FCC Rcd at 477, ¶ 185 and Appendix E at 534-536 (proposed revision to 47 C.F.R. § 1.2110).

<sup>188</sup> *Second Notice*, 13 FCC Rcd at 477, ¶ 183.

<sup>189</sup> *Id.* at 477, ¶ 185.

<sup>190</sup> *Id.* at 477-478, ¶ 185.

<sup>191</sup> *Id.* at 478, ¶ 186.

<sup>192</sup> See 47 C.F.R. § 1.2110(c)(5) as redesignated herein.

<sup>193</sup> See, e.g., 47 C.F.R. § 24.709(b)(5) and (6). See also NextWave Comments at 2-4.

qualify for our small business provisions. We used this same approach in the attribution rules for the LMDS, 800 MHz SMR, 220 MHz, VHF Public Coast and LMS auction proceedings.<sup>194</sup>

60. A "controlling interest" includes individuals or entities, or groups of individuals or entities, that have control of the applicant under the principles of either *de jure* or *de facto* control. Thus, there may be more than one "controlling interest" whose revenues must be counted. The premise of this rule is that all parties that control an applicant or have the power to control an applicant, and their affiliates, will have their gross revenues counted and attributed to the applicant in determining the applicant's eligibility for small business status or for any other size-based status using a gross revenue threshold.

61. *De jure* control is typically evidenced by the holding of 50.1 percent or more of the voting stock of a corporation or, in the case of a partnership, general partnership interests. *De facto* control is determined on a case-by-case basis and includes the criteria set forth in *Ellis Thompson*.<sup>195</sup> For instance, the gross revenues of managers may be attributed to the applicant if *de facto* control standards are met.<sup>196</sup> We do not believe it is necessary to presume that equity interests of less than 50.1 percent are attributable to the applicant because we rely on the concept of *de facto* control. An applicant may have interest holders that do not possess *de jure* control but have "actual" (*i.e.*, *de facto*) control. Therefore, in determining the gross revenues to be attributed to the applicant, we will include individuals or entities that have either *de jure* or *de facto* control. Accordingly, we will amend Section 1.2110 to incorporate these principles of control.<sup>197</sup>

62. Controlling interests must be identified by the applicant seeking status as a small business.<sup>198</sup> The "controlling interest" definition provides specific guidance on the calculation of various types of ownership interests. For purposes of calculating equity held in an applicant, the definition provides for full dilution of certain stock interests, warrants and convertible debentures.<sup>199</sup> In addition, the definition provides for attribution of partnership and other ownership interests, including stock interests held in trust, non-voting stock and indirect ownership through intervening corporations. When

<sup>194</sup> See 47 C.F.R. § 101.1112 (LMDS); 47 C.F.R. § 90.912 (800 MHz SMR); 47 C.F.R. § 90.1021 (220 MHz service); 47 C.F.R. § 80.1252(c) (Public Coast); 47 C.F.R. § 90.1103(c) (LMS).

<sup>195</sup> See *Ellis Thompson Corporation*, 9 FCC Rcd 7138, 7138-7139, ¶ 9, (1994) ("*Ellis Thompson*"), in which the Commission identified the following factors used to determine control of a business: (1) use of facilities and equipment; (2) control of day-to-day operations; (3) control of policy decisions; (4) personnel responsibilities; (5) control of financial obligations; and (6) receipt of monies and profits. See also *Intermountain Microwave*, 24 Rad. Reg. (P&F) 983 (1963); In re Application of Baker Creek Communications, L.P. for Authority to Construct and Operate Local Multipoint Distribution Services in Multiple Basic Trading Areas, *Memorandum Opinion and Order*, 13 FCC Rcd 18709 (Wireless Tel. Bur. 1998) (discussing in detail the factors constituting *de facto* control); Stephen F. Sewell, *Assignments and Transfers of Control of FCC Authorizations Under Section 310(d) of the Communications Act of 1934*, 43 Fed. Comm. L.J. 277 (1991).

<sup>196</sup> See, e.g., 47 C.F.R. § 20.6(d)(9).

<sup>197</sup> See 47 C.F.R. § 1.2110 as adopted herein.

<sup>198</sup> See 47 C.F.R. § 1.2112(b) as adopted herein.

<sup>199</sup> See 47 C.F.R. § 1.2110(c)(2)(ii) as adopted herein. See also 47 C.F.R. § 1.2110(b)(4)(v) (redesignated as § 1.2110(c)(5)(v)) (defining affiliation arising under stock options, convertible debentures, and agreements to merge) and NextWave Comments at 6 (supporting the Commission's approach of calculating equity on a fully-diluted basis).



an applicant cannot identify controlling interests under the definition, the revenues of all interest holders in the applicant and their affiliates will be attributed.<sup>200</sup> For example, if a company is owned by four entities, each of which has 25 percent voting equity, and no shareholders' agreement or voting trust gives any one of them control of the company, the revenues of all four entities must be attributed to the applicant. Treating such a corporation in this way is similar to our treatment of a general partnership -- all general partners are considered to have a controlling interest. This rule, we believe, looks to substance over form in assessing eligibility for small business status.<sup>201</sup>

63. Some commenters have expressed concern over whether the revenues of so called "passive investors" would be attributed to the applicant.<sup>202</sup> The controlling interest standard adopted herein will be applied to all investors in an applicant. In other words, if any investor has either *de jure* or *de facto* control of the applicant, that investor's gross revenues will be attributed to the applicant for purposes of determining whether the applicant qualifies as a small business. Application of the principles of either *de jure* or *de facto* control will accurately identify those investors that are controlling interests and that are not, by definition, therefore, "passive investors." We note too that, under the controlling interest standard, the officers and directors of any applicant will be considered to have a controlling interest in the applicant.<sup>203</sup>

64. We believe that the *de jure* and *de facto* concepts of control, together with the application of our affiliation rules, will effectively prevent larger firms from illegitimately seeking status as small businesses. For this reason, we disagree with the commenter that urges us not to amend our attribution rules to include those that have management agreements and joint marketing agreements with the applicant or licensee.<sup>204</sup> We will adopt provisions that make attributable the gross revenues of those that have management or marketing agreements with the applicant or licensee where such agreements grant authority over key aspects of the applicant's or licensee's business.<sup>205</sup> Management or joint marketing agreements, for example, may grant authority to parties other than the applicant or licensee to make decisions concerning the nature or types of services offered by the applicant or licensee, the terms upon which such services are offered, or the prices charged for such services. Such arrangements allow their holders to exercise control of the applicant or licensee and therefore should be included.

65. We decline to adopt a minimum equity requirement for controlling interests because it is contrary to our goal of providing legitimate small businesses maximum flexibility in attracting passive

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<sup>200</sup> The Part 1 affiliation rules are codified at 47 C.F.R. § 1.2110(b)(4) (redesignated herein as § 1.2110(c)(5)).

<sup>201</sup> See *In re Application of Baker Creek Communications, L.P. for Authority to Construct and Operate Local Multipoint Distribution Services in Multiple Basic Trading Areas*, *Memorandum Opinion and Order*, 13 FCC Rcd 18709 (Wireless Tel. Bur. 1998) (discussing in detail the factors constituting *de facto* control).

<sup>202</sup> Western Comments at 8-9; Americall Comments at 2-3.

<sup>203</sup> See 47 C.F.R. 1.2110(c)(2)(ii)(F) as adopted herein (also providing that the officers and directors of an entity that controls a licensee or applicant shall be considered to have a controlling interest in the licensee or applicant). This rule applies to the officers and directors of rural telephone companies and of entities that control rural telephone companies. See RTG Comments at 20-21 (requesting that the Commission rely on its affiliation rules rather than presume that the officers and directors of rural telephone companies have controlling interests in the companies).

<sup>204</sup> Western Comments at 3-5; Western Reply Comments at 3.

<sup>205</sup> See 47 C.F.R. § 1.2110(c)(2)(ii)(I) as adopted herein. See also 47 C.F.R. § 20.6(d)(9) and (10).

financing. A minimum equity requirement would require any person or entity identified as a controlling interest to retain some level of equity in the applicant, thereby reducing the amount of equity the applicant could offer to non-controlling interests in exchange for financing. This policy would thus limit a small business' ability to raise capital and undermine our intention of promoting small business participation in the highly competitive telecommunications marketplace.

66. Further, we do not believe that the adoption of a minimum equity requirement is necessary to ensure appropriate identification of an applicant's controlling interests if the principles of *de jure* and *de facto* control are applied. These principles are, in effect, broader than the minimum equity requirement because they look to actual control irrespective of the amount of equity held in an applicant. While we agree with commenters that lack of equity may indicate lack of *de facto* control,<sup>206</sup> we are not persuaded that this factor alone is dispositive.<sup>207</sup> Rather than focusing solely on equity holdings, applicants are required to identify those controlling interests that actually have control through application of the principles of either *de jure* or *de facto* control. This approach, which has proven successful in the broadcast context, we conclude, will operate equally well in our calculation of gross revenues for purposes of determining eligibility for bidding preferences.<sup>208</sup> By alerting the Commission to all attributable interests, application of the principles of *de jure* and *de facto* control will preclude unqualified applicants from taking advantage of our small business provisions. Moreover, as discussed in the *Part 1 Third Report and Order*, requiring detailed ownership information under Section 1.2112 will ensure that applicants claiming small business status qualify for such status and that all applicants comply with spectrum caps and other ownership limits.<sup>209</sup>

67. We agree with CIRI that these new rules should not make current C and F block licensees ineligible to hold their licenses.<sup>210</sup> The eligibility of current C and F block licensees to continue to hold their licenses will not be reassessed based on the new attribution rules. These licensees will remain eligible to hold their licenses regardless of whether or not they would qualify under the newly established attribution rules. Thus far, the Commission has conducted four auctions of C block licenses using the Part 24 attribution rules.<sup>211</sup> In many instances, entities participating in these auctions restructured their businesses and formulated business relationships based upon our rules in effect at the time. In good faith, these entities now wish to continue operating under the Part 24 attribution rules rather than face the potential disruption caused by restructuring their organizations and/or altering their business strategies. We see no reason to require that existing C and F block licensees restructure to meet new standards in order to remain licensees. As to future C and F block auctions, however, all applicants, including existing C and F block licensees, will be subject to the attribution rules in effect at the time of filing their short-form applications. For auctions that begin within two years after the start of Auction No. 22, the C, E, and F block auction that began on March 23, 1999, our new attribution rules will have no effect on the eligibility as an entrepreneur of any entity that was eligible for, and participated in, Auction No. 5 or

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<sup>206</sup> See, e.g., AmeriCall Comments at 3.

<sup>207</sup> See NextWave Comments at 5-6.

<sup>208</sup> See, e.g., 47 C.F.R. § 73.3555 (broadcast multiple ownership).

<sup>209</sup> *Part 1 Third Report and Order*, 13 FCC Rcd at 417-421, ¶¶ 73-78.

<sup>210</sup> CIRI Comments at 2-6.

<sup>211</sup> See 47 C.F.R. § 24.709.

Auction No. 10.<sup>212</sup> Eligibility for small business preferences, however, will be determined based on the attribution rules in effect at the time of an applicant's short-form filing.<sup>213</sup> Similarly, with respect to transfers of control and assignments of license, existing C and F block licensees may be assignees or transferees within the first five years of license grant consistent with the anti-trafficking provision contained in Section 24.839(d) of the Commission's rules.<sup>214</sup> Non-licensees, however, are precluded from being assignees or transferees within the first five years of license grant unless they qualify as entrepreneurs based on the attribution rules in effect at the time of assignment or transfer.<sup>215</sup>

### C. Default Payments

68. Background. In the *Second Notice*, we sought comment on whether we should modify Section 1.2104(g) of our rules to provide that, where a winning bidder defaults on multiple licenses, the default payment will be determined based upon the aggregate winning bid and the aggregate winning bid the next time the licenses are offered by the Commission.<sup>216</sup> We sought comment on whether this system could encourage insincere bidding and defaults since it could greatly reduce the effective penalty for a default.<sup>217</sup> We questioned whether, since the potential defaulter would not be facing the full harm caused by the default on the additional license, the incentive for insincere bidding and default would be too great.<sup>218</sup> Indeed, we continued, this modification could encourage speculation by encouraging a high bidder on a relatively high valued license that anticipates default to purposely bid and default on a relatively low valued license in order to lessen the default payment assessed under our rules.<sup>219</sup> Finally, we sought comment on whether such a modification could function without nullifying the provision in Section 1.2104(g) that assesses an additional default payment equal to three percent of the subsequent winning bid or the amount bid, whichever is lower.<sup>220</sup> No comments were received on this issue.

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<sup>212</sup> Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, *Fourth Report and Order*, 13 FCC Rcd 15743, 15751, ¶ 13 and 15752, ¶ 15 (1998) ("*C Block Fourth Report and Order*"); 47 C.F.R. § 24.709(b)(9)(i). We note that Auction No. 22 was originally announced as an auction of licenses for C, D, E, and F block spectrum; however, no D block spectrum remained in the license inventory by the start of the auction.

<sup>213</sup> *C Block Fourth Report and Order* at ¶ 47

<sup>214</sup> See 47 C.F.R. § 24.839(d).

<sup>215</sup> *Id.* We recently issued a *Further Notice of Proposed Rulemaking* seeking comment on whether to open to all qualified applicants, not just entrepreneurs, certain C and F block licenses. Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, FCC 00-197, *Further Notice of Proposed Rulemaking* (rel. June 7, 2000). In addition, we sought comment on modifying our assignment and transfer rules for C and F block licenses. *Id.*

<sup>216</sup> *Second Notice*, 13 FCC Rcd at 479, ¶ 189; 47 C.F.R. § 1.2104(g).

<sup>217</sup> *Second Notice*, 13 FCC Rcd at 479, ¶ 189.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

69. Discussion. Section 1.2104(g)(2) of the Commission's rules is central to the integrity of the Commission's auction process.<sup>221</sup> The principal function of this rule is to establish that the close of the auction creates a binding contractual obligation by the high bidder to pay the auction price for the license. Whether the obligation is thereafter breached by a default of payment or by a failure to qualify to receive the license for which the bid was placed, the winning bidder's liability remains a function of the high bid and is based on the obligation that was incurred at auction, plus an additional 3 percent payment as set forth in the rule.<sup>222</sup>

70. Without more comment, we will not amend our rule to adopt an aggregate approach to calculating default payments. Rather, we will continue to evaluate each licensee's default payment obligations on a license-by-license basis. In other words, we will calculate the default payment owed on each license separately, even in cases where a single bidder defaults on multiple licenses. Therefore, licensees may not use a subsequent auction gain from one defaulted license to reduce default payments on other licenses that are subsequently auctioned for less than that originally bid by the defaulting licensee.

71. When a winning bidder defaults on a license, the bidder becomes subject to a default payment equal to the difference between the amount bid and the subsequent winning bid, plus an additional payment equal to 3 percent of the lower of the initial winning bid or the subsequent winning bid.<sup>223</sup> In the case of multiple defaults, the Commission has determined that the amount of the default payment is calculated on a license-by-license basis and then added together to determine the total default payment.

72. Our auction rules were designed to encourage bidders wishing to withdraw their bids to do so prior to the close of the auction, rather than default after the auction.<sup>224</sup> In the case of withdrawal, the additional 3 percent payment is not required.<sup>225</sup> Thus no withdrawal payment is assessed if the subsequent winning bid exceeds the withdrawn bid.<sup>226</sup> Encouraging withdrawals over defaults increases auction efficiency. If a bidder withdraws its bid during the auction, there is an opportunity for another bidder to win the license. However, if the bidder defaults after the auction, a new spectrum license must be auctioned. A bidder that would have bid to win the license after a withdrawal may not be as willing or able to pay if it has to wait for another auction before it can obtain the license. In addition to the time and expense required to auction the new spectrum license and collect the default payment, a subsequent auction results in a delay in provision of service to the public.

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<sup>221</sup> 47 C.F.R. § 1.2104(g)(2).

<sup>222</sup> By imposing the obligation to pay the winning bid at the time of the auction close, rather than at the time of the license grant, the Commission's rules make clear that the obligation to pay the winning bid amount originates at the close of the auction, not the grant of the license, and thereby eliminates any incentive to abandon the bid before the license grant because of a change in market conditions or the financial condition of the bidder. In short, Section 1.2104(g)(2) places the risk of a post-auction change of circumstances squarely on the winning bidder rather than on the Commission.

<sup>223</sup> 47 C.F.R. § 1.2104(g)(2). In the event that a bidding credit applies to any of the bids, the default payment is either the difference between the net withdrawn bid and the subsequent net winning bid, or the difference between the gross withdrawn bid and the subsequent gross winning bid, whichever is less, plus an additional payment equal to 3 percent of the lower of the initial winning bid or the subsequent winning bid.

<sup>224</sup> *Competitive Bidding Second Report and Order*, 9 FCC Rcd 2348, 2374, ¶ 154.

<sup>225</sup> Compare 47 C.F.R. § 1.2104(g)(1) with 47 C.F.R. § 1.2104(g)(2).

<sup>226</sup> 47 C.F.R. § 1.2104(g)(1).

73. Were we to allow a bidder that defaults on multiple licenses to offset subsequent auction losses with subsequent auction gains, we might encourage insincere bidding and defaults by greatly reducing the effective penalty for a default. A budget-constrained winning bidder that anticipates default on a relatively high valued license would have an incentive to bid and default on a relatively low valued license that would be likely to bring a higher price at a subsequent auction as a means of lowering its total default payment under our rules. Moreover, if the payment for defaults were determined by aggregating subsequent auction gains and losses, a bidder that would otherwise withdraw a bid during the auction might have an incentive to default after the auction instead.<sup>227</sup> If aggregation of subsequent auction gains and subsequent auction losses would result in a net gain, the defaulting bidder would be required to pay only the 3 percent penalty, an amount that could be lower than the withdrawal payments determined on a license-by-license basis.

#### **D. Administrative Filing Periods for Applications and Petitions to Deny**

74. Background. In the *Part 1 Third Report and Order*, we amended Section 1.2108 of our rules to conform to the provisions in the Balanced Budget Act of 1997 regarding the filing period for petitions to deny the long-form applications of winning bidders.<sup>228</sup> The Balanced Budget Act of 1997 gives the Commission authority to shorten the period in which license applications are granted, notwithstanding Section 309(b) of the Communications Act which generally prohibits the Commission from granting applications for licenses prior to 30 days following public notice of their filing.<sup>229</sup> Section 1.2108, as amended, provides that the Commission shall not grant a license less than seven days after public notice that long-form applications have been accepted for filing and that, in all cases, the period for filing petitions to deny such applications shall be no shorter than five days.<sup>230</sup>

75. Although noting our belief that a shortened petition to deny period is appropriate for future auctions, we sought comment on the appropriate length of a petition to deny period in light of this legislation.<sup>231</sup> For example, we sought comment on whether there are instances in which the Commission should provide for a longer period than the minimums set forth in the statute for the filing of petitions to deny or for the grant of initial licenses in auctionable services (five days and seven days, respectively).<sup>232</sup> In particular, we asked commenters to address whether auctions for specific services (*e.g.*, broadcast licenses) require longer periods for the filing of petitions to deny and why this may be so.<sup>233</sup> No comments on these matters were received.

76. Discussion. We will adopt our proposal to shorten administrative filing periods, when possible, as directed by the Balanced Budget Act of 1997. This conclusion is consistent with our mandate

<sup>227</sup> See BDPCS, Inc., BTA Nos. B008, B036, B055, B089, B110, B133, B149, B261, B298, B331, B347, B358, B391, B395, B407, B413, and B447, Frequency Block C, *Memorandum Opinion and Order*, FCC 00-243 (rel. July 10, 2000).

<sup>228</sup> *Part 1 Third Report and Order*, 13 FCC Rcd at 431-432, ¶ 98; 47 C.F.R. § 1.2108.

<sup>229</sup> Balanced Budget Act § 3008; 47 U.S.C. § 309(b).

<sup>230</sup> 47 C.F.R. § 1.2108.

<sup>231</sup> *Second Notice*, 13 FCC Rcd at 480, ¶ 191.

<sup>232</sup> *Id.*

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

in Section 309(j)(3)(A) of the Communications Act, which obligates us to promote "the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, *without administrative or judicial delays.*"<sup>234</sup>

77. In order to have a consistent and general rule for filing petitions to deny, we will establish a maximum ten-day period for the filing of such petitions. However, because the provision in the Balanced Budget Act anticipates -- and we believe -- that the appropriate period for filing petitions to deny may vary from service to service, we will delegate to the appropriate licensing bureau the discretion, to be exercised in exigent circumstances, to reduce this period. This reduced filing period may not be shorter than that prescribed by the Balanced Budget Act. We will increase the time period from 5 days (as originally adopted in the rule) to 10 days in order to afford parties (including small businesses) additional flexibility in challenging license awards. This approach, we believe, is consistent with the intent of Congress in the Balanced Budget Act to more expeditiously resolve these disputes while, at the same time, ensuring that all parties (particularly small businesses) have a reasonable opportunity to exercise their rights under the Communications Act.

## E. Conclusion

78. In the *Part 1 Third Report and Order*, we stated that "[t]hese changes to our general competitive bidding rules are intended to streamline our regulations and eliminate unnecessary rules wherever possible . . . ." <sup>235</sup> With the issuance of this *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making*, we have made a majority of the Part 1 rule changes contemplated in our efforts to streamline the competitive bidding regulations. The next step in this process is to eliminate unnecessary rules to the best of our ability at this time. Some service-specific rules repeat portions of our new Part 1 rules almost verbatim;<sup>236</sup> others contain obvious discrepancies.<sup>237</sup> In our attempt to provide the most specific guidance possible to future auction participants, we believe it is in the public interest to conform the service-specific auction rules to the general competitive bidding rules in cases of obvious repetition and where the Commission specifically superseded inconsistent rules in the course of the Part 1 proceeding. We hereby instruct the Wireless Telecommunications Bureau to make conforming edits to the Code of Federal Regulations consistent with this decision.

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<sup>234</sup> 47 U.S.C. § 309(j)(3)(A) (emphasis added).

<sup>235</sup> *Part 1 Third Report and Order*, 13 FCC Rcd at 376, ¶ 1.

<sup>236</sup> Compare, e.g., 47 C.F.R. § 24.720(e) (definition of "Rural Telephone Company" in the broadband PCS rules) with 47 C.F.R. § 1.2110(b)(3) (definition of "Rural Telephone Companies" in the Part 1 rules).

<sup>237</sup> Compare, e.g., 47 C.F.R. § 1.2110(e)(2) (redesignated herein as 47 C.F.R. § 1.2110(f)(2)) (providing a standard schedule of bidding credits) with §§ 27.209(b), (c) and 27.210(b) (providing for greater bidding credits than the standard schedule).

## V. FOURTH FURTHER NOTICE OF PROPOSED RULE MAKING

### A. Introduction

79. In this *Fourth Further Notice of Proposed Rule Making*, we seek comments on a total assets test to determine small business status and propose exceptions to the attribution rule's requirement that certain stock interests be counted on a "fully diluted" basis.

### B. Rules Governing Designated Entities

#### 1. Total Assets Test

80. Background. In the first *Notice of Proposed Rulemaking* in this proceeding, we proposed to define small businesses, for the purposes of auctions, "purely in terms of gross revenues."<sup>238</sup> In another proceeding, we observed that "[a]ssets, being potentially fluid and subject to inconsistent valuation . . . are generally much less ascertainable than gross revenues . . . ." <sup>239</sup> In the *Part 1 Third Report and Order*, we adopted our proposal to use gross revenues as our general standard for measuring a business' size. We indicated at that time that a gross revenues-based standard provides "an accurate, equitable, and easily ascertainable measure of business size."<sup>240</sup> Furthermore, we observed that while a total assets test had been used in the past to determine eligibility for participation in entrepreneur block auctions, it had not been employed for determining small business eligibility.<sup>241</sup> We also relied on the Small Business Act, which controls how agencies may prescribe size standards for categorizing small businesses. This statute provides no assets test for categorizing business concerns that provide services.<sup>242</sup>

81. Discussion. The Commission intends its small business provisions to be available only to bona fide small businesses. While we have concluded in the past to use gross revenues as the measure of business size, based on correspondence from the Small Business Administration, we take this opportunity to revisit the issue of whether to use a total assets test as well.<sup>243</sup> We seek comment on whether the use of a total assets test, in conjunction with the gross revenues measure already employed, would enhance the Commission's determinations of small business status. For example, commenters may address whether a

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<sup>238</sup> *Part 1 Notice of Proposed Rule Making*, 12 FCC Rcd at 5699-5700, ¶ 20.

<sup>239</sup> 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, Petitions for Reconsideration of the Commission's Competitive Bidding Rules, CC Docket No. 92-297, *Second Order on Reconsideration*, 12 FCC Rcd 15082, 15096-97, ¶ 22 (1997) (petitioners had sought an assets test whereby entities with assets exceeding a specific threshold would be excluded from eligibility for small business provisions).

<sup>240</sup> *Part 1 Third Report and Order*, 13 FCC Rcd at 388-389, ¶ 19.

<sup>241</sup> *Id.* Eligibility for the C and F block PCS auctions was based on an applicant's gross revenues and total assets (*see* 47 C.F.R. § 24.709(a)). "Total assets" are defined as "the book value . . . of all property owned by an entity, whether real or personal, tangible or intangible . . . ." 47 C.F.R. § 24.720(g).

<sup>242</sup> *See* 15 U.S.C. § 632(a).

<sup>243</sup> In an *ex parte* filing, the Small Business Administration, Office of Advocacy, asks the Commission to reconsider the use of a total assets test. *See* Letter to William E. Kennard, Chairman, Federal Communications Commission, from Jere W. Glover, Chief Counsel for Advocacy, and S. Jenell Trigg, Assistant Chief Counsel for Telecommunications, Office of Advocacy, U.S. Small Business Administration, dated September 10, 1998.

gross revenues standard alone allows participation of legitimate start-up companies that are supported only by assets held by affiliates. In the alternative, commenters should address whether our comprehensive affiliation rules counterbalance the effects of a gross revenues standard when applied to such enterprises. We ask that commenters cite to specific statistical and/or anecdotal evidence when addressing these issues. If supporting use of an assets test, commenters should address appropriate thresholds for small business determinations. For example, commenters may address whether the \$500 million total assets test used in determining eligibility for entrepreneurs' block auctions provides a suitable benchmark.<sup>244</sup> A more complete record on this matter will assist the Commission in meeting its goals for small business participation in future spectrum auctions.

## 2. Attribution of Gross Revenues or Total Assets of Investors and Affiliates

82. Background. In the *Second Notice*, we sought further comment on whether to adopt a "controlling interest" standard as our general rule for attributing to an applicant the gross revenues of its investors and their affiliates in determining whether the applicant is eligible for small business preferences.<sup>245</sup> In this *Fifth Report and Order*, we adopt the "controlling interest" standard as our general attribution rule for all future auctions.<sup>246</sup> For purposes of calculating equity held in an applicant, the "controlling interest" definition provides for full dilution of certain stock interests, such as warrants, stock options, and convertible debentures.<sup>247</sup> Accordingly, under the rule we adopt today, as well as under our existing rules, agreements of this type are generally treated as if the rights thereunder have been fully exercised.<sup>248</sup> In our Competitive Bidding *Fifth Memorandum Opinion and Order* ("*Fifth M O & O*"), we established two exceptions to the "fully diluted" requirement for the broadband PCS attribution rule.<sup>249</sup> We decided that two types of ownership interests, "rights of first refusal" and "put" options, would not be considered on a fully diluted basis for purposes of calculating ownership levels.<sup>250</sup>

83. Discussion. In this *Fourth Notice*, we seek comment on whether to incorporate into our Part 1 general competitive bidding rules the two exceptions we adopted for our broadband PCS attribution rule. We also seek comment on a proposed third exception to our general requirement that we treat certain stock interests as "fully exercised."

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<sup>244</sup> To bid in the PCS entrepreneur block auctions, applicants were required to have less than \$125 million in gross revenues and less than \$500 million in total assets. See Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Fifth Report and Order*, 9 FCC Rcd at 5581-82, ¶ 115. See also 47 C.F.R. § 24.709(a).

<sup>245</sup> *Second Notice*, 13 FCC Rcd at 476-78, ¶¶ 183-87.

<sup>246</sup> See *supra* ¶¶ 58-66.

<sup>247</sup> See *supra* ¶ 62.

<sup>248</sup> See, e.g., 47 C.F.R. §§ 1.2110(c)(5)(v) (formerly § 1.2110(b)(4)(v)), 24.709(b)(7). However, agreements such as warrants, stock options, and convertible debentures may not be used to appear to terminate or divest ownership interests before they actually do so. See 47 C.F.R. § 24.709(b)(7).

<sup>249</sup> Implementation of Section 309(j) of the Communications Act-- Competitive Bidding, PP Docket No. 93-253, *Fifth Memorandum Opinion and Order*, 10 FCC Rcd 403, 454-56, ¶¶ 93-95 (1994) ("*Fifth M O & O*").

<sup>250</sup> *Id.* A "right of first refusal" is an agreement between parties which grants an investor the right to match a purchase offer from a third party. See *id.* at 455 n.220. A "put" option gives the holder of an ownership instrument the right to sell a share of stock at a specified price at any time up to the expiration date. See *id.* at 454, ¶ 92.



84. Our attribution rules are designed to preserve control of the applicant by eligible entities while allowing investment in the applicant by entities that do not meet the size restrictions in our rules.<sup>251</sup> We recognize that some forms of stock options and convertible debt instruments are common and often beneficial to the management of a company. Convertible debt instruments may also allow designated entities to obtain debt financing at a lower cost than would otherwise be available, thereby preserving working capital for such uses as the further construction of facilities. Because our rules generally require us to treat stock interests on a fully diluted basis, if an applicant grants its lender stock conversion rights in several promissory notes, the lender's equity could exceed the applicable limit or threshold, thus requiring the applicant to include the lender's gross revenues in determining its eligibility as a designated entity.

85. Our proposed exception to the general attribution rule is a refinement to the "fully diluted" requirement that addresses stock conversion rights that are granted on a contingent basis. An applicant may grant conversion rights on a contingent basis, such rights vesting only in the event that the lender first assigns or transfers all interest in one or more other debt instruments to a qualified unaffiliated third party.<sup>252</sup> Thus, the contingent right of conversion in one debt instrument could only be exercised upon divestiture of enough equity associated with the other debt instruments to allow the lender to remain below the applicable equity limit.

86. We tentatively conclude that furtherance of the policy underlying Section 1.2110(c)(5)(v) of our designated entities rule does not require us to consider all existing stock conversion rights as having been fully exercised simultaneously in a case where exercise of the various conversion rights are mutually exclusive by their terms.<sup>253</sup> We therefore propose an exception to the "fully diluted" requirement in Section 1.2110(c)(5)(v) to permit conversion rights or stock options to be considered individually rather than collectively when they are mutually exclusive.<sup>254</sup> Under this interpretation, for the purpose of calculating ownership interests, all stock interests would continue to be calculated on a fully diluted basis, but if a stock interest by its terms is mutually exclusive of one or more other stock interests, the various ownership interests would be treated as having been fully exercised only in the possible combinations in which they can be exercised by their holder.<sup>255</sup>

87. We seek comment on whether we should amend the controlling interest standard in our Part 1 general competitive bidding rules to include this exception to our requirement for calculating

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<sup>251</sup> See Implementation of Section 309(j) of the Communications Act-- Competitive Bidding, PP Docket No. 93-253, *Fifth Report and Order*, 9 FCC Rcd 5532, 5620, ¶ 205 (1994).

<sup>252</sup> See Letter from Amy J. Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, to Cheryl A. Tritt, Esq., and Michael K. Kurtis, Esq., counsel for DiGiPH PCS, Inc., 13 FCC Rcd 17950 (1998) ("Division Letter to DiGiPH").

<sup>253</sup> 47 C.F.R. § 1.2110(c)(5)(v) (formerly § 1.2110(b)(4)(v)).

<sup>254</sup> *Id.*

<sup>255</sup> For example, a licensee might execute three promissory notes, giving its lender the right to convert the loan amounts to 15 percent, 20 percent, and 25 percent equity interests in the licensee. If the conversion rights in each note were granted on a contingent basis, vesting only on the condition that the lender divest enough equity associated with the other notes to ensure that it remains below the applicable equity limit, we would calculate the stock interests of the lender in all three notes on a fully diluted basis, but we would not consider the conversion rights in all three notes as having been exercised simultaneously. Depending on the equity limit that is applicable in a given case, we could consider the various stock interests as having been exercised alone or in pairs. See Division Letter to DiGiPH.

ownership interests on a fully diluted basis. Under the proposed rule, ownership interests that by their terms are capable of being exercised simultaneously or successively would continue to be treated collectively as if the rights thereunder have been fully exercised. Ownership interests that are mutually exclusive would be considered separately, but each mutually exclusive ownership interest would be considered in combination with all other ownership interests that are capable of being exercised with it simultaneously or successively.<sup>256</sup> Thus, in calculating the equity held in an applicant, we propose to consider the various combinations of stock options or conversion rights that could possibly be exercised by an investor. For each combination, the ownership interests would be considered to have been fully exercised, and each combination would then be reviewed in the context of the specific equity limit or threshold applicable in a given case. We also propose that, for purposes of this rule, we consider one ownership interest to be mutually exclusive of another only if the agreement that conveys the first interest contains explicit language making it clear that the rights conveyed by that agreement cannot be exercised unless all ownership rights associated with the other agreement are either terminated or transferred or assigned to a qualified unaffiliated third party.

88. We further propose to codify in our Part 1 general competitive bidding rules the policy under which we have previously adopted two exceptions to our broadband PCS attribution rule for the same reasons identified in the *Fifth M O & O*.<sup>257</sup> Under these exceptions, we would not treat "rights of first refusal" and "put" options as having been exercised for purposes of calculating ownership levels. We seek comment on this proposal.

## VI. PROCEDURAL MATTERS AND ORDERING CLAUSES

### A. Regulatory Flexibility Analyses

89. Pursuant to the Regulatory Flexibility Act,<sup>258</sup> a Supplemental Final Regulatory Flexibility Analysis for the *Order on Reconsideration* is attached at Appendix C.

90. A Final Regulatory Flexibility Analysis for the *Fifth Report and Order* is contained in Appendix D.

91. An Initial Regulatory Flexibility Analysis ("IRFA") for the *Fourth Notice* is attached at Appendix E.<sup>259</sup> Comments on the IRFA should be labelled as IRFA Comments, and should be submitted pursuant to the filing dates and procedures set forth in paragraphs 94-97, *infra*.

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<sup>256</sup> In the example described in *supra* n.255, if the lender was subject to the 49.9 equity limit in Section 24.709(b)(4) of the Commission's C block eligibility rules, we would consider the conversion rights in only two of the three notes as having been exercised simultaneously. In this example, combining the conversion rights in two of the notes would give the lender either 35 percent, 40 percent, or 45 percent of the licensee's total equity. Therefore, the lender would not be considered to have exceeded the 49.9 percent equity limit in Section 24.709(b)(4). See Division Letter to DiGiPH.

<sup>257</sup> *Fifth M O & O*, 10 FCC Rcd at 454-56 ¶¶ 93-95.

<sup>258</sup> See 5 U.S.C. § 604. 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 CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

<sup>259</sup> See 5 U.S.C. § 603

## B. Paperwork Reduction Act Analysis

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

93. In addition to filing comments on the information collections contained in this *Fifth Report and Order* with the Secretary, a copy of any comments on the information collections should be submitted to Judy Boley, Federal Communications Commission, Room 1-C804, 445 12<sup>th</sup> Street S.W., Washington, DC 20554, or via the Internet to [jboley@fcc.gov](mailto:jboley@fcc.gov) and to Edward Springer, OMB Desk Officer, 10236 NEOB, 725 – 17<sup>th</sup> Street, N.W., Washington, DC 20503 or via the Internet to [edward.springer@omb.eop.gov](mailto:edward.springer@omb.eop.gov)."

## C. Filing Procedures

94. Pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before 45 days after publication in the Federal Register, and reply comments on or before 66 days after publication in the Federal Register. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. See *Electronic Filing of Documents in Rulemaking Proceedings*, 13 FCC Rcd 11322, 11326 (1998).

95. Comments filed through the ECFS can be sent as an electronic file via the Internet to [<http://www.fcc.gov/e-file/ecfs.html>](http://www.fcc.gov/e-file/ecfs.html). Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To obtain filing instructions for e-mail comments, commenters should send an e-mail to [ecfs@fcc.gov](mailto:ecfs@fcc.gov), and should include the following words in the body of the message, "get form <your e-mail address>." A sample form and directions will be sent in reply.

96. Parties that choose to file by paper must file an original and four copies of each filing. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. All filings must be sent to the Commission's Secretary, Magalie Roman Salas, Office of the Secretary, Federal Communications Commission, The Portals, 445 12th Street, S.W., Room TW-A325, Washington, D.C. 20554. In addition, a courtesy copy should be delivered to Leora Hochstein, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, 445 12th Street, S.W., Room #4A633, Washington, D.C. 20554.

97. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. Comments and reply comments will be available for public inspection and duplication during regular business hours in the FCC Reference Information Center, Room CY-A257, 445 12th Street, S.W., Washington, DC 20554. Copies also may be obtained from International Transcription Services, Inc., 445 12th Street, S.W., Room CY-B400, Washington, DC 20554, (202) 314-3070.

#### **D. Contacts for Further Information**

98. For further information concerning this *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making*, contact Leora Hochstein at (202) 418-1022 (Auctions and Industry Analysis Division, Wireless Telecommunications Bureau). For additional information concerning the information collections contained in this *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making*, contact Judy Boley at (202) 418-0214 or via the Internet at [jboley@fcc.gov](mailto:jboley@fcc.gov).

#### **E. Ordering Clauses**

99. Accordingly, IT IS ORDERED that, pursuant to the authority granted in Sections 4(i), 303(r) and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r) and 309(j), the petitions for reconsideration and informal requests for clarification filed in response to the *Part 1 Third Report and Order* are GRANTED IN PART and DENIED IN PART, as provided herein.

100. IT IS FURTHER ORDERED that, pursuant to the authority granted in Sections 4(i), 5(b), 5(c)(1), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(b), 155(c)(1), 303(r), and 309(j), this *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making* is hereby ADOPTED and Part 1, Subpart Q of the Commission's rules are amended as set forth in Appendix A, effective 60 days after publication in the *Federal Register*. The information collection contained in these rules becomes effective 60 days after publication in the *Federal Register*, following OMB approval, unless a notice is published in the *Federal Register* stating otherwise.

101. IT IS FURTHER ORDERED that, pursuant to 47 U.S.C. § 155(c) and 47 C.F.R. §§ 0.131(c) and 0.331, the Chief of the Wireless Telecommunications Bureau IS GRANTED DELEGATED AUTHORITY to prescribe and set forth procedures for the implementation of the provisions adopted herein, including the authority to seek comment on and set forth mechanisms relating to the day-to-day conduct of specific auctions.

102. IT IS FURTHER ORDERED that the Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making*, including the Supplemental Final Regulatory Flexibility Analysis, the Final Regulatory Flexibility Analysis, and the Initial Regulatory Flexibility Analysis to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas  
Secretary

**APPENDIX A****Final Rules**

Part 1 of title 47 of the Code of Federal Regulations is revised to read as follows:

1. Section 1.2104 is amended by revising paragraphs (g)(1) and (g)(2) to read as follows:

**§ 1.2104 Competitive bidding mechanisms.**

\* \* \* \* \*

(g) \* \* \*

(1) Bid withdrawal prior to close of auction. A bidder that withdraws a high bid during the course of an auction is subject to a withdrawal payment equal to the difference between the amount of the withdrawn bid and the amount of the winning bid in the same or subsequent auction(s). In the event that a bidding credit applies to any of the bids, the bid withdrawal payment is either the difference between the net withdrawn bid and the subsequent net winning bid, or the difference between the gross withdrawn bid and the subsequent gross winning bid, whichever is less. No withdrawal payment will be assessed for a withdrawn bid if either the subsequent winning bid or any of the intervening subsequent withdrawn bids equals or exceeds that withdrawn bid. The withdrawal payment amount is deducted from any upfront payments or down payments that the withdrawing bidder has deposited with the Commission. In the case of multiple bid withdrawals on a single license, the payment for each bid withdrawal will be calculated based on the sequence of bid withdrawals and the amounts withdrawn in the same or subsequent auction(s). In the event that a license for which there have been withdrawn bids is not won in the same auction, those bidders for which a final withdrawal payment cannot be calculated will be assessed an interim bid withdrawal payment equal to 3 percent of the amount of their bid withdrawals. The 3 percent interim payment will be applied toward any final bid withdrawal payment that will be assessed at the close of the subsequent auction of the license.

Example: (1) Bidder A withdraws a bid of \$100. Subsequently, Bidder B places a bid of \$90 and withdraws. In that same auction, Bidder C wins the license at a bid of \$95. Withdrawal payments are assessed as follows: Bidder A owes \$5 (\$100 - \$95). Bidder B owes nothing.

Example: (2) Bidder A withdraws a bid of \$100. Subsequently, Bidder B places a bid of \$95 and withdraws. In that same auction, Bidder C wins the license at a bid of \$90. Withdrawal payments are assessed as follows: Bidder A owes \$5 (\$100 - \$95). Bidder B owes \$5 (\$95 - \$90).

Example: (3) Bidder A withdraws a bid of \$100. Subsequently, in that same auction, Bidder B places a bid of \$90 and withdraws. In a subsequent auction, Bidder C places a bid of \$95 and withdraws. Bidder D wins the license in that auction at a bid of \$80. Withdrawal payments are assessed as follows: At the end of the first auction, Bidder A and Bidder B are each assessed an interim withdrawal payment equal to 3 percent of their withdrawn bids pending Commission assessment of a final withdrawal payment (Bidder A would owe 3% of \$100, or \$3, and Bidder B would owe 3% of \$90, or \$2.70). At the end of the second auction, Bidder A would owe \$5 (\$100 - \$95) less the \$3 interim withdrawal payment for a total of \$2. Because Bidder C placed a subsequent bid that was higher than Bidder B's \$90 bid, Bidder B would owe nothing. Bidder C would owe \$15 (\$95 - \$80).

(2) Default or disqualification after close of auction. A bidder assumes a binding obligation to pay its full bid amount upon acceptance of the high bid at the close of an auction. If a high bidder defaults or is disqualified after the close of such an auction, the defaulting bidder will be subject to the payment in paragraph (g)(1) of this section plus an additional payment equal to 3 percent of the subsequent winning bid. If the subsequent winning bid exceeds the defaulting bidder's bid amount, the 3 percent payment will be calculated based on the defaulting bidder's bid amount. If either bid amount is subject to a bidding credit, the 3 percent credit will be calculated using the same bid amounts and basis (net or gross bids) as in the calculation of the payment in paragraph (g)(1) of this section. Thus, for example, if gross bids are used to calculate the payment in paragraph (g)(1) of this section, the 3 percent will be applied to the gross amount of the subsequent winning bid, or the gross amount of the defaulting bid, whichever is less.

\* \* \* \* \*

2. Section 1.2105 is amended by revising paragraphs (a)(2)(xi) and (c)(1) to read as follows:

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

\* \* \* \* \*

(a)(2) \* \* \*

(xi) An attached statement made under penalty of perjury indicating whether or not the applicant has ever been in default on any Commission license or has ever been delinquent on any non-tax debt owed to any Federal agency.

\* \* \* \* \*

(c) Prohibition of collusion. (1) Except as provided in paragraphs (c)(2), (c)(3) and (c)(4) of this section, after the short-form application filing deadline, all applicants are prohibited from cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies, or discussing or negotiating settlement agreements, with other applicants until after the down payment deadline, unless such applicants are members of a bidding consortium or other joint bidding arrangement identified on the bidder's short-form application pursuant to § 1.2105(a)(2)(viii).

\* \* \* \* \*

3. Section 1.2106 is amended by revising paragraph (a) to read as follows:

**§ 1.2106 Submission of upfront payments.**

(a) The Commission may require applicants for licenses subject to competitive bidding to submit an upfront payment. In that event, the amount of the upfront payment and the procedures for submitting it will be set forth in a Public Notice. Any auction applicant that has previously been in default on any Commission license or has previously been delinquent on any non-tax debt owed to any Federal agency must submit an upfront payment equal to 50 percent more than that set for each particular license. No interest will be paid on upfront payments.

\* \* \* \* \*

4. Section 1.2108 is amended by revising paragraph (b) to read as follows:

**§ 1.2108 Procedures for filing petition to deny against long-form applications.**

\* \* \* \* \*

(b) Within a period specified by Public Notice, and after the Commission by Public Notice announces that long-form applications have been accepted for filing, petitions to deny such applications may be filed. The period for filing petitions to deny shall be no more than ten (10) days. The appropriate licensing Bureau, within its discretion, may, in exigent circumstances, reduce this period of time to no less than five (5) days. Any such petitions must contain allegations of fact supported by affidavit of a person or persons with personal knowledge thereof.

\* \* \* \* \*

5. Section 1.2110 is amended by redesignating paragraphs (b) through (m) as (c) through (n), adding new paragraph (b), and revising newly redesignated paragraphs (c), (g)(4), and (j) to read as follows:

**§ 1.2110 Designated entities.**

\* \* \* \* \*

(b) Eligibility for small business provisions.

(1) Size attribution. The gross revenues of the applicant (or licensee), its controlling interests and their affiliates shall be attributed to the applicant and considered on a cumulative basis and aggregated for purposes of determining whether the applicant (or licensee) is eligible for status as a small business under this section. An applicant seeking status as a small business under this section must disclose on its short- and long-form applications, separately and in the aggregate, the gross revenues of the applicant (or licensee), its controlling interests and their affiliates for each of the previous three years.

(2) Aggregation of affiliate interests. Persons or entities that hold interests in an applicant (or licensee) that are affiliates of each other or have an identity of interests identified in § 1.2110(c)(5)(iii) will be treated as though they were one person or entity and their ownership interests aggregated for purposes of determining an applicant's (or licensee's) compliance with the requirements of this section.



Example 1: ABC Corp. is owned by individuals, A, B and C, each having an equal one-third voting interest in ABC Corp. A and B together, with two-thirds of the stock have the power to control ABC Corp. and have an identity of interest. If A&B invest in DE Corp., a broadband PCS applicant for block C, A and B's separate interests in DE Corp. must be aggregated because A and B are to be treated as one person or entity.

Example 2: ABC Corp. has subsidiary BC Corp., of which it holds a controlling 51 percent of the stock. If ABC Corp. and BC Corp., both invest in DE Corp., their separate interests in DE Corp. must be aggregated because ABC Corp. and BC Corp. are affiliates of each other.

(3) Exceptions. (i) Small business consortia. Where an applicant (or licensee) is a consortium of small businesses, the gross revenues of each small business consortium member shall not be aggregated. Each small business consortium member must constitute a separate and distinct legal entity to qualify.

(ii) Applicants without identifiable controlling interests. Where an applicant (or licensee) cannot identify controlling interests under the standards set forth in this section, the gross revenues of all interest holders in the applicant, and their affiliates, will be attributable.

(c) Definitions.

(1) Small businesses. The Commission will establish the definition of a small business on a service-specific basis, taking into consideration the characteristics and capital requirements of the particular service.

(2) Controlling interests. (i) For purposes of this section, controlling interest includes individuals or entities with either *de jure* or *de facto* control of the applicant. *De jure* control is evidenced by holdings of greater than 50 percent of the voting stock of a corporation, or in the case of a partnership, general partnership interests. *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.

(ii) 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 a controlling interest in the entity. The officers and directors of an entity that controls a licensee or applicant shall be considered to have a controlling 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 a controlling interest in such applicant or licensee if such person, or its affiliate, has authority to make decisions or otherwise engage in practices or activities that determine, or significantly influence:

- (1) The nature or types of services offered by such an applicant or licensee;
- (2) The terms upon which such services are offered; or
- (3) 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 a controlling 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:

- (1) The nature or types of services offered by such an applicant or licensee;
- (2) The terms upon which such services are offered; or
- (3) The prices charged for such services.

(3) Businesses owned by members of minority groups and/or women. Unless otherwise provided in rules governing specific services, a business owned by members of minority groups and/or women is one in which minorities and/or women who are U.S. citizens control the applicant, have at least greater than 50 percent equity ownership and, in the case of a corporate applicant, have a greater than 50 percent voting interest. For applicants that are partnerships, every general partner must be either a minority and/or woman (or minorities and/or women) who are U.S. citizens and who individually or together own at least 50 percent of the partnership equity, or an entity that is 100 percent owned and controlled by minorities and/or women who are U.S. citizens. The interests of minorities and women are to be calculated on a fully diluted basis; agreements such as stock options and convertible debentures shall be considered to have a present effect on the power to control an entity and shall be treated as if the rights thereunder already have been fully exercised. However, upon a demonstration that options or conversion rights held by non-controlling principals will not deprive the minority and female principals of a substantial financial stake

in the venture or impair their rights to control the designated entity, a designated entity may seek a waiver of the requirement that the equity of the minority and female principals must be calculated on a fully-diluted basis. The term minority includes individuals of Black or African American, Hispanic or Latino, American Indian or Alaskan Native, Asian, and Native Hawaiian or Pacific Islander extraction. See Office of Management and Budget, Revisions to Standards for the Classification of Federal Data on Race Ethnicity, *Notice of Decision*, 62 FR 58782 (October 30, 1997).

\* \* \* \* \*

(g) \* \* \*

(4) A license granted to an eligible entity that elects installment payments

shall be conditioned upon the full and timely performance of the licensee's payment obligations under the installment plan.

(i) Any licensee that fails to submit its quarterly payment on an installment payment obligation (the "Required Installment Payment") may submit such payment on or before the last day of the next quarter (the "first additional quarter") without being considered delinquent. Any licensee making its Required Installment Payment during this period (the "first additional quarter grace period") will be assessed a late payment fee equal to five percent (5%) of the amount of the past due Required Installment Payment. The late payment fee applies to the total Required Installment Payment regardless of whether the licensee submitted a portion of its Required Installment Payment in a timely manner.

(ii) If any licensee fails to make the Required Installment Payment on or before the last day of the first additional quarter set forth in paragraph (i) of this section, the licensee may submit its Required Installment Payment on or before the last day of the next quarter (the "second additional quarter"), except that no such additional time will be provided for the July 31, 1998 suspension interest and installment payments from C or F block licensees that are not made within 90 days of the payment resumption date for those licensees, as explained in Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications

Services (PCS) Licensees, *Order on Reconsideration of the Second Report and Order*, WT Docket No. 97-82, 13 FCC Rcd 8345 (1998). Any licensee making the Required Installment Payment during the second additional quarter (the "second additional quarter grace period") will be assessed a late payment fee equal to ten percent (10%) of the amount of the past due Required Installment Payment. Licensees shall not be required to submit any form of request in order to take advantage of the first and second additional quarter grace periods.

(iii) All licensees that avail themselves of these grace periods must pay the associated late payment fee(s) and the Required Installment Payment prior to the conclusion of the applicable additional quarter grace period(s). Payments made at the close of any grace period(s) will first be applied to satisfy any lender advances as required under each licensee's "Note and Security Agreement," with the remainder of such payments applied in the following order: late payment fees, interest charges, installment payments for the most back-due quarterly installment payment.

(iv) If an eligible entity obligated to make installment payments fails to pay the total Required Installment Payment, interest and any late payment fees associated with the Required Installment Payment within two quarters (6 months) of the Required Installment Payment due date, it shall be in default, its license shall automatically cancel, and it will be subject to debt collection procedures. A licensee in the PCS C or F blocks shall be in default, its license shall automatically cancel, and it will be subject to debt collection procedures, if the payment due on the payment resumption date, referenced in paragraph (g)(4)(ii) of this section, is more than ninety (90) days delinquent.

\* \* \* \* \*

(j) Designated entities must describe on their long-form applications how they satisfy the requirements for eligibility for designated entity status, and must list and summarize on their long-form applications all agreements that affect designated entity status such as partnership agreements, shareholder agreements, management agreements and other agreements, including oral agreements, establishing, as applicable, *de facto* or *de jure* control of the entity. Such information must be maintained at the licensees' facilities or

by their designated agents for the term of the license in order to enable the Commission to audit designated entity eligibility on an ongoing basis.

\* \* \* \* \*

6. Section 1.2112 is revised to read as follows:

**§ 1.2112 Ownership disclosure requirements for short- and long-form applications.**

(a) Each application to participate in competitive bidding (*i.e.*, short-form application (*see* 47 CFR 1.2105)), or for a license, authorization, assignment, or transfer of control shall disclose fully the real party or parties in interest and must list the following information:

(1) The name, address, and citizenship of any party holding 10 percent or more of stock in the applicant, whether voting or nonvoting, common or preferred, including the specific amount of the interest or percentage held.

(2) In the case of a limited partnership, the name, address and citizenship of each limited partner whose interest in the applicant is 10 percent or greater (as calculated according to the percentage of equity paid in or the percentage of distribution of profits and losses);

(3) In the case of a general partnership, the name, address and citizenship of each partner, and the share or interest participation in the partnership;

(4) In the case of a limited liability company, the name, address and citizenship of each of its members whose interest in the applicant is 10 percent or greater.

(5) All parties holding indirect ownership interests in the applicant as determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain, that equals 10 percent or more of the applicant, 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 and reported as if it were a 100 percent interest.

(6) Any FCC-licensed entity or applicant for an FCC license, in which the applicant or any of the parties identified in subparagraphs (1) through (5) of above, owns 10 percent or more of stock, whether voting or nonvoting, common or preferred. This list must include a description of each such entity's principal

business and a description of each such entity's relationship to the applicant (*e.g.*, Company A owns 10 percent of Company B (the applicant) and 10 percent of Company C, then Companies A and C must be listed on Company B's application, where C is an FCC licensee and/or license applicant);

(b) Designated Entity Status: In addition to the information required under paragraph (a) of this section, each applicant claiming eligibility for small business provisions shall disclose the following:

(1) On its application to participate in competitive bidding (*i.e.*, short-form application (*see* 47 CFR 1.2105)),

- (i) List the names, addresses, and citizenship of all officers, directors, and other controlling interests of the applicant, as described in §1.2110;
- (ii) List any FCC-licensed entity or applicant for an FCC license, in which any controlling interest of the applicant owns a 10 percent or greater interest or a total of 10 percent or more of any class of stock, warrants, options or debt securities. This list must include a description of each such entity's principal business and a description of each such entity's relationship to the applicant;
- (iii) List separately and in the aggregate the gross revenues, computed in accordance with § 1.2110, for each of the following: the applicant, its affiliates, its controlling interests, and affiliates of its controlling interests; and if a consortium of small businesses, the members comprising the consortium;

(2) As an exhibit to its long-form application (*i.e.*, *see* 47 CFR 1.2107):

- (i) List and summarize all agreements or instruments (with appropriate references to specific provisions in the text of such agreements and instruments) that support the applicant's eligibility as a small business under the applicable designated entity provisions, including the establishment of *de facto* or *de jure* control; such agreements and instruments include articles of incorporation and bylaws, shareholder agreements, voting or other trust agreements, franchise agreements, and any other relevant agreements (including letters of intent), oral or written; and

- (ii) List and summarize any investor protection agreements, including rights of first refusal, supermajority clauses, options, veto rights, and rights to hire and fire employees and to appoint members to boards of directors or management committees.
- (iii) List separately and in the aggregate the gross revenues, computed in accordance with § 1.2110, for each of the following: the applicant, its affiliates, its controlling interests, and affiliates of its controlling interests; and if a consortium of small businesses, the members comprising the consortium.



**APPENDIX B****List of Parties****I. Order on Reconsideration**Petitions for Reconsideration

Alpine PCS, Inc., *et al.* ("Alpine PCS")  
Community Teleplay, Inc. ("CTI")  
DiGiPH PCS, Inc. ("DiGiPH")  
Loli, Inc. *et al.* ("Loli")  
NextWave Telecom Inc. ("NextWave")

Petition for Limited Reconsideration and Clarification

CONXUS Communications, Inc. ("CONXUS")

Petition for Partial Reconsideration

Houston 936 SMR, Inc. ("Houston 936")

Comments

Bellingham Corporation and Pueblo Communications, Inc. ("Bellingham")  
In-Sync Interactive/Akron, Inc. *et al.* ("In-Sync")

Comments on Section 1.2112 Filed in Universal Licensing System Proceeding

Comments of AT&T Wireless Services, Inc. ("AT&T")  
Comments of Bell Atlantic Mobile, Inc. ("BAM")  
Comments of The Federal Communications Bar Association ("FCBA")  
Reply Comments of The Federal Communications Bar Association

**II. Fifth Report and Order**Comments

AmeriCall International, LLC ("AmeriCall")  
Cook Inlet Region, Inc. ("CIRI")  
National Telephone Cooperative Association ("NTCA")  
NextWave Telecom Inc. ("NextWave")  
Rural Telecommunications Group ("RTG")  
Western Wireless Corporation ("Western")

Reply Comments

Western Wireless Corporation ("Western")

Ex Parte Filing

Small Business Administration

## APPENDIX C

## SUPPLEMENTAL FINAL REGULATORY FLEXIBILITY ANALYSIS

## (ORDER ON RECONSIDERATION)

1. As required by the Regulatory Flexibility Act (RFA),<sup>1</sup> an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Notice of Proposed Rulemaking* in WT Docket No. 97-82.<sup>2</sup> The Commission sought written public comment on the proposals in the *Notice of Proposed Rulemaking*, including comment on the IRFA. A Final Regulatory Flexibility Analysis (FRFA) was incorporated in the report and order section of the *Third Report and Order and Second Further Notice of Proposed Rule Making* ("Part 1 Third Report and Order" and "Second Notice").<sup>3</sup> The Commission received seven petitions for reconsideration in response to the *Part 1 Third Report and Order* and two comments in support of the petitions for reconsideration. This supplemental FRFA analyzes the modifications adopted in response to those petitions and comments, and conforms to the RFA.<sup>4</sup>

**F. Need for, and Objectives of, This Order on Reconsideration.**

2. This *Order on Reconsideration of the Third Report and Order* ("Order on Reconsideration") amends and clarifies the Commission's general competitive bidding rules for all auctionable services. Specifically, the Commission clarifies that the prohibition on collusion begins on the filing deadline for short-form applications and ends on the down payment deadline. In addition, the Commission clarifies and corrects the ownership disclosure requirements. With respect to entities not seeking designated entity status, we eliminate the requirement to include debt and instruments such as warrants, convertible debentures, options and other debt interests in reporting their ownership interests. The Commission also amends its rules to clarify that in the case of multiple bid withdrawals on a single license, within the same or subsequent auction(s), the payment for each bid withdrawal will be calculated based on the sequence of bid withdrawals and the amounts withdrawn. The Commission further amends its rules to provide that in instances in which bids have been withdrawn on a license that is not won in the same auction, the Commission will assess an interim withdrawal payment equal to 3 percent of the amount of the bid withdrawals. In addition, the Commission retains, for the most part, the installment payment grace period and late payment fee provisions adopted in the *Part 1 Third Report and Order*, but adopts a slight modification to the payment due dates for late installment payments and associated late fees. The Commission also concludes that licensees defaulting on installment payments are subject to the default provisions of Section 1.2110(f)(4) of our rules (redesignated herein as § 1.2110(g)(4)) and not to Section 1.2104(g).<sup>5</sup> The Commission incorporates into the Part 1 general competitive bidding rules the "former defaulter" policies adopted with respect to C block auction applicants. The Commission clarifies the circumstances under which installment payment defaulters will be eligible to participate in future auctions. Finally, this *Order on Reconsideration* makes a number of clarifications with respect to the

<sup>1</sup> 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 CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

<sup>2</sup> Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Proceeding, WT Docket No. 97-82, *Order, Memorandum Opinion and Order, and Notice of Proposed Rulemaking*, 12 FCC Rcd 5686, 5749 (1997).

<sup>3</sup> *Third Report and Order and Second Further Notice of Proposed Rulemaking*, 13 FCC Rcd 374, 492 ("Part 1 Third Report and Order" and "Second Notice") (Appendix B) (1997).

<sup>4</sup> See 5 U.S.C. § 604.

<sup>5</sup> 47 C.F.R. §§ 1.2110(f)(4) (redesignated herein as § 1.2110(g)(4)), 1.2104(g).

restructuring of installment payments, the assignment and transfer of licenses paid for through installment payments, and the unjust enrichment rules for bidding credits.

3. These amendments and clarifications are intended to simplify the Commission's general competitive bidding rules, increase the efficiency of the competitive bidding process, and provide more specific guidance to auction participants.

**G. Summary of Significant Issues Raised by Public Comment in Response to the FRFA Contained in The *Part 1 Third Report and Order*.**

4. No petitions for reconsideration directly addressed the FRFA contained in the *Part 1 Third Report and Order*.<sup>6</sup> The Commission, however, did receive petitions for reconsideration of the *Part 1 Third Report and Order* that addressed issues affecting small businesses. In particular, the Commission received petitions opposing various aspects of the installment payment grace period and late payment fee provisions adopted in the *Part 1 Third Report and Order*.<sup>7</sup> The *Order on Reconsideration* addresses petitioners' arguments and concludes that the revised late payment rules relating to the submission of installment payments are not commercially unreasonable, do not constitute impermissible retroactive rulemaking, and do not violate basic contract principles.<sup>8</sup> The Commission further determines that the modified grace period and late payment fee provisions apply to 900 MHz SMR and MDS licensees that have signed Promissory Notes and Security Agreements.<sup>9</sup> In addition, the Commission adopts a slight modification to the payment due dates for late installment payments and associated late fees in order to avoid any confusion as to when such payments are due.<sup>10</sup> The Commission clarifies that, despite amendments to the installment payment rules, licensees in the installment payment program continue to have the opportunity to seek restructuring of installment payments.<sup>11</sup> The Commission notes, however, that there is no longer a procedure for requesting a grace period to stay installment payment deadlines pending such restructuring.<sup>12</sup> Rather, licensees will be subject to the automatic late payment provisions of Section 1.2110(g) of the Commission's rules as adopted in this *Order on Reconsideration*. The Commission further clarifies in response to comments that the assignee or transferee of a license paid for through installment payments is not responsible for the license debt until the assignment of license or transfer of control has been consummated.<sup>13</sup> Also in response to requests for clarification, the Commission clarifies that the unjust enrichment rules for bidding credits do not apply to assignments and transfers of C and F block licenses to non-entrepreneurs.<sup>14</sup>

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<sup>6</sup> One party, Merlin Telecom, Inc., filed comments in response to the IRFA. These comments were addressed in the FRFA contained in the *Part 1 Third Report and Order*. See *Part 1 Third Report and Order*, 13 FCC Rcd at 492 (Appendix B).

<sup>7</sup> See *Part 1 Third Report and Order*, 13 FCC Rcd at 434-442, ¶¶ 103-113.

<sup>8</sup> See *supra* ¶¶ 16-28.

<sup>9</sup> See *supra* ¶ 26.

<sup>10</sup> See *supra* ¶¶ 27-28.

<sup>11</sup> See *supra* ¶¶ 29-30.

<sup>12</sup> *Id.*

<sup>13</sup> See *supra* ¶¶ 31-33.

<sup>14</sup> See *supra* ¶¶ 34-37.

## H. Description and Estimate of the Number of Small Entities to Which Rules will Apply.

5. The Commission is required 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.<sup>15</sup> The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."<sup>16</sup> In addition, the term "small business" has the same meaning as the term "small business concern", under Section 3 of the Small Business Act, unless the Commission has developed one or more definitions that are appropriate for its activities.<sup>17</sup> Under the Small Business Act, a "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) meets any additional criteria established by the Small Business Administration (SBA).<sup>18</sup> A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."<sup>19</sup> Nationwide, as of 1992, there were approximately 275,801 small organizations.<sup>20</sup> "Small governmental jurisdiction" generally means "governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000."<sup>21</sup> As of 1992, there were approximately 85,006 such jurisdictions in the United States.<sup>22</sup> This number includes 38,978 counties, cities and towns; of these, 37,566, or 96 percent, have populations of fewer than 50,000.<sup>23</sup> The Census Bureau estimates that this ratio is approximately accurate for all governmental entities. Thus, of the 85,006 governmental entities, we estimate that 81,600 (96 percent) are small entities. Nationwide, there are 4.44 million small business firms, according to SBA reporting data.<sup>24</sup>

6. The rules adopted in this *Order on Reconsideration* apply to all entities, including small entities, seeking to obtain licenses in auctionable services through competitive bidding. These rules generally apply to future auctions. In estimating the number of small entities that may participate in future auctions of radio services, we anticipate that current radio services licensees are representative of future auction participants. The following is our estimate of the number of small entities that are current radio licensees:

*Cellular Licensees.* Neither the Commission nor the SBA has developed a definition of small entities applicable to cellular licensees. Therefore, the applicable definition of small entity is the definition under

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<sup>15</sup> 5 U.S.C. § 603(b)(3).

<sup>16</sup> 5 U.S.C. § 601(6).

<sup>17</sup> 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632).

<sup>18</sup> 15 U.S.C. § 632.

<sup>19</sup> 5 U.S.C. § 601(4).

<sup>20</sup> 1992 Economic Census, U.S. Bureau of the Census, Table 6 (special tabulation of data under contract to Office of Advocacy of the U.S. Small Business Administration).

<sup>21</sup> 5 U.S.C. § 601(5).

<sup>22</sup> U.S. Dept. of Commerce, Bureau of the Census, "1992 Census of Governments."

<sup>23</sup> *Id.*

<sup>24</sup> See 1992 Economic Census, U.S. Bureau of the Census, Table 6 (special tabulation of data under contract to Office of Advocacy of the U.S. Small Business Administration).

the SBA rules applicable to radiotelephone (wireless) companies. This definition provides that a small entity is a radiotelephone company employing no more than 1,500 persons.<sup>25</sup> According to the Bureau of the Census, only 12 radiotelephone firms out of a total of 1,178 such firms that operated during 1992 had 1,000 or more employees.<sup>26</sup> Therefore, even if all 12 of these firms were cellular telephone companies, nearly all cellular carriers were small businesses under the SBA's definition. In addition, we note that there are 1,758 cellular licenses; however, we do not know the number of cellular licensees, since a cellular licensee may own several licenses. The most reliable source of information regarding the number of cellular service providers nationwide appears to be data the Commission publishes annually in its *Telecommunications Industry Revenue* report, regarding the Telecommunications Relay Service (TRS). The report places cellular licensees and Personal Communications Service (PCS) licensees in one group. According to the most recent *Telecommunications Industry Revenue* data, 808 carriers reported that they were engaged in the provision of either cellular service or Personal Communications Service (PCS) services.<sup>27</sup> We do not have data specifying the number of these carriers that are not independently owned and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of cellular service carriers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are no more than 808 small cellular service carriers.

*220 MHz Radio Service -- Phase I Licensees.* The 220 MHz service has both Phase I and Phase II licenses. Phase I licensing was conducted by lotteries in 1992 and 1993. There are approximately 1,515 such non-nationwide licensees and four nationwide licensees currently authorized to operate in the 220 MHz band. The Commission has not developed a definition of small entities specifically applicable to such incumbent 220 MHz Phase I licensees. To estimate the number of such licensees that are small businesses, we apply the definition under the SBA rules applicable to radiotelephone communications companies. This definition provides that a small entity is a radiotelephone company employing no more than 1,500 persons.<sup>28</sup> According to a 1995 estimate by the Bureau of the Census, only 12 radiotelephone firms out of a total of 1,178 such firms that operated during 1992 had 1,000 or more employees.<sup>29</sup> Therefore, assuming this general ratio has not changed significantly in recent years in the context of Phase I 220 MHz licensees, we estimate that nearly all such licensees are small businesses under the SBA's definition.

*220 MHz Radio Service -- Phase II Licensees.* The Phase II 220 MHz service is a new service, and is subject to spectrum auctions. In the 220 MHz *Third Report and Order*, we adopted criteria for defining small businesses and very small businesses for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.<sup>30</sup> We have defined a small business as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding

<sup>25</sup> 13 C.F.R. § 121.201, SIC code 4812.

<sup>26</sup> U.S. Bureau of the Census, U.S. Department of Commerce, 1992 Census of Transportation, Communications, and Utilities, UC92-S-1, Subject Series, Establishment and Firm Size, Table 5, Employment Size of Firms: 1992, SIC Code 4812 (issued May 1995).

<sup>27</sup> *Trends in Telephone Service*, Table 19.3 (March 2000).

<sup>28</sup> 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) code 4812.

<sup>29</sup> U.S. Bureau of the Census, U.S. Department of Commerce, 1992 Census of Transportation, Communications, and Utilities, UC92-S-1, Subject Series, Establishment and Firm Size, Table 5, Employment Size of Firms; 1992, SIC code 4812 (issued May 1995).

<sup>30</sup> 220 MHz Third Report and Order, 12 FCC Rcd 10943, 11068-70, ¶¶ 291- 295 (1997).

\$15 million for the preceding three years. Additionally, a very small business is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$3 million for the preceding three years.<sup>31</sup> The SBA has approved these definitions.<sup>32</sup> An auction of Phase II licenses commenced on September 15, 1998, and closed on October 22, 1998.<sup>33</sup> Nine hundred and eight (908) licenses were auctioned in 3 different-sized geographic areas: three nationwide licenses, 30 Regional Economic Area Group ("REAG") licenses, and 875 Economic Area (EA) licenses. Of the 908 licenses auctioned, 693 were sold. Companies claiming small business status won: 1 of the Nationwide licenses, 67% of the Regional licenses, 47% of the REAG licenses and 54% of the EA licenses. As of January 22, 1999, the Commission announced that it was prepared to grant 654 of the Phase II licenses won at auction.<sup>34</sup> A second 220 MHz Radio Service auction began on June 8, 1999 and closed on June 30, 1999. This auction offered 225 licenses in 87 EAs and four REAGs. (A total of 9 REAG licenses and 216 EA licenses. No nationwide licenses were available in this auction.) Of the 215 EA licenses won, 153 EA licenses (71%) were won by bidders claiming small business status. Of the 7 REAG licenses won, 5 REAG licenses (71%) were won by bidders claiming small business status.

*Private and Common Carrier Paging.* The Commission has adopted a two-tier definition of small businesses in the context of auctioning licenses in the Common Carrier Paging and exclusive Private Carrier Paging services. A small business will be defined as either (1) an entity that, together with its affiliates and controlling principals, has average gross revenues for the three preceding years of not more than \$3 million, or (2) an entity that, together with affiliates and controlling principals, has average gross revenues for the three preceding calendar years of not more than \$15 million. Because the SBA has not yet approved this definition for paging services, we will utilize the SBA's definition applicable to radiotelephone companies, *i.e.*, an entity employing no more than 1,500 persons.<sup>35</sup> At present, there are approximately 24,000 Private Paging licenses and 74,000 Common Carrier Paging licenses. According to the most recent *Telecommunications Industry Revenue* data, 172 carriers reported that they were engaged in the provision of either paging or "other mobile" services, which are placed together in the data.<sup>36</sup> We do not have data specifying the number of these carriers that are not independently owned and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of paging carriers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are no more than 172 small paging carriers. We estimate that the majority of private and common carrier paging providers would qualify as small entities under the SBA definition.

*Mobile Service Carriers.* Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to mobile service carriers, such as paging companies. As noted above in the section concerning paging service carriers, the closest applicable definition under the SBA rules is that

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<sup>31</sup> 220 MHz Third Report and Order, 12 FCC Rcd at 11068-69, ¶ 291.

<sup>32</sup> See Letter from A. Alvarez, Administrator, SBA, to D. Phythyon, Chief, Wireless Telecommunications Bureau, FCC (Jan. 6, 1998).

<sup>33</sup> See generally Public Notice, "220 MHz Service Auction Closes," Report No. WT 98-36 (Wireless Telecom. Bur. Oct. 23, 1998).

<sup>34</sup> Public Notice, "FCC Announces It is Prepared to Grant 654 Phase II 220 MHz Licenses After Final Payment is Made," Report No. AUC-18-H, DA No. 99-229 (Wireless Telecom. Bur., rel. Jan. 22, 1999).

<sup>35</sup> 13 C.F.R. § 121.201, SIC code 4812.

<sup>36</sup> *Trends in Telephone Service*, Table 19.3 (Feb. 19, 1999).

for radiotelephone (wireless) companies,<sup>37</sup> and the most recent *Telecommunications Industry Revenue* data shows that 172 carriers reported that they were engaged in the provision of either paging or "other mobile" services.<sup>38</sup> Consequently, we estimate that there are no more than 172 small mobile service carriers.

*Broadband Personal Communications Service (PCS).* The broadband PCS spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission defined "small entity" for blocks C and F as an entity that has average gross revenues of less than \$40 million in the three previous calendar years.<sup>39</sup> For block F, an additional classification for "very small business" was added and is defined as an entity that, together with their affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.<sup>40</sup> These regulations defining "small entity" in the context of broadband PCS auctions have been approved by the SBA.<sup>41</sup> No small businesses within the SBA-approved definition bid successfully for licenses in blocks A and B. There were 90 winning bidders that qualified as small entities in the C block auctions. A total of 93 small and very small business bidders won approximately 40% of the 1,479 licenses for blocks D, E, and F.<sup>42</sup> On March 23, 1999, the Commission held another auction (Auction No. 22) of C, D, E, and F block licenses for PCS spectrum returned to the Commission by previous license holders. In that auction, 48 bidders claiming small business, very small business or entrepreneurial status won 272 of the 341 licenses (80%) offered. Based on this information, we conclude that the number of small broadband PCS licensees includes the 90 winning C block bidders, the 93 qualifying bidders in the D, E, and F blocks, and the 48 winning bidders from Auction No. 22, for a total of 231 small entity PCS providers as defined by the SBA and the Commission's auction rules.

*Narrowband PCS.* The Commission has auctioned nationwide and regional licenses for narrowband PCS. There are 11 nationwide and 30 regional licensees for narrowband PCS. The Commission does not have sufficient information to determine whether any of these licensees are small businesses within the SBA-approved definition for radiotelephone companies. At present, there have been no auctions held for the major trading area (MTA) and basic trading area (BTA) narrowband PCS licenses. The Commission anticipates a total of 561 MTA licenses and 2,958 BTA licenses will be awarded by auction. Such auctions, however, have not yet been scheduled. Given that nearly all radiotelephone companies have no more than 1,500 employees and that no reliable estimate of the number of prospective MTA and BTA narrowband licensees can be made, we assume, for our purposes here, that all of the licenses will be awarded to small entities, as that term is defined by the SBA.

<sup>37</sup> 13 C.F.R. § 121.201, SIC code 4812.

<sup>38</sup> *Trends in Telephone Service*, Table 19.3 (February 19, 1999).

<sup>39</sup> *See Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, Report and Order*, FCC 96-278, WT Docket No. 96-59, ¶¶ 57-60 (released Jun. 24, 1996), 61 FR 33859 (Jul. 1, 1996); *see also* 47 C.F.R. § 24.720(b).

<sup>40</sup> *See Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, Report and Order*, FCC 96-278, WT Docket No. 96-59, ¶ 60 (1996), 61 FR 33859 (Jul. 1, 1996).

<sup>41</sup> *See, e.g., Implementation of Section 309(j) of the Communications Act -- Competitive Bidding*, PP Docket No. 93-253, *Fifth Report and Order*, 9 FCC Rcd 5532, 5581-84 (1994).

<sup>42</sup> FCC News, *Broadband PCS, D, E and F Block Auction Closes*, No. 71744 (rel. Jan. 14, 1997).

*Rural Radiotelephone Service.* The Commission has not adopted a definition of small entity specific to the Rural Radiotelephone Service.<sup>43</sup> A significant subset of the Rural Radiotelephone Service is the Basic Exchange Telephone Radio Systems (BETRS).<sup>44</sup> We will use the SBA's definition applicable to radiotelephone companies, *i.e.*, an entity employing no more than 1,500 persons.<sup>45</sup> There are approximately 1,000 licensees in the Rural Radiotelephone Service, and we estimate that almost all of them qualify as small entities under the SBA's definition.

*Air-Ground Radiotelephone Service.* The Commission has not adopted a definition of small entity specific to the Air-Ground Radiotelephone Service.<sup>46</sup> Accordingly, we will use the SBA's definition applicable to radiotelephone companies, *i.e.*, an entity employing no more than 1,500 persons.<sup>47</sup> There are approximately 100 licensees in the Air-Ground Radiotelephone Service, and we estimate that almost all of them qualify as small under the SBA definition.

*Specialized Mobile Radio (SMR).* The Commission awards bidding credits in auctions for geographic area 800 MHz and 900 MHz SMR licenses to two tiers of firms: (1) "small entities," those with revenues of no more than \$15 million in each of the three previous calendar years; and (2) "very small entities," those with revenues of no more than \$3 million in each of the three previous calendar years. The regulations defining "small entity" and "very small entity" in the context of 800 MHz SMR (upper 10 MHz and lower 230 channels) and 900 MHz SMR have been approved by the SBA. The Commission does not know how many firms provide 800 MHz or 900 MHz geographic area SMR service pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than \$15 million. One firm has over \$15 million in revenues. We assume, for our purposes here, that all of the remaining existing extended implementation authorizations are held by small entities, as that term is defined by the SBA. The Commission has held auctions for geographic area licenses in the 800 MHz (upper 10 MHz) and 900 MHz SMR bands. There were 60 winning bidders that qualified as small and very small entities in the 900 MHz auction. Of the 1,020 licenses won in the 900 MHz auction, 263 licenses were won by bidders qualifying as small and very small entities. In the 800 MHz SMR auction, 38 of the 524 licenses won were won by small and very small entities.

*Private Land Mobile Radio (PLMR).* PLMR systems serve an essential role in a range of industrial, business, land transportation, and public safety activities. These radios are used by companies of all sizes operating in all U.S. business categories. The Commission has not developed a definition of small entity specifically applicable to PLMR licensees due to the vast array of PLMR users. For the purpose of determining whether a licensee is a small business as defined by the SBA, each licensee would need to be evaluated within its own business area. The Commission is unable at this time to estimate the number of small businesses that could be affected by the rules. However, the Commission's 1994 Annual Report on PLMRs<sup>48</sup> indicates that at the end of fiscal year 1994 there were 1,087,267 licensees operating 12,481,989 transmitters in the PLMR bands below 512 MHz. Any entity engaged in a commercial activity is eligible to hold a PLMR license. Therefore, these rules could potentially affect every small business in the United States if PLMR licenses are subject to auction.

<sup>43</sup> The service is defined in § 22.99 of the Commission's Rules, 47 C.F.R. § 22.99.

<sup>44</sup> BETRS is defined in §§ 22.757 and 22.759 of the Commission's Rules, 47 C.F.R. §§ 22.757 and 22.759.

<sup>45</sup> 13 C.F.R. 121.201, SIC code 4812.

<sup>46</sup> The service is defined in § 22.99 of the Commission's Rules, 47 C.F.R. § 22.99.

<sup>47</sup> 13 C.F.R. § 121.201, SIC code 4812.

<sup>48</sup> Federal Communications Commission, *60th Annual Report, Fiscal Year 1994*, at 116.



*Amateur Radio Service.* We estimate that 8,000 applicants will apply for vanity call signs in FY 2000. All are presumed to be individuals.

*Aviation and Marine Radio Service.* Small businesses in the aviation and marine radio services use a marine very high frequency (VHF) radio, any type of emergency position indicating radio beacon (EPIRB) and/or radar, a VHF aircraft radio, and/or any type of emergency locator transmitter (ELT). The Commission has not developed a definition of small entities specifically applicable to these small businesses. Therefore, the applicable definition of small entity is the definition under the SBA rules for radiotelephone communications.<sup>49</sup> Most applicants for recreational licenses are individuals. Approximately 581,000 ship station licensees and 131,000 aircraft station licensees operate domestically and are not subject to the radio carriage requirements of any statute or treaty. Therefore, for purposes of our evaluations and conclusions here, we estimate that there may be at least 712,000 potential licensees that are individuals or small entities, as that term is defined by the SBA.

*Marine Coast Service.* Between December 3, 1998 and December 14, 1998, the Commission held an auction of 42 VHF Public Coast licenses in the 157.1875-157.4500 MHz (ship transmit) and 161.775-162.0125 MHz (coast transmit) bands. For purposes of this auction, and for future public coast auctions, the Commission defines a "small" business as an entity that, together with controlling interests and affiliates, has average gross revenues for the preceding three years not to exceed \$15 million dollars. A "very small" business is one that, together with controlling interests and affiliates, has average gross revenues for the preceding three years not to exceed \$3 million dollars.<sup>50</sup> There are approximately 10,672 licensees in the Marine Coast Service, and the Commission estimates that almost all of them qualify as "small" businesses under the Commission's definition, which has been approved by the SBA.

*Location and Monitoring Service (LMS).* The SBA has not developed a definition of small entities specifically applicable to LMS licensees. Therefore, the applicable definition under SBA rules of a small entity is the definition under the rules applicable to radiotelephone (wireless) companies. This provides that a small entity is a radiotelephone company employing no more than 1,500 persons.<sup>51</sup> According to the Bureau of the Census, only twelve radiotelephone firms out of a total of 1,178 such firms which operated during 1992 had 1,000 or more employees.<sup>52</sup> Therefore, using such data, even if all twelve of these firms were LMS companies, nearly all such carriers were small businesses under the SBA's definition. As a practical matter, there are only a handful of existing LMS licensees -- those being those licensed under the former Automatic Vehicle Monitoring service.

*Fixed Microwave Services.* Microwave services include common carrier,<sup>53</sup> private-operational fixed,<sup>54</sup> and broadcast auxiliary radio services.<sup>55</sup> At present, there are approximately 22,015 common carrier fixed

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<sup>49</sup> 13 C.F.R. § 121.201, SIC code 4812.

<sup>50</sup> Amendment of the Commission's Rules Concerning Maritime Communications, *Third Report and Order and Memorandum Opinion and Order* (rel. July 9, 1998) PR Docket No. 92-257, FCC 98-151

<sup>51</sup> 13 C.F.R. § 121.201, SIC code 4812.

<sup>52</sup> *1992 Census, Series UC92-S-1*, at Table 5, SIC code 4812.

<sup>53</sup> 47 C.F.R. §§ 101 *et seq.* (formerly, part 21 of the Commission's Rules).

<sup>54</sup> Persons eligible under parts 80 and 90 of the Commission's rules can use Private Operational-Fixed Microwave services. See 47 C.F.R. parts 80 and 90. Stations in this service are called operational-fixed to distinguish them (continued....)

licensees and 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. The Commission has not yet defined a small business with respect to microwave services. For our purposes here, we will utilize the SBA's definition applicable to radiotelephone companies -- *i.e.*, an entity with no more than 1,500 persons.<sup>56</sup> Under this definition, we estimate that all of the Fixed Microwave licensees (excluding broadcast auxiliary licensees) would qualify as small entities.

*Local Multipoint Distribution Service.* The Commission held two auctions for licenses in the Local Multipoint Distribution Services (LMDS) (Auction No. 17 and Auction No. 23). For both of these auctions, the Commission defined a small business as an entity, together with its affiliates and controlling principals, having average gross revenues for the three preceding years of no more than \$15 million but not more than \$40 million. A very small business was defined as an entity, together with affiliates and controlling principals, having average gross revenues for the three preceding years of not more than \$15 million. Of the 144 winning bidders in Auction Nos. 17 and 23, 125 bidders (87%) were small or very small businesses.

*24 GHz -- Incumbent 24 GHz Licensees.* The rules we are adopting today may affect incumbent licensees who were relocated to the 24 GHz band from the 18 GHz band, and applicants who wish to provide services in the 24 GHz band. The Commission has not developed a definition of small entities applicable to licensees in the 24 GHz band. Therefore, the applicable definition of small entity is the definition under the SBA rules for the radiotelephone industry that provides that a small entity is a radiotelephone company employing fewer than 1,500 persons.<sup>57</sup> The 1992 Census of Transportation, Communications, and Utilities, conducted by the Bureau of the Census, which is the most recent information available, shows that only 12 radiotelephone firms out of a total of 1,178 such firms that operated during 1992 had 1,000 or more employees.<sup>58</sup> This information notwithstanding, we believe that there are only two licensees in the 24 GHz band that were relocated from the 18 GHz band, Teligent and TRW, Inc.<sup>59</sup> Both Teligent and TRW appear to have more than 1,500 employees. Therefore, it appears that no incumbent licensee in the 24 GHz band is a small business entity.

*Future 24 GHz Licensees.* The proposals also affect potential new licensees on the 24 GHz band. Pursuant to 47 C.F.R. § 24.720(b), the Commission has defined "small business" for Blocks C and F broadband PCS licensees as firms that had average gross revenues of less than \$40 million in the three

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from common carrier and public fixed stations. Only the licensee may use the operational-fixed station, and only for communications related to the licensee's commercial, industrial, or safety operations.

<sup>55</sup> Auxiliary Microwave Service is governed by part 74 of Title 47 of the Commission's Rules. See 47 C.F.R. 74 *et seq.* Available to licensees of broadcast stations and to broadcast and cable network entities, broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes mobile TV pickups, which relay signals from a remote location back to the studio.

<sup>56</sup> 13 C.F.R. § 121.201, SIC 4812.

<sup>57</sup> See 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) Code 4812.

<sup>58</sup> U.S. Bureau of the Census, U.S. Department of Commerce, 1992 Census of Transportation, Communications, and Utilities, UC92-S-1, Subject Series, Establishment and Firm Size, Table 5, Employment Size of Firms: 1992, SIC Code 4812 (issued May 1995).

<sup>59</sup> Teligent has acquired the DEMS licenses of FirstMark, the only other licensee in the 24 GHz band whose license has been modified to require relocation to the 24 GHz band.

previous calendar years. This regulation defining “small business” in the context of broadband PCS auctions has been approved by the SBA.<sup>60</sup> With respect to new applicants in the 24 GHz band, we shall use this definition of “small business” and apply it to the 24 GHz band under the name “entrepreneur.” With regard to “small business,” we shall adopt the definition of “very small business” used for 39 GHz licenses and PCS C and F block licenses: businesses with average annual gross revenues for the three preceding years not in excess of \$15 million. Finally, “very small business” in the 24 GHz band shall be defined as an entity with average gross revenues not to exceed \$3 million for the preceding three years. The Commission will not know how many licensees will be small or very small businesses until the auction, if required, is held. Even after that, the Commission will not know how many licensees will partition their license areas or disaggregate their spectrum blocks, if partitioning and disaggregation are allowed.

39 GHz. The Commission held an auction (Auction No. 30) for fixed point-to-point microwave licenses in the 38.6 to 40.0 GHz band (39 GHz Band).<sup>61</sup> For this auction, the Commission defined a small business as an entity, together with affiliates and controlling interests, having average gross revenues for the three preceding years of not more than \$40 million. A very small business was defined as an entity, together with affiliates and controlling principals, having average gross revenues for the three preceding years of not more than \$15 million. The SBA has approved these definitions.<sup>62</sup> Of the 29 winning bidders in Auction No. 30, 18 bidders (62%) were small business participants.

*Multipoint Distribution Service (MDS).* This service involves a variety of transmitters, which are used to relay data and programming to the home or office, similar to that provided by cable television systems.<sup>63</sup> In connection with the 1996 MDS auction, the Commission defined small businesses as entities that had annual average gross revenues for the three preceding years not in excess of \$40 million.<sup>64</sup> This definition of a small entity in the context of MDS auctions has been approved by the SBA.<sup>65</sup> These stations were licensed prior to implementation of Section 309(j) of the Communications Act of 1934, as amended.<sup>66</sup> Licenses for new MDS facilities are now awarded to auction winners in Basic Trading Areas (BTAs) and BTA-like areas.<sup>67</sup> The MDS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 BTAs. Of the 67 auction winners, 61 meet the definition of a small business.

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<sup>60</sup> See Implementation of Section 309(j) of the Communications Act — Competitive Bidding, Fifth Report and Order, 9 FCC Rcd 5532, 5581-82 ¶ 115 (1994).

<sup>61</sup> See 39 GHz Band Auction Closes; Winning Bidders of 2,173 Licenses Announced, *Public Notice*, DA 00-1035 (rel. May 10, 2000).

<sup>62</sup> See Letter to Ms. Kathleen O’Brien Ham, Chief, Auction and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, U.S. Small Business Administration, dated February 4, 1998.

<sup>63</sup> For purposes of this item, MDS includes both the single channel Multipoint Distribution Service (MDS) and the Multichannel Multipoint Distribution Service (MMDS).

<sup>64</sup> 47 CFR 1.2110 (a)(1).

<sup>65</sup> Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act - Competitive Bidding, 10 FCC Rcd 9589 (1995), 60 FR 36524 (Jul. 17, 1995).

<sup>66</sup> 47 U.S.C. 309(j).

<sup>67</sup> *Id.* A Basic Trading Area (BTA) is the geographic area by which the Multipoint Distribution Service is licensed. See Rand McNally 1992 *Commercial Atlas and Marketing Guide*, 123rd Edition, pp. 36-39.

MDS is also heavily encumbered with licensees of stations authorized prior to the MDS auction. SBA has developed a definition of small entities for pay television services, which includes all such companies generating \$11 million or less in annual receipts.<sup>68</sup> This definition includes MDS systems, and thus applies to incumbent MDS licensees and wireless cable operators which may not have participated or been successful in the MDS auction. Information available to us indicates that there are 832 of these licensees and operators that do not generate revenue in excess of \$11 million annually. Therefore, for purposes of this analysis, we find there are approximately 892 small MDS providers as defined by the SBA and the Commission's auction rules.

*Public Safety Radio Services.* Public Safety radio services include police, fire, local government, forestry conservation, highway maintenance, and emergency medical services.<sup>69</sup> There are a total of approximately 127,540 licensees within these services. Governmental entities<sup>70</sup> as well as private businesses comprise the licensees for these services. As noted above, governmental entities with populations of less than 50,000 fall within the SBA definition of a small entity.<sup>71</sup> There are 85,006 governmental entities in the nation, as of the last census.<sup>72</sup> This number includes such entities as states, counties, cities, utility districts, and school districts. There are no figures available on what portion of this number has populations of fewer than 50,000; however, this number includes 38,978 counties, cities, and towns and of those, 37,566 or 96 percent, have populations of fewer than 50,000.<sup>73</sup> The Census Bureau estimates that this ratio is approximately accurate for all governmental entities. Thus, of the 85,006 governmental entities, the Commission estimates that 96 percent or 81,600 are small entities that may be affected by our rules.

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<sup>68</sup> 13 C.F.R. §121.201.

<sup>69</sup> With the exception of the special emergency service, these services are governed by Subpart B of part 90 of the Commission's Rules, 47 C.F.R. §§ 90.15 through 90.27. The police service includes 26,608 licensees that serve state, county, and municipal enforcement through telephony (voice), telegraphy (code) and teletype and facsimile (printed material). The fire radio service includes 22,677 licensees comprised of private volunteer or professional fire companies as well as units under governmental control. The local government service that is presently comprised of 40,512 licensees that are state, county, or municipal entities that use the radio for official purposes not covered by other public safety services. There are 7,325 licensees within the forestry service, which is comprised of licensees from state departments of conservation and private forest organizations who set up communications networks among fire lookout towers and ground crews. The 9,480 state and local governments are licensed to highway maintenance service provide emergency and routine communications to aid other public safety services to keep main roads safe for vehicular traffic. The 1,460 licensees in the Emergency Medical Radio Service (EMRS) use the 39 channels allocated to this service for emergency medical service communications related to the delivery of emergency medical treatment. 47 C.F.R. §§ 90.15 through 90.27. The 19,478 licensees in the special emergency service include medical services, rescue organizations, veterinarians, handicapped persons, disaster relief organizations, school buses, beach patrols, establishments in isolated areas, communications standby facilities, and emergency repair of public communications facilities. 47 C.F.R. §§ 90.33 through 90.55.

<sup>70</sup> 47 C.F.R. § 1.1162.

<sup>71</sup> 5 U.S.C. § 601(5).

<sup>72</sup> 1992 Census of Governments, Bureau of the Census, U.S. Department of Commerce.

<sup>73</sup> *Id.*

*Offshore Radiotelephone Service.* This service operates on several UHF TV broadcast channels that are not used for TV broadcasting in the coastal area of the states bordering the Gulf of Mexico.<sup>74</sup> At present, there are approximately 55 licensees in this service. We are unable at this time to estimate the number of licensees that would qualify as small under the SBA's definition for radiotelephone communications.

*Wireless Communications Services.* This service can be used for fixed, mobile, radio-location and digital audio broadcasting satellite uses. The Commission defined "small business" for the wireless communications services (WCS) auction as an entity with average gross revenues of \$40 million for each of the three preceding years, and a "very small business" as an entity with average gross revenues of \$15 million for each of the three preceding years. The Commission auctioned geographic area licenses in the WCS service. In the auction, there were seven winning bidders that qualified as very small business entities and one winning bidder that qualified as a small business entity. We conclude that the number of geographic area WCS licensees affected includes these eight entities.

*General Wireless Communication Service.* This service was created by the Commission on July 31, 1995<sup>75</sup> by transferring 25 MHz of spectrum in the 4660-4685 MHz band from the federal government to private sector use. The Commission sought and obtained SBA approval of a refined definition of "small business" for GWCS in this band.<sup>76</sup> According to this definition, a small business is any entity, together with its affiliates and entities holding controlling interests in the entity, that has average annual gross revenues over the three preceding years that are not more than \$40 million.<sup>77</sup> By letter dated March 30, 1999, NTIA reclaimed the spectrum allocated to GWCS and identified alternative spectrum at 4940-4990 MHz. On February 23, 2000, the Commission released its *Notice of Proposed Rule Making* in WT Docket No. 00-32 proposing to allocate and establish licensing and service rules for the 4.9 GHz band.<sup>78</sup>

*Television Broadcasting Stations.* The SBA defines a television broadcasting station that has no more than \$10.5 million in annual receipts as a small business.<sup>79</sup> Television broadcasting stations consist of establishments primarily engaged in broadcasting visual programs by television to the public, except cable and other pay television services.<sup>80</sup> Included in this industry are commercial, religious, educational, and other television stations.<sup>81</sup> Also included are establishments primarily engaged in television broadcasting

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<sup>74</sup> This service is governed by subpart I of part 22 of the Commission's Rules. See 47 C.F.R. §§ 22.1001 through 22.1037.

<sup>75</sup> See *Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use*, ET Docket No. 94-32, *Second Report and Order*, 11 FCC Rcd 624 (1995).

<sup>76</sup> See Letter to Daniel B. Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, U.S. Small Business Administration, dated May 19, 1998.

<sup>77</sup> See 47 C.F.R. § 26.4.

<sup>78</sup> See *In the Matter of the 4.9 GHz Band Transferred From Federal Government Use, Notice of Proposed Rule Making*, WT Docket No. 00-32, 15 FCC Rcd 4778 (2000).

<sup>79</sup> 13 C.F.R. § 121.201, Standard Industrial Code (SIC) 4833 (1996).

<sup>80</sup> Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, 1992 Census of Transportation, Communications and Utilities, Establishment and Firm Size, Series UC92-S-1, Appendix A-9 (1995).

<sup>81</sup> *Id.* See Executive Office of the President, Office of Management and Budget, Standard Industrial Classification Manual (1987), at 283, which describes Television Broadcasting Stations (SIC Code 4833) as: Establishments primarily engaged in broadcasting visual programs by television to the public, except cable and other pay television services. Included in this industry are commercial, religious, educational and other television stations. Also included (continued....)

and which produce taped television program materials.<sup>82</sup> Separate establishments primarily engaged in producing taped television program materials are classified under another SIC number.<sup>83</sup>

There were 1,509 television stations operating in the nation in 1992.<sup>84</sup> That number has remained fairly steady as indicated by the approximately 1,590 operating television broadcasting stations in the nation as of January 1999.<sup>85</sup> For 1992,<sup>86</sup> the number of television stations that produced less than \$10.0 million in revenue was 1,155 establishments.<sup>87</sup> Thus, of the 1,590 television stations approximately 77%, or 1,224, of those stations are considered small businesses.<sup>88</sup> As of January 1999, 2136 low power television stations and 4921 television translator stations were also licensed,<sup>89</sup> and we believe the vast majority of these stations are small businesses. These estimates may overstate the number of small entities since the revenue figures on which they are based do not include or aggregate revenues from non-television affiliated companies.

*Radio Broadcasting Stations.* The SBA defines a radio broadcasting station that has no more than \$5 million in annual receipts as a small business.<sup>90</sup> A radio broadcasting station is an establishment primarily engaged in broadcasting aural programs by radio to the public.<sup>91</sup> Included in this industry are commercial, religious, educational and other radio stations.<sup>92</sup> Radio broadcasting stations that primarily are engaged in radio broadcasting and that produce radio program materials are similarly included.<sup>93</sup> However, radio stations that are separate establishments and are primarily engaged in producing radio program material are

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here are establishments primarily engaged in television broadcasting and which produce taped television program materials.

<sup>82</sup> Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, 1992 Census of Transportation, Communications and Utilities, Establishment and Firm Size, Series UC92-S-1, Appendix A-9 (1995).

<sup>83</sup> *Id.*; SIC 7812 (Motion Picture and Video Tape Production); SIC 7922 (Theatrical Producers and Miscellaneous Theatrical Services) (producers of live radio and television programs).

<sup>84</sup> FCC News Release No. 31327, January 13, 1993; Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, *supra* note 6, Appendix A-9.

<sup>85</sup> FCC News Release, "Broadcast Station Totals as of January 31, 1999" (rel. Feb. 18, 1999).

<sup>86</sup> Census for communications establishments are performed every five years, during years ending with a "2" or "7." See Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, *supra* note 6, III.

<sup>87</sup> The amount of \$10 million was used to estimate the number of small business establishments because the relevant census categories stopped at \$9,999,999 and began at \$10,000,000. No category for \$10.5 million existed. Thus, the number is as accurate as it is possible to calculate with the available information.

<sup>88</sup> We use the 77% figure of television stations producing less than \$10 million in revenue for 1992 and apply it to the 1999 total of 1,590 television stations to arrive at stations categorized as small businesses.

<sup>89</sup> FCC News Release, "Broadcast Station Totals as of January 31, 1999" (rel. Feb. 18, 1999).

<sup>90</sup> 13 C.F.R. § 121.201, SIC 4832.

<sup>91</sup> Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, *supra* note 6, Appendix A-9.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

classified under another SIC number.<sup>94</sup> The 1992 census indicates that 96% (5,861 of 6,127) of radio station establishments produced less than \$5 million in revenue in 1992.<sup>95</sup> Official Commission records indicate that 11,334 individual radio stations were operating in 1992.<sup>96</sup> As of January 1999, official Commission records indicate that 12,496 radio stations were operating.<sup>97</sup> We conclude that a similarly high percentage (96%) of current radio broadcasting licensees are small entities.<sup>98</sup> As of January 1999, there were also 3171 FM translator/booster stations licensed, and we believe the vast majority of these stations are small businesses. These estimates may overstate the number of small entities since the revenue figures on which they are based do not include or aggregate revenues from non-radio affiliated companies.

*Instructional Television Fixed Service (ITFS).* In addition, there are presently 2032 ITFS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions may be included in the definition of a small entity.<sup>99</sup> ITFS is a non-pay, non-commercial educational microwave service that, depending on SBA categorization, has, as small entities, entities generating either \$10.5 million or less, or \$11.0 million or less, in annual receipts.<sup>100</sup> However, we do not collect, nor are we aware of other collections of, annual revenue data for ITFS licensees. Thus, we conclude that up to 1932 of these licensees are small entities.

*Pending and Future Broadcast Applicants.* We have given the SBA broadcast size standards, *supra*. The competitive bidding procedures set forth in the *Order on Reconsideration* will affect: (1) any entity with a pending application for a construction permit for a new full service commercial radio or analog television broadcast station, if mutually exclusive applications have been filed; (2) any entity that files an application in the future for a new full service commercial radio or analog television station, if mutually exclusive applications are filed; (3) any entity with a pending application on file, or filing an application in the future, for a new low power television station, or a television or FM translator station, if mutually exclusive applications have been or are filed; (4) any entity that has a pending or future application to make a major change in an existing facility in any commercial broadcast or secondary broadcast service, if mutually exclusive applications have been or are filed; and (5) any entity that has filed or files in the future an application for a license for an ITFS station, if mutually exclusive applications have been filed or are filed.

We estimate that there are currently pending before the Commission the following mutually exclusive applications:

- approximately 620 mutually exclusive applications for full power commercial radio stations, and approximately 165 competing applications for full power commercial analog television stations;<sup>101</sup>

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<sup>94</sup> *Id.*

<sup>95</sup> The Census Bureau counts radio stations located at the same facility as one establishment. Therefore, each co-located AM/FM combination counts as one establishment.

<sup>96</sup> FCC News Release No. 31327, January 13, 1993.

<sup>97</sup> FCC News Release, "Broadcast Station Totals as of January 31, 1999" (rel. Feb. 18, 1999).

<sup>98</sup> We use the 96% figure of radio station establishments with less than \$5 million revenue from the census data and apply it to the 12,496 individual station count to arrive at 11,996 individual stations as small businesses.

<sup>99</sup> See 5 U.S.C. §§ 601(3)-(5).

<sup>100</sup> See 13 C.F.R. § 121.210, SIC 4833, 4841 and 4899.

<sup>101</sup> These numbers of pending applications do not include situations where both commercial and noncommercial applicants have filed competing applications for nonreserved, or "commercial," channels. As described in the *First* (continued....)

- approximately 275 mutually exclusive applications for low power television stations and television translator stations, and approximately 20 competing applications for FM translator stations; and
- approximately 200 or more mutually exclusive applications for ITFS stations.

Although applicants for broadcast construction permits have been required to demonstrate sufficient financing to construct and initially operate the proposed broadcast station, we do not require the filing of financial information specifically concerning the entity seeking a construction permit, such as the entity's annual revenues. Thus, we have no data on file as to whether entities with pending permit applications, which are subject to the new competitive bidding selection procedures adopted for the broadcast services, meet the SBA's definition of a small business concern. However, we conclude that, given the smaller size of the markets at issue in the pending applications, most of the entities with pending applications for a permit to construct a new primary or secondary broadcast station are small entities, as defined by the SBA rules.

In addition to the pending applicants that may be affected by the auction procedures adopted for the broadcast services, any entity that applies for a construction permit for a new broadcast station in the future will be subject to these competitive bidding rules if mutually exclusive applications are filed. It is not possible, at this time, to estimate the number of markets for which mutually exclusive applications will be received, nor the number of entities that in the future may seek a construction permit for a new broadcast station. Given the fact that fewer new stations (particularly fewer analog television stations) will be licensed in the future and that these stations generally will be located in smaller, more rural areas, we conclude that most of the entities applying for these stations will be small entities, as defined by the SBA rules.

*Digital Audio Radio Service (DARS).* The Commission has not developed its own definition of "small entity" for purposes of licensing satellite delivered services. Accordingly, we rely on the definition of "small entity" provided under the Small Business Administration (SBA) rules applicable to Communications Services, Not Elsewhere Classified.<sup>102</sup> A "small entity" under these SBA rules is defined as an entity with \$11.0 million or less in annual receipts. The two current U.S. satellite DARS licensees, XM Satellite Radio and Sirius Satellite Radio, are in the midst of deploying their systems, and appear to have no revenues. Thus, XM and Sirius are "small entities" under the SBA definition.

*Direct-to-Home (DTH) Satellite Service -- Direct Broadcast Satellite (DBS) and Home Satellite Services (HSD).* Video service is available from high power DBS satellites that transmit signals to small DBS dish antennas installed at subscribers' premises, and from medium and low power satellites requiring larger satellite dish antennas. In the last year, DirecTV merged with United States Satellite Broadcasting Co., Inc. (USSB) and acquired PrimeStar. DirecTV and EchoStar are among the ten largest providers of multichannel video programming service. DBS represented a 12.5% share of the national MVPD market in June 1999 and HSD represented another 2.2% of that market. Thus, it appears that no DBS or HSD operators meet the SBA's definition of "small entity."

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*Report and Order*, resolution of these cases will be addressed in our noncommercial proceeding (MM Docket No. 95-31).



## I. Description of the Projected Reporting, Record-keeping, and Other Compliance Requirements.

7. One rule amendment adopted in this *Order on Reconsideration* will decrease the reporting requirements for entities not seeking designated entity status. Other rule amendments, however, may increase the reporting and recordkeeping requirements for all license applicants, including small entities.

8. Specifically, we amend Section 1.2112 of our rules to reduce the amount of ownership information that applicants must report on their short- and long-form applications.<sup>103</sup> Section 1.2112 requires applicants to identify direct and indirect owners with an interest of 10 percent or greater. Previously under Section 1.2112, in calculating the 10 percent interest, we required applicants to include debt and interests such as warrants and convertible debentures, stock options, debt securities or other debt interests. In this *Order on Reconsideration*, we amend Section 1.2112 to provide that such interests need not be reported unless the entity is seeking status as a designated entity. For the purpose of determining designated entity status and eligibility for bidding credits, we believe that warrants, convertible debentures, options and other debt interests should be treated as having been exercised. For the broader purpose of determining all applicants' ownership interests, we will not require information regarding interests in an applicant that have not yet vested.

9. The Commission amends its general competitive bidding rules to permit "former defaulters," *i.e.*, applicants that have defaulted or been delinquent in the past, but have since paid all of their outstanding non-Internal Revenue Service Federal debts and all associated charges or penalties, to certify on FCC Form 175 that they are not in default and are, therefore, eligible for auction participation.<sup>104</sup> "Former defaulters" will be required to pay an upfront payment amount of 1.5 times the normal amount set by the Bureau for any given license in a Commission auction.<sup>105</sup> So that the Bureau may implement this rule, it will require applicants to make an additional certification revealing whether they or any of their controlling interests or affiliates have ever been in default on any Commission license or have ever been delinquent on any non-tax debt owed to any Federal agency.<sup>106</sup>

10. The *Order on Reconsideration* also clarifies that the assignee or transferee of a license paid for through installment payments is not responsible for the license debt until the assignment or transfer has been consummated.<sup>107</sup> There may be cases in which the Commission believes that an assignment or transfer has been consummated when it has not. In such instances, the Commission may mistakenly initiate debt collection procedures against the wrong party. If such action occurs, the affected party should notify the Commission in writing that the underlying transaction was not consummated and the Commission will stop its debt collection proceedings against that party.<sup>108</sup>

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<sup>103</sup> See *supra* ¶12.

<sup>104</sup> See *supra* ¶41.

<sup>105</sup> See *supra* ¶¶ 42-43.

<sup>106</sup> See *supra* ¶42.

<sup>107</sup> See *supra* ¶¶ 32-33.

<sup>108</sup> See *supra* ¶¶ 26-27.

**J. Steps Taken to Minimize the Economic Impact on Small Entities, and Significant Alternatives Considered.**

11. Incorporation into the Part 1 general competitive bidding rules of the “former defaulter” policies adopted with respect to C block auction applicants will provide more opportunities for all entities, including small entities, to participate in spectrum auctions. The “former defaulter” policies adopted herein permit all “former defaulters” including small entities, to participate in future spectrum auctions under certain conditions.

12. All petitioners in this proceeding oppose some aspect of the Commission’s installment payment grace period and late payment fee provisions adopted in the *Part 1 Third Report and Order*. The Commission has reviewed petitioners’ arguments and concludes that it will retain these provisions, but will adopt a slight modification to the payment due dates for late installment payments and associated late fees.<sup>109</sup> Specifically, we amend the due dates for installment payments to comport with quarterly due dates. An alternative would be to maintain the current rules, but this modification may avoid confusion as to when such payments are due. Revisions to the Commission’s installment payment rules were first proposed in the notice section of the *Order, Memorandum Opinion and Order and Notice of Proposed Rule Making*, released in 1997.<sup>110</sup> Comments on installment payment issues were received and addressed in the *Part 1 Third Report and Order*.<sup>111</sup> In response to the *Part 1 Third Report and Order*, the Commission received petitions for reconsideration of its installment payment grace period and late payment fee provisions. In concluding to retain these provisions in this *Order on Reconsideration*, the Commission has thoroughly reviewed and carefully evaluated all of the opposing arguments presented.<sup>112</sup> The Commission rejected the alternative of reinstating the requirement for licensees using installment payments to submit grace period requests demonstrating financial needs due, in part, to the burdens that procedure imposes on small business licensees.

13. The Commission determines that the revised late payment rules relating to the submission of installment payments are not commercially unreasonable, do not constitute impermissible retroactive rulemaking, and do not violate basic contract principles.<sup>113</sup> The late installment payment provisions were not intended to serve as a tool that licensees might use in their normal course of planning auction strategy and build-out. These provisions are provided for extraordinary circumstances -- instances of financial distress -- for which temporary relief is appropriate. We considered a number of alternatives presented by petitioners, but found that those proposals were not consistent with the Commission’s fundamental goal in adopting the late payment provisions, which is to encourage payment on the due date.<sup>114</sup> The Commission has determined that this goal is best attainable by adhering to the 5 percent and 10 percent late payment fee schedule adopted in the *Part 1 Third Report and Order*. The Commission further determines that the modified grace period and late payment fee provisions apply to 900 MHz SMR and MDS licensees that have signed Promissory Notes and Security Agreements.<sup>115</sup> The SMR and MDS

<sup>109</sup> See *supra* ¶¶ 16-28.

<sup>110</sup> Amendment of Part 1 of the Commission’s Rules -- Competitive Bidding Proceeding, *Order, Memorandum Opinion and Order and Notice of Proposed Rule Making*, WT Docket No. 97-82, 12 FCC Rcd 5686, 5725 (1997).

<sup>111</sup> *Part 1 Third Report and Order* at 13 FCC Rcd at 434-442, ¶¶ 103-113.

<sup>112</sup> See *supra* ¶¶ 16-28.

<sup>113</sup> *Id.*

<sup>114</sup> See *supra* ¶¶ 18-28.

<sup>115</sup> See *supra* ¶ 26.

notes emphasized that the Commission's rules, as amended, would take precedence over the terms of the notes in case of any conflict. The Commission clarifies that, despite amendments to the installment payment rules, licensees in the installment payment program continue to have the opportunity to seek restructuring of installment payments.<sup>116</sup> The Commission notes, however, that there is no longer a procedure for requesting a grace period to stay installment payment deadlines pending such restructuring.<sup>117</sup> Rather, licensees will be subject to the automatic late payment provisions of Section 1.2110(g) of the Commission's rules as adopted in this *Order on Reconsideration*.

**K. Report to Congress.**

14. The Commission shall send a copy of this Final Regulatory Flexibility Analysis, along with this *Order on Reconsideration*, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. § 801(a)(1)(A). A copy of the Order and this FRFA (or a summary thereof) will be published in the Federal Register. *See* 5 U.S.C. § 604(b). A copy of the Order and this FRFA will also be sent to the Chief Counsel for Advocacy of the Small Business Administration.

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<sup>116</sup> *See supra* ¶¶ 29-30.

<sup>117</sup> *Id.*

**APPENDIX D**  
**FINAL REGULATORY FLEXIBILITY ANALYSIS**  
**(FIFTH REPORT AND ORDER)**

1. As required by the Regulatory Flexibility Act (RFA),<sup>1</sup> an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the notice section of the *Third Report and Order and Second Further Notice of Proposed Rule Making* ("Part 1 Third Report and Order" and "Second Notice") in WT Docket No. 97-82.<sup>2</sup> The Commission sought written public comment on the proposals in the *Second Notice*, including comment on the IRFA. This Final Regulatory Flexibility Analysis (FRFA) in this *Fifth Report and Order* conforms to the RFA, as amended by the Contract With America Advancement Act of 1996 (CWAAA), Pub. L. No. 104-121, 110 Stat. 847 (1996).<sup>3</sup>

**A. Need for, and Objectives of, This Fifth Report and Order.**

15. This *Fifth Report and Order* makes substantive amendments to the Commission's general competitive bidding rules for auctionable services. Specifically, the *Fifth Report and Order* adopts a "controlling interest" standard for the attribution of gross revenues in determining whether a license applicant qualifies as a small business.<sup>4</sup> The "controlling interest" standard is intended to prevent larger firms from illegitimately seeking status as small businesses and ensure that only those entities truly meriting small business status are eligible for the small business provisions. In addition, the *Order* establishes a maximum 10-day filing period for the submission of petitions to deny the long-form applications of winning bidders.<sup>5</sup> The Commission increases the filing period from 5 days (as adopted in the *Part 1 Third Report and Order*) to 10 days in order to afford parties (including small businesses) additional flexibility in challenging license awards. The Commission also delegates to the Wireless Telecommunications Bureau the authority to make any revisions to the Code of Federal Regulations that are necessary to conform the service-specific auction rules to the Part 1 general competitive bidding rules.<sup>6</sup> Finally, the Commission addresses other issues raised by the *Second Notice* and affirms its existing rules relative to those issues.

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<sup>1</sup> 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 CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

<sup>2</sup> 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" and "Second Notice") (*see* IRFA at Appendix C).

<sup>3</sup> See 5 U.S.C. § 603.

<sup>4</sup> See *supra* ¶¶ 58-67.

<sup>5</sup> See *supra* ¶¶ 74-77.

<sup>6</sup> See *supra* ¶ 78.

**B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA.**

16. No comments were received directly in response to the IRFA. The Commission, however, did receive comments on issues affecting small businesses in response to the *Second Notice*.<sup>7</sup> Specifically, RTG proposed that we establish geographic area licenses no larger than BTAs in all future auctions.<sup>8</sup> RTG argued that the use of small areas facilitates the delivery of service to rural areas by increasing the opportunity for rural small businesses and rural telephone companies to acquire licenses.<sup>9</sup> RTG also contends that authorizing smaller geographic areas increases the number of licenses available and the diversity of licenses, and facilitates the buildout of networks.<sup>10</sup> We reject RTG's proposal. Section 309(j) of the Communications Act requires the Commission to disseminate licenses to a wide variety of applicants, including small businesses and rural telephone companies, and to promote the development and rapid deployment of new technologies to the public, including those residing in rural areas.<sup>11</sup> We believe that we can best satisfy this mandate by establishing license areas that promote these goals on a service-specific basis. Although we have used small license areas in several services (*e.g.*, broadband PCS D, E and F blocks and LMDS) and may do so in specific services in the future, we are unwilling to limit our flexibility by adopting an ironclad rule against large service areas. We anticipate, for example, that certain satellite-based services may not be particularly suited to small geographic area licensing, while other services may indeed be more suitable for this type of license category (*i.e.*, the broadband PCS C block auction).

17. Comments were also filed in response to the Commission's proposal to adopt a "controlling interest" standard as its general attribution rule for determining which applicants qualify as small businesses.<sup>12</sup> In this *Fifth Report and Order*, the Commission adopts a "controlling interest" standard and addresses the related comments.<sup>13</sup> Under the "controlling interest" standard, the gross revenues of the applicant, its controlling interests and their affiliates will be aggregated and attributed to the applicant in determining whether the applicant qualifies as a small business. A "controlling interest" includes individuals or entities that have control of the applicant as determined by the principles of *de jure* or *de facto* control.

18. Commenters raised various issues regarding the attribution standard. Some commenters expressed concern over whether the revenues of so called "passive investors" would be attributed to the applicant.<sup>14</sup> The Commission states that the controlling interest standard adopted herein will be applied to all investors of the applicant.<sup>15</sup> In other words, if any investor has either *de jure* or *de facto* control of the

<sup>7</sup> *Second Notice*, 13 FCC Rcd at 471-482, ¶¶ 170-194.

<sup>8</sup> RTG Comments at 14-15.

<sup>9</sup> *Id.* at 15.

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

<sup>11</sup> 47 U.S.C. § 309(j)

<sup>12</sup> *Second Notice*, 13 FCC Rcd at 477-478, ¶¶ 185-187.

<sup>13</sup> *See supra* ¶¶ 58-67.

<sup>14</sup> Western Wireless Corporation ("Western") Comments at 8-9; RTG Comments at 21; AmeriCall International, LLC ("AmeriCall") Comments at 2-3.

<sup>15</sup> *See supra* ¶ 63.

applicant, that investor's gross revenues will be attributed to the applicant for purposes of determining whether the applicant qualifies as a small business.<sup>16</sup> Some commenters suggested that the Commission adopt a minimum equity requirement for controlling interests.<sup>17</sup> The Commission concludes that rather than focusing solely on equity-holdings, applicants will be required to identify those controlling interests that actually have control through application of the principles of *de jure* or *de facto* control.<sup>18</sup> Western Wireless Corporation ("Western") urges the Commission not to amend its attribution rules to include entities that have management and joint marketing agreements with the applicant or licensee.<sup>19</sup> The Commission adopts provisions that make attributable the gross revenues of those that have management or marketing agreements where such agreements grant authority over key aspects of the applicant's or licensee's business.<sup>20</sup> Cook Inlet Region, Inc., ("CIRI") urges the Commission not to apply any new attribution or affiliation rules adopted in this proceeding to current C block licensees that won their licenses under the control group broadband PCS rules.<sup>21</sup> The Commission will not reassess the eligibility of current C and F block licensees to continue to hold their licenses under the new attribution rules adopted herein.<sup>22</sup> These licensees will remain eligible to hold their licenses regardless of whether or not they would qualify under the newly established attribution rules. As to future C and F block auctions, however, all applicants, including existing C and F block licensees, will be subject to the attribution rules in effect at the time of filing their short-form applications.<sup>23</sup> For auctions that begin within two years after the start of Auction No. 22 (March 23, 1999), our new attribution rules will have no effect on the eligibility as an entrepreneur of any entity that was eligible for, and participated in, Auction No.5 or Auction No.10.<sup>24</sup> Eligibility for small business preferences, however, will be determined based on the attribution rules in effect at the time of an applicant's short-form filing.<sup>25</sup>

**C. Description and Estimate of the Number of Small Entities to Which Rules Will Apply.**

19. The Commission is required 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.<sup>26</sup> The rules adopted in this *Fifth Report and Order* apply to all entities, including small entities, seeking to obtain licenses in auctionable services through competitive bidding. These rules generally apply to future auctions. In estimating the number of small entities that may participate in future auctions of wireless services, we anticipate that current wireless services licensees are representative of future auction participants. The

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<sup>16</sup> *Id.*

<sup>17</sup> NextWave Comments at 5; AmeriCall Comments at 3.

<sup>18</sup> *See supra* ¶ 66.

<sup>19</sup> Western Comments at 3-5.

<sup>20</sup> *See supra* ¶ 64.

<sup>21</sup> CIRI Comments at 2-4.

<sup>22</sup> *See supra* ¶ 67.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> 5 U.S.C. § 603(b)(3).

Commission hereby incorporates into this FRFA section the detailed Supplemental FRFA analysis and descriptions of potentially affected small entities, *supra*, including the cellular, broadband and narrowband PCS, 220 MHz, paging, mobile service, air-ground, SMR, PLMR, aviation and marine, offshore radiotelephone services, GWCS, fixed microwave, rural, wireless, public safety, governmental entities and Marine Coast Services.<sup>27</sup>

**D. Description of the Projected Reporting, Record-keeping, and Other Compliance Requirements.**

20. All license applicants are subject to the reporting and record-keeping requirements of the competitive bidding rules.<sup>28</sup> Specifically, applicants are required to apply for spectrum auctions by filing a short-form application prior to auction. Applicants are also required to file a long-form application at the conclusion of an auction. Entities seeking treatment as "small businesses" must disclose on their short- and long-form applications, separately and in the aggregate, the gross revenues of the applicant, its controlling interests (as that term is defined in this *Fifth Report and Order*), and their affiliates.

**E. Steps Taken to Minimize the Economic Impact on Small Entities, and Significant Alternatives Considered.**

21. The Commission has considered the economic impact on small entities of the following rules and modifications adopted in this *Order* and has taken steps to minimize the burdens on small entities.

*Attribution of Gross Revenues of Investors and Affiliates.* The Commission adopts a "controlling interest" standard for attributing to an applicant the gross revenues of its investors and affiliates in determining whether the applicant qualifies as a small business.<sup>29</sup> Application of the controlling interest standard protects the interests of small businesses by preventing larger firms from illegitimately seeking small business status and ensuring that only those entities truly meriting such status are eligible for the small business provisions. The Commission further concludes that the eligibility of current C and F block licensees to continue to hold their licenses will not be reassessed based on the new attribution rules.<sup>30</sup> Therefore, these licensees will continue to be eligible to hold their licenses regardless of whether or not they would qualify under the newly established attribution rules. By applying the current, rather than the new, rules to existing C and F block licensees, the Commission eliminates the burden on such licensees of having to restructure to meet new standards in order to remain licensees.

*Administrative Filing Periods for Applications and Petitions to Deny.* The Commission establishes a maximum 10-day filing period for submitting petitions to deny against long-form applications.<sup>31</sup> The Commission increases the filing period from 5 days (as adopted in the *Part 1 Third Report and Order*) to 10 days in order to afford parties (including small businesses) additional flexibility in challenging license applications.

22. In addition to the modifications adopted in this *Fifth Report and Order*, the Commission affirms its existing rules with respect to certain other issues affecting small businesses. Specifically, the

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<sup>27</sup> See Appendix C at section C, *supra*.

<sup>28</sup> See 47 C.F.R. Part 1, Subpart Q.

<sup>29</sup> See *supra* ¶¶ 58-67.

<sup>30</sup> See *supra* ¶ 67.

<sup>31</sup> See *supra* ¶¶ 74-77.

Commission declines, at this time, to adopt special provisions for minority- and women-owned businesses pending completion of a series of market studies to determine whether, and under what circumstances, targeted preferences for minorities and women are appropriate.<sup>32</sup> The Commission notes, however that minority- and women-owned businesses that qualify as small businesses may take advantage of the provisions adopted for small businesses. In addition, the Commission declines, at this time, to adopt special provisions for rural telephone companies, such as bidding preferences or an unserved area fill-in policy.<sup>33</sup> The Commission notes, however, that it will continue to provide rural telephone companies with bidding credits should such entities qualify as small businesses. The Commission further determines that, for the time being, it will not offer installment payments for auctionable services.<sup>34</sup> The Commission notes that commenters did not offer suggestions as to how to retain the program or alternatives to replace the program. The Commission states that it will, as it has done in the LMDS, LMS, 220 MHz Service, and VHF Public Coast Service auctions, continue to provide small businesses with bidding credits.

#### **F. Report to Congress.**

23. The Commission shall send a copy of this Final Regulatory Flexibility Analysis, along with this *Order*, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. § 801(a)(1)(A). A copy of the *Order* and this FRFA (or a summary thereof) will be published in the Federal Register. See 5 U.S.C. § 604(b). A copy of the *Order* and this FRFA will also be sent to the Chief Counsel for Advocacy of the Small Business Administration.

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<sup>32</sup> See *supra* ¶¶ 45-50.

<sup>33</sup> See *supra* ¶¶ 51-53.

<sup>34</sup> See *supra* ¶¶ 54-57.



**APPENDIX E**  
**INITIAL REGULATORY FLEXIBILITY ANALYSIS**  
**(FOURTH NOTICE)**

2. As required by the Regulatory Flexibility Act (RFA),<sup>1</sup> the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the rules proposed in this *Fourth Further Notice of Proposed Rule Making* ("*Fourth Notice*") in WT Docket No. 97-82. Written public comments are requested on the IRFA. Comments on the IRFA must have a separate and distinct heading designating them as responses to the IRFA and must be filed by the deadlines for comments on the *Fourth Notice*. The Commission will send a copy of the *Fourth Notice*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration. In addition, the *Fourth Notice* and IRFA (or summaries thereof) will be published in the Federal Register.

**G. Need for, and Objectives of, This *Fourth Notice*.**

24. This *Fourth Notice* is being initiated to secure comment on additional issues relating to the general competitive bidding rules for all auctionable services. Specifically, the *Fourth Notice* seeks comment on whether the Commission should use a total assets test, in conjunction with the gross revenues measure already employed, in determining whether auction applicants qualify as small businesses. The Commission seeks to ensure that only *bona fide* small businesses are eligible for the small business provisions. It, therefore, solicits comment on whether the application of a total assets test would enhance its determinations of small business status. Further, in the *Fifth Report and Order*, the Commission adopts as its general attribution rule a "controlling interest" standard, which provides for the full dilution of certain stock interests for purposes of calculating equity held in an applicant.<sup>2</sup> In this *Fourth Notice*, the Commission proposes to codify in the Part 1 competitive bidding rules the policy under which it previously adopted two exceptions to the "fully diluted" requirement of its broadband PCS attribution rule.<sup>3</sup> Under these exceptions, two types of ownership interests, "rights of first refusal" and "put" options, would not be considered on a fully diluted basis for purposes of calculating ownership levels.<sup>4</sup> The Commission also seeks comment on whether it should adopt a third exception to the "fully diluted" requirement of Section 1.2110(b)(4)(v) of the Commission's Rules.<sup>5</sup> The Commission proposes that, in calculating the equity held in an applicant, the conversion rights or stock options be considered individually rather than collectively when they are mutually exclusive. The Commission believes that these proposals will enhance its assessments of small business eligibility.

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<sup>1</sup> 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 CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

<sup>2</sup> See *supra* ¶¶ 58-67.

<sup>3</sup> See Implementation of Section 309(j) of the Communications Act-Competitive Bidding, PP Docket No. 93-253, *Fifth Memorandum Opinion and Order*, 10 FCC Rcd 403, 454-56, ¶¶ 93-95 (1994) ("*Fifth M O & O*").

<sup>4</sup> *Id.*

<sup>5</sup> 47 C.F.R. § 1.2110(b)(4)(v) (redesignated as 47 C.F.R. § 1.2110(c)(5)(v)).

**H. Legal Basis.**

25. This action is taken pursuant to Sections 4(i), 5(b), 5(c)(1), 303(r), and 309 (j) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 155(b), 155(c)(1), 303(r), and 309(j).

**I. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply.**

26. The Commission is required 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.<sup>6</sup> The rules proposed in this *Fourth Notice* would apply to license applicants seeking small business status in all future auctions. In estimating the number of small entities that may participate in future auctions of wireless services, the Commission anticipates that the makeup of current wireless services licensees is representative of future auction participants. The Commission hereby incorporates into this IRFA section the Supplemental FRFA analysis and descriptions of potentially affected small entities.<sup>7</sup>

**J. Description of Reporting, Recordkeeping, and Other Compliance Requirements.**

27. The *Fourth Notice* proposes the adoption of a total assets test to be used in conjunction with the gross revenues measure already employed in determining whether auction applicants qualify as small businesses. The total assets test would require auction applicants seeking small business status to disclose their assets.

**K. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered.**

28. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule or any part thereof for small entities.<sup>8</sup>

29. The Commission has adopted specific provisions to promote small business participation in spectrum auctions. In order to ensure that only those entities truly meriting small business status qualify for special preferences, such as bidding credits, the Commission must have an accurate and easily applicable method of calculating business size. While it has concluded in the past to use gross revenues as the measure of business size, it now seeks comment on whether to use a total assets test as well. The Commission also seeks comment on whether it should adopt exceptions to the general requirement that certain stock interests are treated as fully diluted in calculating the equity held in an applicant. These proposals are intended to help the Commission realize its goal of widening the opportunities for small businesses in the spectrum auction program.

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<sup>6</sup> 5 U.S.C. §§ 603(b)(3).

<sup>7</sup> See Appendix C at section C, *supra*.

<sup>8</sup> See 5 U.S.C. § 603.

**L. Federal Rules Which Overlap, Duplicate, Or Conflict With These Rules.**

30. None.