

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

In the Matter of
Amendment of the Commission's Rules
Regarding Installment Payment Financing for
Personal Communications Services (PCS)
Licensees
WT Docket No. 97-82

ORDER ON RECONSIDERATION

Adopted: January 16, 2001

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By the Commission:

TABLE OF CONTENTS

Heading Paragraph #
I. INTRODUCTION ..... 1
II. BACKGROUND ..... 2
III. DISCUSSION ..... 6
A. Reconfiguration of C Block Spectrum License Size ..... 6
B. Eligibility Restrictions Under a Tiered Approach ..... 9
C. Competitive Bidding Design ..... 16
D. Bidding Credits ..... 19
E. Transfer Requirements ..... 23
IV. ORDERING CLAUSE ..... 27
V. APPENDIX A .....

I. INTRODUCTION

1. In this Order on Reconsideration ("Order on Reconsideration"), we address five petitions for reconsideration ("Petitions") of the Commission's Sixth Report and Order<sup>1</sup> in WT Docket No. 97-82 ("C/F Block Sixth Report and Order"), in which we modified the auction and service rules for C and F block broadband Personal Communications Services (PCS) licenses. For the reasons set forth below, we deny these Petitions and affirm our findings in the C/F Block Sixth Report and Order.

<sup>1</sup> Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, Sixth Report and Order and Order on Reconsideration, FCC 00-313 (rel. August 29, 2000) ("C/F Block Sixth Report and Order"). A list of pleadings is included as Appendix A.

## II. BACKGROUND

2. The Commission outlined the original framework for C and F block auctions in the 1994 *Competitive Bidding Fifth Report and Order*, establishing the C and F blocks as “set-aside” licenses for “entrepreneurs” in which eligibility would be restricted to entities below a specified financial threshold.<sup>2</sup> These provisions were consistent with Congress’ mandate to promote participation of small businesses, rural telephone companies, and businesses owned by members of minority groups and women (collectively “designated entities”) in the provision of spectrum-based services.<sup>3</sup> In addition, the Commission adopted special provisions for the C and F blocks to assist designated entities.<sup>4</sup>

3. Section 309(j)(4) of the Communications Act directs the Commission, in prescribing regulations to implement the objectives of Section 309(j)(3), to, *inter alia*: (1) establish performance requirements to ensure prompt delivery of service to rural areas and prevent warehousing of spectrum by licensees; (2) prescribe area designations and bandwidth assignments that promote an equitable geographic distribution of licenses and services, economic opportunity for a wide variety of applicants, including designated entities, and rapid deployment of services; and (3) ensure that designated entities are given the opportunity to participate in the provision of spectrum-based services, and, for such purposes, consider using bidding preferences and other procedures.<sup>5</sup>

4. The Commission has held four entrepreneurs’ block broadband PCS auctions to date. The initial C block licenses were awarded through two auctions, Auction No. 5, which ended on May 6, 1996, and Auction No. 10, which concluded on July 16, 1996. Auction No. 11, the initial F block auction, ended on January 14, 1997, and also included D and E block licenses. Auction No. 22, which concluded on April 15, 1999, made available C and F block licenses that had been returned to, or reclaimed by, the Commission.<sup>6</sup> The inventory for Auction No. 35, which began on December 12, 2000, includes 422 licenses covering 195 various Basic Trading Areas (BTAs). The 422 licenses include 312 C block 10

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<sup>2</sup> The Commission required that in order to be eligible to bid, an applicant, including attributable investors and affiliates, must have gross revenues of less than \$125 million in each of the last two years and less than \$500 million in total assets. *See* Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket 93-253, *Fifth Report and Order*, 9 FCC Rcd 5532, at 5581-82, ¶ 115 (1994) (“*Competitive Bidding Fifth Report and Order*”). These applicants are called “entrepreneurs” and the licenses that they are eligible to bid on are “set-asides”. But note that, under the Commission’s “grandfathering” exception, any entity that was eligible for, and participated in, either of the first two C block auctions (Auction No. 5 or Auction No. 10), will be eligible to bid in C block spectrum auctions that begin within two years of the start of Auction No. 22, March 23, 1999. An entity that qualifies under this exception is called a “grandfathered” entity. 47 C.F.R. § 24.709(b)(9)(i); *see also* Amendment of the Commission’s Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, WT Docket No. 97-82, *Fourth Report and Order*, 13 FCC Rcd 15, 743, at 15,751-52 ¶¶ 13, 15 (1998) (“*C Block Fourth Report and Order*”).

<sup>3</sup> *See* 47 U.S.C. § 309(j)(4)(D), 47 U.S.C. § 309(j)(4)(D).

<sup>4</sup> *See Competitive Bidding Fifth Report and Order*, 9 FCC Rcd 5532; Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket 93-253, *Fifth Memorandum Opinion and Order*, 100 FCC Rcd 403 (1994) (“*Competitive Bidding Fifth Memorandum Opinion and Order*”).

<sup>5</sup> 47 U.S.C. § 309(j)(4).

<sup>6</sup> E block licenses were also included in Auction No. 22.

MHz licenses, 43 C block 15 MHz licenses, and 67 F block 10 MHz licenses.<sup>7</sup>

5. On June 7, 2000, we released a Further Notice of Proposed Rulemaking (“*Further Notice*”) which set forth tentative conclusions and proposals concerning the C and F block rules.<sup>8</sup> On August 29, 2000, we released the *C/F Block Sixth Report and Order*,<sup>9</sup> which resolved the issues raised in the *Further Notice* and revised the service and auction rules for the auction of C and F block broadband PCS licenses in furtherance of the various goals of Section 309(j) of the Communications Act.<sup>10</sup> The *C/F Block Sixth Report and Order*, among a number of other modifications to the Commission’s rules, reconfigured the size of C block spectrum license size; removed the entrepreneur eligibility restrictions (permitted “open” bidding)<sup>11</sup> for some, but not all, licenses available in Auction No. 35 and in future C and F block auctions; eliminated bidding credits in closed bidding; and modified the transfer restrictions for C and F block licenses.<sup>12</sup> As addressed more fully below, Petitioners challenge a number of the modifications to the C and F block service and auction rules adopted in the *C/F Block Sixth Report and Order*.

### III. DISCUSSION

#### A. Reconfiguration of C Block Spectrum License Size

6. **Background.** In the *C/F Block Sixth Report and Order*, we reconfigured each 30 MHz C block license available in Auction No. 35, or any subsequent auction, into three 10 MHz C block licenses.<sup>13</sup>

7. **Discussion.** All five of the petitioners object to the Commission’s decision to split the 30 MHz C block licenses into three 10 MHz licenses.<sup>14</sup> Petitioners argue that a 10 MHz license is insufficient to provide advanced mobile services.<sup>15</sup> We considered and rejected similar arguments in the *C/F Block Sixth*

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<sup>7</sup> See “C and F Block Broadband PCS Spectrum Auction Scheduled for December 12, 2000,” *Public Notice*, DA 00-2259 (rel. October 5, 2000).

<sup>8</sup> See Amendment of the Commission’s Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, *Further Notice of Proposed Rulemaking*, 15 FCC Rcd 9773 (2000) (“*Further Notice*”).

<sup>9</sup> See *C/F Block Sixth Report and Order*.

<sup>10</sup> See Section 309(j) of the Communications Act of 1934, as amended (“Communications Act”), 47 U.S.C. § 309(j).

<sup>11</sup> See *C/F Block Sixth Report and Order*; see generally 24 C.F.R. §§ 24.712(b) and 24.717(b). Both entrepreneurs and non-entrepreneurs can bid on licenses in “open” bidding. Only entrepreneurs can bid on licenses in “closed” bidding.

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

<sup>13</sup> *C/F Block Sixth Report and Order* at ¶ 12.

<sup>14</sup> The Office of Advocacy of the United States Small Business Administration (“Advocacy”), Alpine, PCS, Inc. (“Alpine”), Northcoast Communications, LLC (“Northcoast”), The Rural Telecommunications Group and the Organization for the Promotion and Advancement of Small Telecommunications Companies (“RTG and OPASTO”), National Telephone Cooperative Association (“NTCA”) (collectively “Petitioners”).

<sup>15</sup> See Alpine Petition at 6-7, Northcoast Petition at 2, RTG and OPASTCO Petition at 13-16, 18-20, NTCA NTCA Petition at 2-3, Advocacy Petition at 1-3; see also RTG *Ex Parte* and RTG, NTCA, OPASTCO, and Advocacy *Ex Parte* at 1-2.

*Report and Order*.<sup>16</sup> As explained below, we decline to further reconfigure the available C block licenses and we affirm our decision to provide for three 10 MHz C block licenses.

8. As the petitioners have not provided any new rationale to justify deviating from our conclusion in the *C/F Block Sixth Report and Order*, we decline to reconsider our decision to divide each available 30 MHz C block license into three 10 MHz licenses. Historically 10 MHz has been one of the principal license sizes used in broadband PCS.<sup>17</sup> In the *C/F Block Sixth Report and Order*, we found that 10 MHz is a viable minimum license size.<sup>18</sup> Moreover, we note that our rules permit aggregation, subject to the spectrum cap, and a 10 MHz license allows bidders to acquire additional spectrum in particular markets.<sup>19</sup> Further, we believe dividing the spectrum into three 10 MHz C block licenses should promote a wider dissemination of licenses, provide bidders with more flexibility to adapt their bidding strategies to meet their business plans, and should make licenses more affordable, especially for entrepreneurs.<sup>20</sup> As we noted in establishing both 20 MHz and 10 MHz licenses for wireless use in the 700 MHz service, 10 MHz wireless licenses “should prove of interest to parties in the record who desire spectrum to deploy innovative wireless technologies, including high-speed Internet access, that do not require as much spectrum.”<sup>21</sup> Thus, we continue to believe that this reconfiguration, along with the other rule modifications adopted in the *C/F Block Sixth Report and Order*, meets the diverse needs of both large and small carriers seeking to participate in the next C and F block auction.<sup>22</sup> The reconfiguration ensures the most efficient use of spectrum through the competitive bidding process while at the same time promoting wider auction participation and license distribution in accordance with the goals of Section 309(j) of the Communications Act.<sup>23</sup> Lastly, as explained below, we note that we have retained entrepreneur eligibility restrictions for some C block licenses to ensure that entrepreneurs are provided greater opportunities to acquire spectrum to fulfill their business needs.<sup>24</sup>

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<sup>16</sup> See *C/F Block Sixth Report and Order* at ¶¶ 13-15.

<sup>17</sup> *C/F Block Sixth Report and Order* ¶ 14.

<sup>18</sup> *Id.*; see also *Further Notice* at 9784, ¶ 16 (where we tentatively concluded that a 10 MHz C block license is a viable minimum size for voice and some data services).

<sup>19</sup> See *Further Notice* at 9784, ¶ 16.

<sup>20</sup> See *C/F Block Sixth Report and Order* at ¶¶ 13-14.

<sup>21</sup> In the Matter of Service Rules for 746-764 MHz and 776-794 MHz Bands, and Revisions to Part 27 of the Commission’s Rules, WT Docket No. 99-168, *First Report and Order*, 15 FCC Rcd at 478, ¶ 3 (2000) (“700 MHz *First Report and Order*”).

<sup>22</sup> See *C/F Block Sixth Report and Order* at ¶ 15.

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

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

## B. Eligibility Restrictions Under a Tiered Approach

9. **Background.** In the *C/F Block Sixth Report and Order*, we divided the BTAs into two categories, “Tier 1” BTAs and “Tier 2” BTAs. Tier 1 comprises BTAs with populations that, according to the 1990 census, are equal to or greater than 2.5 million; and Tier 2 comprises the remaining BTAs.<sup>25</sup> We decided to establish open bidding (bidding without entrepreneur eligibility restrictions) for two of the three newly reconfigured 10 MHz C block licenses in Tier 1 and for one of the three newly reconfigured 10 MHz C block licenses in Tier 2.<sup>26</sup> We also adopted open bidding for all F block licenses available in Auction No. 35 and in all future auctions.<sup>27</sup>

10. **Discussion. Tiers.** Northcoast urges the Commission to reconsider and simplify its tiering and eligibility restrictions by eliminating all tiering and by allowing open bidding only for a single 10 MHz C block license in all markets.<sup>28</sup> Northcoast asserts that, under the new tiering rule, it will be unable to meet its business plans because it will not be able to competitively bid for available C block spectrum in markets with a population above 2.5 million.<sup>29</sup> We considered and rejected similar arguments in the *C/F Block Sixth Report and Order*.<sup>30</sup> We continue to believe that this approach is, in conjunction with the other modifications to the entrepreneur eligibility restrictions, the most effective method of accommodating the various business plans of both small and larger carriers and is fully consistent with the statutory goals for competitive bidding. This approach, in conjunction with the changes in entrepreneur eligibility restrictions, makes more spectrum available for “open” bidding in the most populous markets where the demand for spectrum by existing CMRS carriers is the greatest and the prospects of a spectrum shortage for these carriers is the most acute.<sup>31</sup> At the same time, this approach keeps most of the C block spectrum (i.e. 20 MHz) closed in all but the very largest markets, while also retaining restricted eligibility for some spectrum (i.e. 10 MHz) even in those latter cases.<sup>32</sup> Thus, under our new rules, entrepreneurs will have an opportunity to acquire additional spectrum on a set-aside basis in all available C block markets, which should assist them in achieving their business goals and objectives. At the same time, our new rules also take into account the need of many large carriers to acquire additional spectrum. In adopting this approach, we have also taken into account Section 309(j)(3) of the Communications Act which requires us to promote a variety of objectives, including but not limited to, the promotion of economic opportunity and competition, and the dissemination of licenses among a wide variety of applicants, in order to serve the needs of the public.<sup>33</sup> We continue to believe that “our decision to establish two tiers with 2.5 million population demarcation represents the most reasonable balancing of the various competing public interest factors that bear on this issue.”<sup>34</sup> For the foregoing reasons, we affirm our decision in the *C/F Block Sixth*

<sup>25</sup> *Id.* at ¶ 18.

<sup>26</sup> *Id.* at ¶ 20.

<sup>27</sup> *Id.* at ¶ 24.

<sup>28</sup> Northcoast Petition at 7-8. *See generally* Advocacy at 1-3.

<sup>29</sup> Northcoast Petition at 7-8.

<sup>30</sup> *See C/F Block Sixth Report and Order* at ¶¶ 18-23.

<sup>31</sup> *Id.* at ¶ 19.

<sup>32</sup> *Id.*

<sup>33</sup> 47 U.S.C. § 309(j)(3).

*Report and Order* to utilize a tiered approach, limiting non-entrepreneurs participation to certain markets.

11. **30 MHz and 15 MHz C block licenses.** Alpine maintains that the Commission, in eliminating some of the entrepreneur eligibility restrictions, failed to consider the 309(j)(3) statutory objectives, particularly the objective to avoid the excessive concentration of licenses.<sup>35</sup> Additionally, several petitioners state that the record does not support the Commission's decision to eliminate some of the entrepreneur eligibility restrictions.<sup>36</sup> These petitioners assert that the majority of the commenters favored maintaining the entrepreneur eligibility restrictions.<sup>37</sup> As discussed below, by eliminating some, but not all, of the C block entrepreneur eligibility restrictions, we give effect to, and reasonably balance, as many of the Section 309(j) objectives as possible.

12. Section 309(j)(3) directs the Commission to seek to promote a variety of objectives, including economic opportunity, competition, and the rapid deployment of new technologies and services by, *inter alia*, disseminating licenses among a wide variety of applicants.<sup>38</sup> In certain instances, these objectives conflict, thus requiring the Commission to balance the competing objectives. Section 309(j) does not require the Commission to seek to promote the participation of small businesses in PCS auctions at the expense of other enumerated 309(j)(3) objectives nor does it give one objective greater weight than another objective.<sup>39</sup> In balancing the 309(j)(3) objectives, including the avoidance of the excessive concentration of licenses, we reviewed the record before us and have taken into account the needs of both large and small carriers to acquire additional spectrum to provide services and/or to satisfy their business plans. In the *C/F Block Sixth Report and Order*, we concluded that it was fair and appropriate to apportion the spectrum to accommodate the interests of large carriers to obtain additional spectrum to "fill out" regional or national service areas.<sup>40</sup> At the same time, we decided to maintain a significant set-aside of C block spectrum for entrepreneurs.<sup>41</sup> As previously explained, section 309(j) does not mandate the use of set-asides or any other method to promote the participation of small businesses in spectrum auctions, particularly in light of changed circumstances.<sup>42</sup>

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<sup>34</sup> *C/F Block Sixth Report and Order* at ¶ 19.

<sup>35</sup> Alpine Petition at 2-5.

<sup>36</sup> See Advocacy Petition at 1-3; Alpine Petition at 6-7; RTG and OPASTCO Petition at 9-17; see also RTG *Ex Parte* and RTG, NTCA, OPASTCO and Advocacy *Ex Parte* at 1.

<sup>37</sup> See Advocacy Petition at 1-3; Alpine Petition at 6-7; RTG and OPASTCO Petition at 9-17; see also RTG *Ex Parte* and RTG, NTCA, OPASTCO and Advocacy *Ex Parte* at 1.

<sup>38</sup> 47 U.S.C. § 309(j)(3).

<sup>39</sup> 47 U.S.C. § 309(j); see also 47 U.S.C. § 309(j)(4) (requires the Commission to ensure that small businesses and others "are given the opportunity to participate in the provision of spectrum based services" and directs the Commission to consider the use of mechanisms that will further that end.)

<sup>40</sup> *C/F Block Sixth Report and Order* at ¶ 23.

<sup>41</sup> *Id.* at ¶ 23.

<sup>42</sup> See *C/F Block Sixth Report and Order* at ¶ 22; 47 U.S.C. § 309(j).

13. Three petitioners argue that the record provides no justification for providing large carriers with additional spectrum.<sup>43</sup> Specifically, they point to recent general statements in news articles where two large carriers asserted that they have a sufficient amount of spectrum.<sup>44</sup> Therefore, petitioners argue that the record provides no justification for providing them with an opportunity to acquire additional spectrum.<sup>45</sup> As we previously discussed, circumstances in the industry have changed dramatically, and continue to change, since the implementation of our rules in 1994.<sup>46</sup> The introduction of wireless Internet, advanced data, and 3G services, as well as global competition within these services, has created a shortage of suitable available spectrum.<sup>47</sup> The statement of two large carriers, as reported in two recent news articles, does not undermine the record as a whole, particularly where other large carriers claim that they need additional spectrum to provide advanced services or to fulfill their business plans.<sup>48</sup> We believe that apportioning the spectrum as described above promotes the further development of CMRS competition and innovation, especially in large markets.<sup>49</sup> For these reasons, we affirm our position in the *C/F Block Sixth Report and Order* to remove the eligibility restrictions for some, but not all, of the available C block spectrum.

14. **F block licenses.** Four petitioners requested that the Commission retain entrepreneur eligibility requirements for F block licenses.<sup>50</sup> These petitioners argue that the Commission failed to provide support for eliminating the F block set-aside, particularly in light of the success of F block licensees.<sup>51</sup> For instance, Northcoast argues that since entrepreneurs are in the process of building out their systems and

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<sup>43</sup> See Alpine Petition at 7-8; Northcoast Petition at 5-7; RTG and OPASTCO Petition at 11.

<sup>44</sup> See Alpine Petition at 7-8; Northcoast Petition at 5-7; RTG and OPASTCO Petition at 11 (citing “Nextel’s Lost Narrow, Subscriber List Grows”, *Washington Post*, Jul 19, 2000, at E1-E2; “No Spectrum Worries for Sprint,” *Wireless Review*, September 15, 2000, at 9).

<sup>45</sup> See Alpine Petition at 7-8; Northcoast Petition at 5-7; RTG and OPASTCO Petition at 11.

<sup>46</sup> *C/F Block Sixth Report and Order* at ¶ 23 (citing *Further Notice*, 15 FCC Rcd at 9788, ¶ 25).

<sup>47</sup> See, e.g., Jill Carroll and Leslie Cauley, *Demand for Airwaves May Create Shortage*, *The Wall Street Journal*, Aug. 2, 2000, at A2 (The explosion in wireless communications and the emergence of 3G technology have resulted in a shortage of spectrum to satisfy the huge demand.); Susan Schmidt and Peter S. Goodman, *Spectrum Up for Grabs*, *The Washington Post*, July 11, 2000, at E1 (“[T]he 21<sup>st</sup> –century battle over the spectrum is a scramble for a highly valuable resource in increasingly short supply.”); Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, *Fifth Report*, FCC-00289, at Part II.A.1.h (rel. August 18, 2000).

<sup>48</sup> See, e.g., SBC Petition at 3, 11, 15; see also, e.g., the following comments and reply comments to the SBC and Nextel Petitions: AT & T Comments at 2-4; Bell Atlantic Comments at 9-10; SBC Comments at 12-13.

<sup>49</sup> *C/F Block Sixth Report and Order* at ¶ 23.

<sup>50</sup> See Advocacy Petition at 5-6, Alpine Petition at 10-11, Northcoast Petition at 8-9, RTG and OPASTCO Petition at 20-21; see also NTCA Petition at 2-3; RTG *Ex Parte* and RTG, NTCA, OPASTCO and Advocacy *Ex Parte* at 2. But see Verizon Opposition at 5-6.

<sup>51</sup> See Advocacy Petition at 5-6, Alpine Petition at 10-11, Northcoast Petition at 8-9, RTG and OPASTCO Petition at 20-21; see also RTG *Ex Parte*.

service has not been delayed to the public, the entrepreneur eligibility requirement should be maintained.<sup>52</sup> These petitioners have not provided any new rationale to justify the preservation of the F block set-aside. We considered arguments such as Northcoast's when we reached our decision in the *C/F Block Sixth Report and Order*. As we stated there, the need for additional open spectrum that exists in the C block markets also extends to the F block markets.<sup>53</sup> Additionally, open bidding for F block licenses may lead to more expeditious provision of wireless services to the public.<sup>54</sup> The C and F blocks have been subject to different regulatory requirements, reflecting the different bidding and marketplace histories of the two blocks as well as the corresponding different equity and reliance concerns applicable to bidders and licensees in each of the blocks.<sup>55</sup> Taking into account the divergent history of F block, we decided to remove the entrepreneur eligibility restrictions and to allow open bidding for all available F block licenses in Auction No. 35 and in future auctions. This determination was informed by the fact that almost every market with an available F block license already has a significant 30 MHz C block entrepreneur presence.<sup>56</sup> Thus, we found that we could modify the F block eligibility rules while preserving the diversity of opportunity and service that are goals of Section 309(j).<sup>57</sup> For these reasons, we affirm our position in the *C/F Block Sixth Report and Order* to allow open bidding and eliminate the F block entrepreneur eligibility restrictions.

15. **Unsold set-aside licenses.** For Auction No. 35, in the *C/F Block Sixth Report and Order*, we eliminated entrepreneur eligibility requirements for all C block licenses that were available but not sold in Auction No. 22.<sup>58</sup> We also decided to eliminate the set-aside for *any* C and F block license that was available, but not sold, in any subsequent auction.<sup>59</sup> RTG and OPASTCO urge the Commission not to eliminate entrepreneur eligibility requirements for licenses unsold in Auction No. 22, but rather provide entrepreneurs with one more opportunity to bid on such licenses on a closed basis as well as on future unsold licenses under a set-aside approach.<sup>60</sup> We previously considered RTG and OPASTCO's position and determined that closed bidding for this spectrum will not result in the acquisition and construction of

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<sup>52</sup> See Northcoast Petition at 8-9.

<sup>53</sup> *C/F Block Sixth Report and Order* at ¶ 26.

<sup>54</sup> *Id.*

<sup>55</sup> See *Id.*; see also *Further Notice* at 9785-86, ¶ 19, 9788, ¶ 25, 9790, ¶ 31; 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 8377-78, ¶¶ 75-76 (1998) ("*C Block Reconsideration Order*"); Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, *Second Report and Order and Further Notice of Proposed Rule Making*, 12 FCC Rcd at 16,446, ¶ 20 (1997) ("*C Block Second Report and Order*").

<sup>56</sup> See *Further Notice* at 9790, ¶ 31.

<sup>57</sup> See *C/F Block Sixth Report and Order* at ¶ 26.

<sup>58</sup> *C/F Block Sixth Report and Order* at ¶ 27. These licenses include both 15 MHz C block licenses and 10 MHz C block licenses that have been reconfigured from the 30 MHz C block licenses that were available but not sold in Auction No. 22.

<sup>59</sup> *Id.*

<sup>60</sup> RTG and OPASTCO Petition at 21-22; see also RTG, NTCA, OPASTCO, and Advocacy *Ex Parte* at 2.



these licenses.<sup>61</sup> The failure of certain 15 MHz C block licenses to sell in Auction No. 22 indicates that closed bidding for these licenses will not expeditiously result in the acquisition and construction of these licenses and in service to the public.<sup>62</sup> By lifting the eligibility restrictions for these unsold licenses, we seek to prevent additional delays in their utilization. For these reasons, we affirm our decision in the *C/F Block Sixth Report and Order* and will provide all bidders with an opportunity to acquire previously unsold set-aside licenses.

### C. Competitive Bidding Design

16. **Background.** In the *C/F Block Sixth Report and Order*, we rejected Nextel Communications, Inc.'s ("Nextel") bulk bid proposal.<sup>63</sup> We concluded that Nextel's proposal would exclude all but a very few competitors.<sup>64</sup> We also left to the Bureau, under its existing delegated authority, the final selection of a competitive bidding design and methodology for Auction No. 35, including the decision whether to implement a combinatorial (package) bidding design for the auction.<sup>65</sup> On September 6, 2000, the Bureau released the *Comment Public Notice*, which invited public comment on its auction procedures for the C and F block auction, including the proposal to adopt a simultaneous multiple round bidding methodology.<sup>66</sup> On October 5, 2000, the Bureau released the *Procedures Public Notice* in which, *inter alia*, it determined to utilize a simultaneous multiple round bidding design for Auction No. 35.<sup>67</sup> Subsequently, on November 6, 2000, Nextel filed a petition seeking to change the Auction No. 35 design to allow package bidding.<sup>68</sup> The Bureau denied Nextel's Petition.<sup>69</sup>

17. **Discussion.** As an alternative to the Commission reserving at least 20 MHz of spectrum for entrepreneurs, RTG and OPASTCO have requested that the Commission provide entities with a means of

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<sup>61</sup> See *C/F Block Sixth Report and Order* at ¶ 29.

<sup>62</sup> *Id.*

<sup>63</sup> *C/F Block Sixth Report and Order* at ¶ 36. Presently, the Commission has before us a Petition for Expedited Action to Modify the Auction Design for Auction No. 35, the C and F Block Reauction filed by Nextel Communications, Inc. ("Nextel") on November 6, 2000.

<sup>64</sup> See *Id.* at ¶ 34.

<sup>65</sup> *C/F Block Sixth Report and Order* at ¶ 36.

<sup>66</sup> "C and F Block Broadband PCS Spectrum Auction Schedule for November 29, 2000 Rescheduled for December 12, 2000; Revised List of Available Licenses, Comment Sought on Reserve Prices or Minimum Opening Bids and Other Procedural Issues," *Public Notice*, DA 00-2038 at 7 (rel. September 6, 2000) ("*Comment Public Notice*").

<sup>67</sup> "C and F Block Broadband PCS Spectrum Auction Scheduled for December 12, 2000; Notice and Filing Requirements for 422 Licenses in the C and F Block Broadband PCS Spectrum Auction, Minimum Opening Bids, Upfront Payments and Other Procedural Issues for Final Auction Inventory," *Public Notice*, DA 00-2259 at 9 (rel. October 5, 2000) ("*Procedures Public Notice*").

<sup>68</sup> See Petition for Expedited Action to Modify the Auction Design for Auction No. 35, the C and F Block Reauction filed by Nextel Communications, Inc. (filed November 6, 2000) ("Petition").

<sup>69</sup> In the Matter of Nextel Communications Inc.'s Petition for Expedited Action to Modify the Auction Design for Auction No. 35, the C and F Block Reauction, *Order*, DA 00-2825 at ¶¶ 11-12 (rel. December 14, 2000) ("*Order*").

combinatorial bidding on the disaggregated licenses.<sup>70</sup> We reject this alternative because, as the Bureau previously explained in response to Nextel's request for combinatorial bidding, the public interest would not be served by implementing package bidding for Auction No. 35.<sup>71</sup> Implementation of a package bidding design would have necessitated a notice and comment period due to the unique auction and service rules applicable to Auction No. 35.<sup>72</sup> The public had ample opportunity to request an alternative bidding design prior to the start of Auction No. 35. First, we sought comment, in the *Further Notice*, on possible ways for bidders to efficiently aggregate licenses in Auction No. 35.<sup>73</sup> The Bureau also invited public comment on its proposal to adopt simultaneous multiple round bidding.<sup>74</sup> No party filed comments contesting this bidding methodology.<sup>75</sup> In denying Nextel's Petition, the Bureau found that establishing combinatorial bidding, after the short-form application filing deadline, would impose delay on auction participants that would not be in the public interest.<sup>76</sup>

18. Moreover, the Commission has not yet conducted an auction utilizing combinatorial bidding due to the complexity of implementing such a bidding design. Although the Bureau has adopted package bidding procedures for the auction of the 747-762 and 777-792 MHz bands (Auction No. 31), the package bidding procedures established for Auction No. 31 were not designed with Auction No. 35 in mind. Accordingly, absent significant modification, such a design would have been complex and impractical to implement for Auction No. 35, particularly in light of the large number of licenses involved.<sup>77</sup> Further, applicants prepared business plans based on the Bureau's bidding methodology announced in the *Procedure Public Notice*. As noted, parties that need additional spectrum have the ability to aggregate licenses, subject to the CMRS spectrum cap.<sup>78</sup> For these reasons, we affirm that the final selection of a bidding design is within the Bureau's delegated authority and we will not disturb the Bureau's final selection of a simultaneous multiple round bidding design for Auction No. 35.

#### D. Bidding Credits

19. **Background.** In the *C/F Block Sixth Report and Order*, we decided to maintain existing small and very small business bidding credits (15 percent and 25 percent, respectively) for licenses won in open

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<sup>70</sup> RTG and OPASTCO Petition at 3, 20.

<sup>71</sup> *Order* at ¶¶ 11-12.

<sup>72</sup> *See Order*. Section 309(j)(3)(E) of the Communications Act provides that the Commission must provide a notice and comment period before the issuance of bidding rules, and after the issuance of bidding rules, provide an adequate period of time to allow interested parties to develop their business plans. 47 U.S.C. § 309(j)(3)(E).

<sup>73</sup> *See Further Notice* at 9785, ¶ 17.

<sup>74</sup> *Comment Public Notice* at 7. (seeking comment from the public on the proposed bidding methodology for Auction No. 35).

<sup>75</sup> Comments were filed by AT & T Wireless, Inc., BellSouth Corporation and SBC Communications, Inc., and Verizon Wireless. Reply comments were filed by AT & T Wireless Services, Inc., and BellSouth Corporation and SBC Communications, Inc.

<sup>76</sup> *Order* at ¶ 12.

<sup>77</sup> *See Order*.

<sup>78</sup> *C/F Block Sixth Report and Order* at ¶ 14.

bidding and to eliminate bidding credits for licenses won in closed bidding.<sup>79</sup> With respect to open bidding, we concluded that bidding credits of 15 and 25 percent will allow effective competition by small businesses.<sup>80</sup> With respect to closed bidding, we concluded that the continued use of bidding credits in restricted auctions would not serve its intended purpose.<sup>81</sup>

20. **Discussion. Open Bidding.** We received petitions from Northcoast, RTG and OPASTCO requesting an increase in bidding credits in open auctions.<sup>82</sup> Northcoast argues that retaining the existing levels of bidding credits (15 and 25 percent) in open bidding will not permit effective competition by small businesses.<sup>83</sup> Similarly, RTG and OPASTCO argue that the Commission should increase bidding credits in open auctions to ensure that entrepreneurs have an opportunity to participate.<sup>84</sup> We considered and rejected these arguments in the *C/F Block Sixth Report and Order*.<sup>85</sup> We noted that in our Specialized Mobile Radio (SMR) 900 MHz auction – using bidding credits of 10 percent and 15 percent – 75 percent of the winning bidders were small businesses, winning 26 percent of the licenses.<sup>86</sup> Moreover, in Auction No. 11, the auction of D, E, and F block licenses, small and very small business were the high bidders for 141 of the 986 D and E block licenses won in that auction, even though bidding credits were not available for D and E block licenses.<sup>87</sup> Thus, small businesses have proven to be competitive in auctions even where we have provided for lower bidding credits than what we have adopted for Auction No. 35. Northcoast, RTG and OPASTCO have not provided any new rationale to justify increasing the level of bidding credits for licenses subject to open bidding. Therefore, for open licenses, we will maintain the current level of bidding credits for small and very small businesses.

21. **Closed Bidding.** With respect to closed bidding, four petitioners object to the Commission’s decision to eliminate bidding credits in closed auctions.<sup>88</sup> These petitioners argue that by eliminating the bidding credits in closed auctions, the Commission has violated the congressional mandate pursuant to

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<sup>79</sup> See *Id.* at ¶ 44.

<sup>80</sup> *Id.* at ¶ 44.

<sup>81</sup> *Id.* at ¶ 45.

<sup>82</sup> See Northcoast Petition at 9-11 and RTG and OPASTCO Petition at 22-25; see also RTG, NTCA, OPASTCO and Advocacy *Ex Parte* at 2.

<sup>83</sup> See Northcoast Petition at 9-11.

<sup>84</sup> See RTG and OPASTCO Petition at 22-25 and RTG *Ex Parte*.

<sup>85</sup> See *C/F Block Sixth Report and Order* at ¶ 44.

<sup>86</sup> *C/F Block Sixth Report and Order* at ¶ 44.

<sup>87</sup> *Id.*

<sup>88</sup> See Alpine Petition at 9-10, Northcoast Petition at 9-11, RTG and OPASTCO Petition at 22-25, NTCA Petition at 3-6; see also RTG *Ex Parte* and RTG, NTCA, OPASTCO and Advocacy *Ex Parte* at 2-3 (also requesting the Commission to revise its generic auction rules to incorporate a “total assets” test as proposed in the FNPRM in the Part 1 proceeding. See Amendment of Part 1 of the Commission’s Rules - Competitive Bidding Procedures, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Notice of Proposed Rule Making*, WT Docket No. 97-82, FCC 00-274 (rel. August 14, 2000)). The “total assets” test is currently part of a FNPRM in the Part 1 proceeding; thus, is not a subject of this rulemaking proceeding.

Section 309(j) to provide small and very small businesses with a meaningful opportunity to compete in spectrum auctions.<sup>89</sup> Specifically, Northcoast, NTCA, and RTG and OPASTCO are concerned that, without bidding credits, small and very small businesses will be unable to compete against “grandfathered”<sup>90</sup> entities that are generating millions of dollars in gross revenues.<sup>91</sup>

22. We considered and rejected this argument in the *C/F Block Sixth Report and Order*.<sup>92</sup> We noted that two groups are included among those entities eligible to participate in the entrepreneurs’ block auctions.<sup>93</sup> One group consists of well-capitalized new entities with small gross revenues.<sup>94</sup> Another group consists of older companies with small total assets and net revenues, but high gross revenues.<sup>95</sup> As we explained, this situation creates an anomaly because the first group, the well-capitalized new entities, may qualify for bidding credits, while the second group, the older companies, may not qualify for bidding credits.<sup>96</sup> If we were to retain bidding credits in closed bidding, it may skew these auctions in favor of well-capitalized new entities that are uniquely structured to protect large investors from attribution.<sup>97</sup> Moreover, although there may be a number of “grandfathered” entities participating in Auction No. 35, we have found that small and very small businesses have been previously successful in open auctions without bidding credits.<sup>98</sup> As we are not persuaded that small and very small businesses will be unable to effectively compete against “grandfathered” entities, and as we do not want to undermine the “grandfather” exception, we reject petitioners’ request to provide bidding credits in closed auctions. We continue to believe that small and very small businesses will have a meaningful opportunity to compete in Auction No. 35 and in future spectrum auctions.<sup>99</sup> For this reason, we affirm our decision in the *C/F Block Sixth Report and Order* to eliminate bidding credits in closed auctions.

#### E. Transfer Requirements

23. **Background.** In the *C/F Block Sixth Report and Order*, we modified the transfer restrictions

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<sup>89</sup> See Alpine Petition at 9-10, Northcoast Petition at 9-11, RTG and OPASTCO Petition at 22-25, NTCA Petition at 3-6; see also RTG *Ex Parte*.

<sup>90</sup> See 47 C.F.R. § 24.709(b)(9)(i). A “grandfathered” entity is a qualified applicant that was eligible for and participated in Auction No. 5 or 10; thus, permitted to bid on closed C block licenses in any auction that begins on or before March 23, 2001.

<sup>91</sup> See Northcoast Petition at 9-11, RTG and OPASTCO Petition at 22-25, NTCA Petition at 3-6; see also RTG, NTCA, OPASTCO and Advocacy *Ex Parte* at 2.

<sup>92</sup> See *C/F Block Sixth Report and Order* at ¶ 45.

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

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

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*; see also Dobson Comments at 13-16 and Dobson Reply at 5-6.

<sup>98</sup> See *C/F Block Sixth Report and Order* at ¶¶ 44-45.

<sup>99</sup> *Id.* at ¶ 45.

for C and F block licenses.<sup>100</sup> Specifically, we concluded that C and F block spectrum licenses won pursuant to open bidding would not be subject to a five-year holding and limited transfer rule.<sup>101</sup> With respect to closed bidding, we concluded that a licensee would be allowed to assign or transfer a license to a non-entrepreneur as soon as the licensee completed its first construction benchmark.<sup>102</sup> Additionally, we eliminated unjust enrichment payments for licenses won in Auction No. 5 and Auction No. 10, but retained unjust enrichment payments for licenses that were acquired in Auction No. 11 and Auction No. 22.<sup>103</sup> Despite requests from commenters, we decided not to allow a carrier to exchange or transfer restricted C or F block licenses during the holding period where the carrier could demonstrate “substantial service” throughout its system, but not in the particular market that would be affected by the transfer.<sup>104</sup>

24. **Discussion.** On August 9, 2000, fourteen days before adoption of the *C/F Block Sixth Report and Order*, Congress adopted legislation that grants qualifying Alaska Native regional corporations relief from the entrepreneur transfer restrictions and unjust enrichment payment requirements. To qualify, the corporation (or an affiliate thereof) must be organized pursuant to the Alaska Native Claims Settlement Act, hold a PCS license as of the date of the enactment of the legislation, and either have paid for the license in full or have complied with the payment schedules for the license.<sup>105</sup> Cook Inlet Region, Inc. (“CIRI”) is an Alaska Native regional corporation and meets the requirements of the statute. Thus, this legislation allows CIRI to transfer or assign a license to a non-entrepreneur without paying any unjust enrichment penalties.<sup>106</sup> Alpine requests that the Commission, in light of this legislation, revise its transfer rules so as to apply the same relief afforded CIRI in a uniform manner to all entrepreneurs.<sup>107</sup> Alpine argues that if relief from the unjust enrichment penalty requirements is not applied to all entrepreneurs, then

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<sup>100</sup> *Id.* at ¶¶ 46-53.

<sup>101</sup> *C/F Block Sixth Report and Order* at ¶ 47.

<sup>102</sup> *Id.* at ¶ 49. (The decision to transfer a restricted license to a non-entrepreneur before the end of the five-year holding period in this manner must be made by those in control of the entrepreneur).

<sup>103</sup> *See C/F Block Sixth Report and Order* at ¶ 51.

<sup>104</sup> *C/F Block Sixth Report and Order* at ¶ 53.

<sup>105</sup> Department of Defense Appropriations of 2001, Public Law 106-259, § 8149, 114 Stat. 656 (Aug. 9, 2000). Section 8149 provides:

Licenses Held By Alaska Native Regional Corporation – An Alaska Native regional corporation organized pursuant to the Alaska Native Claims Settlement Act, or affiliate thereof, that holds a Federal Communications Commission license in the personal communications service as of the date of enactment of this section and has either paid for such license in full or has complied with the payment schedules for such license shall be permitted to transfer and assign without penalty such license to any transferee or assignee. No economic penalties shall apply to any transfer or assignment authorized under this section. Any amounts owed to the United States for the initial grant of such licenses shall become immediately due and payable upon the consummation of any such transfer or assignment. Any application for such a transfer or assignment shall be deemed granted if not denied by the Commission within 90 days of the date on which it was initially filed. Any provision of law or regulation to the contrary is hereby amended.

<sup>106</sup> *See* Department of Defense Appropriations of 2001, Public Law 106-259, § 8149, 114 Stat. 656 (Aug. 9, 2000).

<sup>107</sup> Alpine Petition at 12.

this will result in discriminatory application of the Commission's rule.<sup>108</sup> In the alternative, Alpine asks the Commission to amend its rules to exclude CIRI from Auction No. 35 if all entrepreneurs cannot be afforded the same relief.<sup>109</sup> CIRI and VoiceStream Wireless Corporation ("VoiceStream") both oppose Alpine's request to exclude CIRI from Auction No. 35.<sup>110</sup> Although CIRI and VoiceStream do not oppose the elimination of all transfer restrictions for entrepreneurs, both parties object to Alpine's attempt to utilize a rulemaking proceeding to decide CIRI's eligibility to participate in Auction No. 35.<sup>111</sup> Verizon opposes Alpine's request to remove all transfer restrictions on licenses won in closed bidding.<sup>112</sup> Verizon states that, absent the Commission's transfer restrictions, entrepreneurs could purchase licenses and immediately sell the licenses to non-entrepreneurs.<sup>113</sup>

25. As stated above, we have made several modifications to the C and F block transfer restrictions. In modifying the transfer restrictions, we have attempted to level the playing field for entrepreneurs with respect to other licensees, making it easier for entrepreneurs to restructure their spectrum holdings, provide additional access to capital, and to increase effective competition by entrepreneurs. The relief accorded CIRI under the statute was specifically authorized by Congress and narrowly tailored. The legislation, therefore, does not change the Commission's application of its transfer requirements to all other entrepreneurs. As a matter of legislative initiative, Congress determined to exempt companies like CIRI from the economic consequences of the application of the unjust enrichment provisions. Congress could have provided the same relief to all applicants, but instead Congress chose to narrowly tailor the specific relief. Notably, Congress left intact the statutory directive of Section 309(j)(4)(E), which requires the Commission to "require such transfer disclosures and antitrafficking restrictions and payment schedules as may be necessary to prevent unjust enrichment as a result of the methods employed to issue licenses and permits."<sup>114</sup> Therefore, Congress' determination to create an exemption that applies to CIRI does not show legislative intent to exempt all applicants from the antitrafficking and unjust enrichment provisions. Nor does Congress' action negate the statutory purpose served by the transfer restrictions. Providing all applicants with the specific relief provided to CIRI would circumvent the underlying purpose of retaining a set-aside in that entrepreneurs could acquire a license in a closed auction and immediately sell the newly acquired license on the open market at windfall prices without paying any penalties. We think that such a result is neither consistent with making licenses available for closed bidding by entrepreneurs,<sup>115</sup> in furtherance of Section 309(j)(4)(D)(requiring the Commission to ensure that small businesses, *inter alia*, are given the opportunity to participate in the provision of spectrum-based services, and, for such purposes, consider the use of bidding preferences and other procedures) nor, as indicated above, with the directives of Section 309(j)(4)(E) (requiring various measures to prevent unjust enrichment).

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<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> CIRI Opposition at 1-5 and VoiceStream Opposition at 1, 3-4.

<sup>111</sup> *See Id.*

<sup>112</sup> Verizon Opposition at 6-7.

<sup>113</sup> Verizon Opposition at 7 (Verizon also argues that Alpine's request to remove all transfer restrictions illuminates its arguments to maintain the C and F block set-asides).

<sup>114</sup> 47 U.S.C. § 309(j)(4)(E).

<sup>115</sup> *See C/F Block Sixth Report and Order* at ¶ 53.

26. Moreover, the legislation that provides CIRC with this relief does not at the same time, in and of itself, render CIRC ineligible for entrepreneur status in Auction No. 35, or in any future auction. CIRC's eligibility to participate in Auction No. 35 as an entrepreneur is dependent on CIRC satisfying our entrepreneur eligibility restrictions.<sup>116</sup> The instant rulemaking proceeding is not the proper forum to challenge congressional legislation or to determine CIRC's entrepreneur status for Auction No. 35. After the Commission by public notice announces that long-form applications have been accepted for filing, Alpine and/or any other applicant, if they choose to do so, will have an opportunity to challenge CIRC's entrepreneurial status by way of a petition to deny filed with the Commission.<sup>117</sup> For these reasons, we will not further revise its transfer rules or amend its rules to exclude CIRC from Auction No. 35.

#### IV. ORDERING CLAUSE

27. Accordingly, IT IS ORDERED THAT, 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), 156(c)(1), 303(r), and 309(j), the Petitions filed by Alpine PCS, Inc, National Telephone Cooperative Association, Northcoast Communications, LLC, Office of Advocacy of the United States Small Business Administration, and The Rural Telecommunications Group and the Organization for the Promotion and Advancement of Small Telecommunications Companies filed in response to the *C/F Block Sixth Report and Order* are DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Secretary

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<sup>116</sup> See 47 C.F.R. § 24.709.

<sup>117</sup> See 47 C.F.R. § 1.2108.

**V. APPENDIX A****LIST OF PLEADINGS****Petitions for Reconsideration**

1. Alpine, PCS, Inc. (“Alpine”)
2. National Telephone Cooperative Association (“NTCA”)
3. Northcoast Communications, LLC (“Northcoast”)
4. Office of Advocacy of the United States Small Business Administration (“Advocacy”)
5. The Rural Telecommunications Group (“RTG”) and the Organization for the Promotion and Advancement of Small Telecommunications Companies (“OPASTCO”)

**Oppositions**

1. Cook Inlet Region, Inc. (“CIRI”)
2. Verizon Wireless (“Verizon”)
3. VoiceStream Wireless Corporation (“VoiceStream”)

**Notice of *Ex Parte* Meetings**

1. The Rural Telecommunications Group (“RTG”)
2. The Rural Telecommunications Group (“RTG”), National Telephone Cooperative Association (“NTCA”), Organization for the Promotion and Advancement of Small Telecommunications Companies (“OPASTCO”), and Office of Advocacy, U.S. Small Business Administration (“Advocacy”)