

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

In the Matter of)
Implementation of Competitive Bidding) WT Docket No. 01-32
Rules To License Certain) RM-8897
Rural Service Areas)

NOTICE OF PROPOSED RULE MAKING

Adopted: January 31, 2001

Released: February 12, 2001

Comment Date: March 19, 2001

Reply Comment Date: April 3, 2001

By the Commission:

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I. INTRODUCTION

1. In this *Notice of Proposed Rule Making*, we propose rules for awarding licenses for four cellular Rural Service Areas (RSAs) that remain unlicensed because the initial lottery winner was disqualified or has otherwise withdrawn its application.¹ Under the Balanced Budget Act of 1997 (1997 Budget Act), we are now required, with certain exceptions not applicable here, to resolve mutually exclusive applications for initial licenses by competitive bidding.² We propose to: 1) allow all eligible parties to apply for these initial licenses; and 2) license these markets on an RSA basis under our Part 22 rules. As discussed below, we also propose to use our Part 1 competitive bidding rules to auction these licenses.

II. BACKGROUND

2. The Commission has been awarding cellular licenses since 1982.³ Under the original cellular licensing rules, one of the two cellular channel blocks in each market (the Channel B block) was awarded to a local wireline carrier, while the other block (the Channel A block) was awarded competitively to a carrier other than a local wireline incumbent.⁴ Although we awarded the first thirty Metropolitan Statistical Area (MSA) licenses pursuant to comparative hearing rules, we adopted rules in 1984 to award

¹ There are currently seven cellular RSA markets that remain unlicensed because the initial lottery winner was disqualified. The seven unlicensed markets are: 370A – Monroe, FL; 492A – Goodhue, MN; 615A – Bradford, PA; 332A – Polk, AR; 582A-Barnes, ND; 727A – Ceiba, Puerto Rico; and 672A - Chambers, TX. Of these seven unlicensed markets, three markets (370A – Monroe, FL, 492A – Goodhue, MN, and 615A – Bradford, PA) were the subject of recent Congressional action. See District of Columbia Appropriations Act of FY 2001, Pub. L. No. 106-553, 114 Stat. 2762, Title X, § 1007, Launching Our Communities' Access to Local Television Act of 2000 (2000) (D.C. Appropriations Act of FY 2001). In the legislation, Congress requires the Commission to reinstate the original lottery winner in each of the three markets to tentative selectee status and proceed with processing the selectee's application for authority to operate. We will address the reinstatement of the former lottery winners to tentative selectee status and application processing in a separate action. Accordingly, this NPRM addresses only the four remaining unlicensed cellular RSAs.

² Balanced Budget Act of 1997, Pub. L. No. 105-33, § 3002(a), 111 Stat. 251, at 258-60 (1997). Section 3002(a) provides that competitive bidding shall be used to resolve mutually exclusive applications for initial licenses and construction permits except in the case of public safety radio services, digital television service licenses and permits given to existing terrestrial broadcast licensees to replace their analog television service licenses, and licenses and construction permits for noncommercial educational broadcast stations and public broadcast stations. 1997 Budget Act, Section 3002(a)(1)(A), codified at 47 U.S.C. § 309(j)(1), (2). Section 3002(a) further states that, with limited exceptions not applicable to this proceeding, "the Commission shall not issue any licenses or permits using a system of random selection under this subsection after July 1, 1997." 1997 Budget Act, Section 3002(a)(2)(B), codified at 47 U.S.C. § 309(i)(5).

³ See An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems, *Memorandum Opinion and Order on Reconsideration*, 89 F.C.C. 2d 58 (1982).

⁴ *Id.*

the remaining cellular MSA and RSA licenses through lotteries.⁵ By 1991, lotteries had been held for every MSA and RSA, and licenses were awarded to the lottery winners in most instances. In some RSA markets, however, the initial lottery winner was disqualified from receiving the license because of a successful petition to deny or other Commission action. In these markets, the initial RSA license was never awarded, but under our former cellular lottery procedures, the remaining lottery applications remained pending. These procedures provided that, if the application of the tentative selectee were denied, a second lottery would be held among the remaining applicants or, in cases where multiple rank-ordered applicants were selected, the next ranked applicant would become the tentative selectee.⁶

3. In the Omnibus Budget Reconciliation Act of 1993 (1993 Budget Act), Congress added Section 309(j) to the Communications Act, authorizing the Commission to resolve mutually exclusive applications for use of the electromagnetic spectrum by auction.⁷ In addition, Section 6002(e) of the 1993 Budget Act provided that: "The Federal Communications Commission shall not issue any license or permit [by lottery] after the date of enactment of this Act unless . . . one or more applications for such license were accepted for filing by the Commission before July 26, 1993."⁸ This provision left to the Commission's discretion whether to use auctions or lotteries for applications filed before July 26, 1993. In the *Competitive Bidding Second Report and Order* in 1994, the Commission concluded that mutually exclusive applications for initial licenses in the Public Mobile Services, including cellular service, would be subject to auction unless specifically excluded.⁹

⁵ See, e.g., Amendment of the Commission's Rules to Allow the Selection from Mutually Exclusive Competing Cellular Applications Using Random Selection or Lotteries Instead of Comparative Hearings, *Report and Order*, 98 F.C.C. 2d 175 (1984).

⁶ See *Public Notice*, FCC to Hold Domestic Public Cellular Telecommunications Service Lottery for RSA Markets in Which the Previous Winner Was Defective, Mimeo No. 63896 (July 12, 1996). See also former rule section 1.823(b)(3), 47 C.F.R. § 1.823(b)(3) (1991) (which provided that if a winning application for an unserved area was dismissed, another lottery would be held to select an application from the remaining applicants). See also Amendment of the Commission's Rules on the Selection from Among Mutually Exclusive Competing Applications Using Random Selection or Lotteries in the Public Land Mobile and Domestic Cellular Radio Telecommunications Services, *Order*, FCC 88-165 (rel. May 4, 1988) (amending rule section 1.823(a) to provide the Chief of the Common Carrier Bureau and Managing Director with the authority to determine the number of applicants to be selected in each lottery). In 1988, the Chief of the Common Carrier Bureau and Managing Director routinely placed a number of tentative selectees in rank order and, for RSA lotteries, where an initial tentative selectee was disqualified, the next rank-ordered applicant would become the tentative selectee for the RSA market.

⁷ Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(a), 107 Stat. 312, 387-92 (1993).

⁸ *Id.* at § 6002(e).

⁹ Implementation of Section 309(j) of the Communications Act — Competitive Bidding, *Second Report and Order*, 9 FCC Rcd 2348, 2359, ¶ 61 (1994) (*Competitive Bidding Second Report and Order*). The Commission first exercised its discretion in 1994 and used lotteries, rather than auctions, to resolve mutually exclusive applications for cellular unserved areas filed prior to July 26, 1993. See Implementation of Section 309(j) of the Communications Act — Competitive Bidding, *Memorandum Opinion and Order*, 9 FCC Rcd 7387 (1994). For

4. On July 12, 1996, the Wireless Telecommunications Bureau (WTB or Bureau) scheduled a second lottery for September 18, 1996, for six RSA markets in which applications had been filed prior to July 26, 1993, and the original lottery winner had been disqualified.¹⁰ This second lottery was scheduled to resolve mutually exclusive applications originally filed in 1989 for six markets. On September 9, 1996, Cellular Communications of Puerto Rico (CCPR) filed a petition requesting that the Commission award these six licenses by auction instead of lottery.¹¹ On September 10, 1996, WTB postponed the lottery in order to preserve the issue raised in CCPR's petition.¹² On October 24, 1996, WTB invited comment on the CCPR petition, which was treated as a petition for rulemaking (CCPR Public Notice).¹³ Nineteen comments and eleven reply comments, both in support of and opposed to CCPR's petition, were received.¹⁴

5. On August 5, 1997, President Clinton signed the 1997 Budget Act into law, which modified the Commission's auction authority by amending Section 309(j) of the Communications Act to require that all mutually exclusive applications for initial licenses or construction permits be auctioned,

mutually exclusive cellular unserved area applications filed after July 26, 1993, the Commission conducted an auction, which was concluded on January 21, 1997. *See Public Notice, Cellular Unserved Areas Auction Closes; Winning Bidders in the Auction of 14 Licenses to Provide Cellular Service in Unserved Areas*, 12 FCC Rcd 999 (Jan. 22, 1997).

¹⁰ *Public Notice, FCC to Hold Domestic Public Cellular Telecommunications Service Lottery for RSA Markets in Which the Previous Winner Was Defective*, Mimeo No. 63896 (July 12, 1996). In other markets where the original lottery winner was disqualified, the Commission completed second lotteries. For example, a second lottery was completed for Market 672A - Chambers, TX. However, the application of the tentative selectee from the second lottery for Market 672A, Alee Cellular Communications, was recently dismissed for lack of character qualification. *See Application of Alee Cellular Communication, Memorandum Opinion and Order*, DA 00-276 (rel. February 15, 2000). Therefore, the Channel A Block in Market 672 currently remains unlicensed, resulting in seven currently unlicensed RSA markets, four of which are addressed in this NPRM. *See fn. 1, supra.*

¹¹ *Cellular Communications of Puerto Rico, Inc. Petition for Declaratory Ruling, Or, in the Alternative, for Rulemaking*, RM-8897 (filed Sept. 9, 1996).

¹² *Public Notice, Wireless Telecommunications Bureau Postpones Cellular Telecommunications Service Lottery for Rural Service Areas*, Mimeo No. 65051 (Sept. 10, 1996).

¹³ *Public Notice, Public Comment Invited, Cellular Communications of Puerto Rico, Inc. Petition for Declaratory Ruling or Rulemaking to Determine Whether Competitive Bidding Procedures Should Be Used to License Certain Rural Service Areas*, RM-8897, DA 96-1685 (Oct. 24, 1996).

¹⁴ Appendix A identifies the parties filing comments and reply comments. On April 17, 1997, the Coalition for Equity in Licensing filed a Petition for Writ of Mandamus with the U.S. Court of Appeals for the D.C. Circuit. The Petition asked the Court to order the Commission to award the licenses at issue in this rulemaking proceeding by lottery. On May 30, 1997, the Commission filed its brief in opposition to the mandamus petition. On June 27, 1997, the Court denied the Petition. *See In re: Coalition for Equity in Licensing, Petitioner*, No. 97-1272 (D.C. Cir. June 27, 1997).

with certain exceptions not applicable here.¹⁵ The 1997 Budget Act expressly repealed Section 6002(e) of the 1993 Budget Act,¹⁶ and terminated the Commission's authority to award licenses through random selection, even in the case of applications filed prior to July 26, 1993, except for licenses for noncommercial educational and public broadcast stations.¹⁷

6. Because the 1997 Budget Act terminated the Commission's remaining lottery authority, WTB dismissed all pending RSA lottery applications by separate orders released April 2, 1999, and April 29, 1999.¹⁸ In the April 2, 1999 order, WTB also dismissed as moot CCPR's petition requesting that we award licenses for the remaining RSA markets through competitive bidding.¹⁹

III. DISCUSSION

7. We propose to allow all eligible applicants to apply for licenses for the four remaining unlicensed cellular RSAs. Further, we propose to license these markets on an RSA basis, subject to the same construction and operational rules as previously licensed RSAs. Finally, if there are mutually exclusive applications for these markets, we propose to use the general competitive bidding rules set forth in Part 1, Subpart Q, of the Commission's rules to conduct the auction. We seek comment on these issues, which we address in greater detail below.

A. Eligibility for Licenses

8. We propose to allow all eligible entities and persons to apply for the licenses at issue in this proceeding. Our competitive bidding program seeks to award each license to the applicant who values it most highly, as determined by the marketplace, and who is therefore most likely to offer valued service to

¹⁵ 1997 Budget Act, Pub. L. No. 105-33, § 3002(a), 111 Stat. 251, 258-60 (1997) (amending 47 U.S.C. § 309(j)).

¹⁶ *Id.* at § 3002(a)(4).

¹⁷ *Id.* at § 3002(a)(2)(B). As noted above, the Commission had found in the *Competitive Bidding Second Report and Order* that mutually exclusive applications for initial licenses to provide cellular service were auctionable under the auction authority provided by the 1993 Budget Act. See *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2359, ¶ 61.

¹⁸ See Certain Cellular Rural Service Area Applications, *Order*, 14 FCC Rcd 4619 (1999); Certain Cellular Rural Service Area Applications in Market Nos. 599A and 672A, *Order*, DA 99-814 (rel. April 29, 1999).

¹⁹ CCPR's petition specifically requested that market 727A – Ceibo, Puerto Rico, be awarded through competitive bidding rather than through a second lottery. However, the CCPR Petition raised certain issues concerning the broader applicability of the use of competitive bidding for all markets where an initial lottery was held and the winner was disqualified. We therefore treated the CCPR Petition as a Petition for Rulemaking and requested comment on awarding cellular licenses through competitive bidding for all remaining unlicensed RSAs. Although we dismissed CCPR's petition as moot because we are required by the 1997 Budget Act to award licenses through competitive bidding, we have considered, and are incorporating into the record of this proceeding, all comments and reply comments submitted in response to the CCPR Public Notice.

the public. Excluding potential applicants that were not previously lottery applicants would be inconsistent with that goal. We also note that nearly twelve years have passed since the closing of the original RSA filing window, so that a number of commenters who have expressed interest in participating in RSA auctions did not have the opportunity to file applications, while some applicants that did file lottery applications may no longer exist. Finally, to the extent that former lottery applicants continue to have an interest in applying for these markets, open eligibility allows them to do so. We therefore tentatively conclude that it would be in the public interest to permit all eligible entities to participate in an RSA auction. We seek comment on this proposal.

9. In all of the four unlicensed RSAs, the Commission has granted interim operating authority (IOA) to one or more cellular operators to provide cellular service on the Channel A block pending the ultimate permanent licensing of these RSAs.²⁰ We propose to permit current IOA holders to participate in the auction of licenses for the unlicensed RSAs on an equal basis with other applicants. Although IOAs confer no interest or expectation of receiving a cellular license, IOA holders may have a substantial interest in bidding for permanent authorizations in markets where they may have been providing interim cellular service. Finally, we note that under the terms of each of the existing IOAs, the IOA operator must cease operations immediately upon initiation of service by the new licensee, provided that the new licensee gives at least 30 days written notice of its intent to provide service.²¹ In order to prevent unnecessary interruption of service to existing cellular customers, we propose that, in the event that any of the current IOA holders do not obtain the RSA license for their markets, they should be allowed to continue providing service on a temporary basis subject to these conditions, *i.e.*, until the auction winner provides the required notice and is prepared to commence service. We seek comment on these proposals.

B. Market Areas To Be Auctioned

10. We also seek comment on whether the unlicensed markets for which licenses are to be awarded through competitive bidding should be licensed on an RSA basis, or whether alternative licensing models should be considered. For the reasons discussed below, we tentatively conclude that the unlicensed cellular markets should be licensed on an RSA basis under our Part 22 rules.

²⁰ The following entities hold interim operating authority in the four cellular RSAs subject to this NPRM:

1) Southwestern Bell Wireless, Inc. – KNKP970 (332A-Polk, AR); 2) KETS Partnership – KNKP980 (582A-Barnes, ND); 3) WWC Holding Co., Inc. – KNKP986 and KNKP990 (582A-Barnes, ND); 4) CCPR Services, Inc. – KNKQ240 (727A-Ceiba, PR); 5) San Juan Cellular Telephone Company – KNKQ241 (727A-Ceiba, PR); and 6) Galveston Cellular Telephone Co. – KNKP971 (672A - Chambers, TX). Of the three cellular RSAs subject to the D.C. Appropriations Act of FY 2001, *see* fn. 1, *supra*, two markets have holders of interim operating authority as follows: 1) McCaw Communications of Florida, Inc. – KNKQ202 (370A-Monroe, FL); and 2) AT&T Wireless Services of Minnesota, Inc. – KNKQ214 (492A-Goodhue, MN). There are currently no holders of interim operating authority in the third market identified as subject to the D.C. Appropriations Act of FY 2001, RSA market 615A-Bradford, PA.

²¹ The IOA condition specifically provides that “[t]he interim operator must fully cooperate with the permanent licensee in effectuating a smooth transition to the provision of service in the market by the permanent licensee without disruption of service to the public. The interim operator must cease operations in the market on the date of initiation of permanent service or within 30 days of written notice by the permanent permittee to the interim operator of the day and time that it intends to initiate service, whichever date occurs later.”

11. The initial lotteries for the unlicensed markets were for RSAs as defined in Part 22 of our rules.²² For purposes of administrative efficiency, we propose to retain the RSA model for licensing operators in these currently unlicensed cellular markets. Under this proposal, licenses awarded for these markets would be subject to the same construction and operational rules as licenses granted to prior RSA lottery winners, including the exclusive right of the licensee of the first cellular system on each channel block to expand its system within that market for a period of five years.²³ After the expiration of the five-year expansion period, any areas within the RSA market that remained unserved would be available for licensing pursuant to our Part 22 unserved areas Phase I and Phase II filing procedures.²⁴

C. Competitive Bidding Procedures

12. We propose to conduct the auction of cellular RSA licenses in conformity with the general competitive bidding rules set forth in Part 1, Subpart Q, of the Commission's rules, and consistent with the bidding procedures that have been employed in previous auctions.²⁵ Specifically, we propose to employ the Part 1 rules governing competitive bidding design, designated entities, application and payment procedures, reporting requirements, collusion issues, and unjust enrichment. Under this proposal, such rules would be subject to any modifications that the Commission may adopt in the Part 1 proceeding.²⁶ We also note that under the Part 1 rules, winning bidders would be eligible to obtain a bidding credit for serving qualifying tribal lands pursuant to Section 1.2110(f)(3).²⁷ In addition, consistent with current practice, matters such as

²² See rule section 22.909, 47 C.F.R. § 22.909.

²³ See rule section 22.947, 47 C.F.R. § 22.947.

²⁴ See rule section 22.949, 47 C.F.R. § 22.949.

²⁵ In the *Part 1 Third Report and Order*, the Commission streamlined its auction procedures by adopting general competitive bidding rules applicable to all auctionable services. Amendment of Part 1 of the Commission's Rules — Competitive Bidding Procedures, Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374 (1997) (modified by Erratum, DA 98-419 (rel. March 2, 1998)) (*Part 1 Third Report and Order*). More recently, the Commission clarified and amended these general competitive bidding procedures. 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 Further Notice of Proposed Rule Making*, 15 FCC Rcd 15293 (2000) (*Part 1 Order on Reconsideration, Fifth Report and Order, and Fourth FNPRM*). See also 47 C.F.R. § 1.2101 *et seq.*

²⁶ See *Part 1 Order on Reconsideration, Fifth Report and Order, and Fourth FNPRM*, 15 FCC Rcd at 15331-15334, ¶¶ 79-88. The Commission is also considering certain modifications to its rule prohibiting collusion among auction participants. See Amendment of Part 1 of the Commission's Rules — Competitive Bidding Procedures, *Third Further Notice of Proposed Rule Making*, 14 FCC Rcd 21558 (1999).

²⁷ See 47 C.F.R. § 1.2110(f)(3). In this regard, we note that only one RSA subject to these proposals — RSA 582A-Barnes, ND — contains any federally recognized tribal lands.

the appropriate competitive bidding design, as well as minimum opening bids and reserve prices, would be determined by WTB pursuant to its delegated authority.²⁸ We seek comment on this approach.

13. We also seek comment on whether to adopt special provisions for small businesses that participate in the auction of cellular RSA licenses. In the *Competitive Bidding Second Memorandum Opinion and Order*, the Commission stated that it would define eligibility requirements for small businesses on a service-specific basis, taking into account the capital requirements and other characteristics of each particular service in establishing the appropriate threshold.²⁹ The *Part 1 Third Report and Order*, while it standardizes many auction rules, provides that the Commission will continue a service-by-service approach to defining small businesses.³⁰

14. We believe that the auction of authorizations for the currently unlicensed cellular RSA markets could attract a wide range of entities. Therefore, we propose to provide small businesses with bidding credits in order to meet our Congressional mandate to promote competition and to disseminate licenses among a wide variety of applicants.³¹ Specifically, we propose to establish three small business definitions. Under this proposal, we would define an entrepreneur as an entity with average annual gross revenues for the preceding three years not exceeding \$40 million, a small businesses as an entity with average annual gross revenues for the preceding three years not exceeding \$15 million, and a very small business as an entity with average annual gross revenues for the preceding three years not exceeding \$3 million. The first two of these definitions are consistent with the small business definitions we have established for the broadband Personal Communications Services (PCS) C and F blocks.³² Given the similarities between broadband PCS and cellular service, we tentatively conclude that this consistency is appropriate. We note, however, that the markets in question here are relatively small rural markets, and we believe that smaller businesses may be interested in acquiring licenses to provide service in these markets and may benefit from bidding credits. For this reason we tentatively conclude that, in addition to establishing small business definitions consistent with those of broadband PCS, we should also adopt the definition of very small business that we propose today. As provided in section 1.2110(f)(2) of our rules,

²⁸ *Part 1 Third Report and Order*, 13 FCC Rcd at 448-49, 454-55, ¶¶ 125, 139 (directing the Bureau to seek comment on specific mechanisms relating to auction conduct pursuant to the 1997 Budget Act).

²⁹ Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Second Memorandum Opinion and Order*, 9 FCC Rcd 7245, 7269, ¶ 145 (1994) (*Competitive Bidding Second Memorandum Opinion and Order*).

³⁰ *Part 1 Third Report and Order*, 13 FCC Rcd at 388, ¶ 18.

³¹ See 47 U.S.C. § 309(j)(3)(B).

³² In our auctions of broadband PCS C and F block licenses, we have provided bidding credits to entities with average annual gross revenues for the preceding three years not exceeding \$40 million and entities with average annual gross revenues for the preceding three years not exceeding \$15 million. See 47 C.F.R. § 24.720(b)(1) & (2).

we propose to offer entrepreneurs a bidding credit of 15 percent, small businesses a bidding credit of 25 percent, and very small businesses a bidding credit of 35 percent.³³

15. We seek comment on this proposal. We note that the three-tiered approach to bidding credits we propose here is consistent with the approach we have recently adopted for the 24 GHz band and that we have proposed for the 3650-3700 MHz band.³⁴ We seek comment on whether this approach is also appropriate here, or whether there is anything about the characteristics and capital requirements of cellular service that would require a different approach. We also acknowledge that we have not offered bidding credits to applicants for cellular unserved areas,³⁵ but cellular RSA licenses are different from cellular unserved area licenses in that they are licenses for an entire cellular market rather than a portion of a market. In addition, cellular RSA licensees are required to construct and initiate service from at least one facility within 18 months of grant, but are afforded a five-year period to expand their facilities within the RSA market. In contrast, cellular unserved areas licensees are required to construct and initiate service at proposed facilities within one year after grant. Thus, we tentatively conclude that greater capital will be required to provide service to cellular RSAs and a wider range of entities may be interested in acquiring cellular RSA licenses. Commenters wishing to make proposals regarding small business definitions and bidding credits as an alternative to the approach we propose here should support their suggestions with a discussion of the anticipated capital requirements to deploy service.

16. We also seek comment on whether the small business provisions we propose today are sufficient to promote participation by businesses owned by minorities and women, as well as rural telephone companies. To the extent that commenters propose additional provisions to ensure participation by minority-owned or women-owned businesses, they should address how such provisions should be crafted to meet the relevant standards of judicial review.³⁶

³³ 47 C.F.R. § 1.2110(f)(2).

³⁴ See Amendments to Part 1, 2, 87 and 101 of the Commission's Rules to License Fixed Services at 24 GHz, *Report and Order*, 15 FCC Rcd 16934 (2000); Amendment of the Commission's Rules With Regard to the 3650-3700 MHz Government Transfer Band, *First Report and Order and Second Notice of Proposed Rule Making*, FCC 00-363, ET Docket No. 98-237, WT Docket No. 00-32 (rel. Oct. 24, 2000).

³⁵ The Commission explained its decision not to offer bidding credits in the auctions for cellular unserved area radiotelephone licenses as follows: “[U]nserved area licenses in the cellular radiotelephone service are highly specialized licenses that are valued mainly by a discrete group of entrepreneurs. In addition, because cellular unserved area radiotelephone service, characterized by small geographic areas that were not covered by the initial cellular licensee during the five-year build-out period, is not a capital-intensive service, we expect that designated entities who are interested in participating in provision of the service will more easily access the capital needed to participate in the auction.” Implementation of Section 309(j) of the Communications Act — Competitive Bidding, Amendment of Part 22 of the Commission's Rules to Provide for the Filing and Processing of Applications for Unserved Areas in the Cellular Service and to Modify Other Cellular Rules, *Ninth Report and Order*, 11 FCC Rcd 14769, ¶ 45 (1996).

³⁶ See *Adarand Constructors v. Peña*, 515 U.S. 200 (1995) (requiring a strict scrutiny standard of review for Congressionally mandated race-conscious measures); *United States v. Virginia*, 518 U.S. 515 (1996) (applying an intermediate standard of review to a state program based on gender classification).

IV. PROCEDURAL MATTERS

A. *Ex Parte* Rules

17. Pursuant to Section 1.1206 of the Commission's *ex parte* rules, 47 C.F.R. § 1.1206, this rulemaking proceeding proposing rules for awarding licenses for cellular RSAs for which the tentative selectee has been disqualified is a permit-but-disclose proceeding. Provided they are disclosed in accordance with the Commission's rules, *ex parte* presentations are permitted, except during the Sunshine Agenda period.

B. Filing Procedures

18. 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 this *Notice* on or before March 19, 2001, and reply comments on or before March 26, 2001. Comments and reply comments should be filed in WT Docket No. 01-32. All relevant and timely filings will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, interested parties must file an original and four copies of each comment or reply comment. Commenters who wish each Commissioner to receive personal copies of their submissions must file an original and nine copies of each comment and reply comment. Comments and reply comments must be directed to the Office of the Secretary, Federal Communications Commission, 445 12th St., S.W., Room TW-A325, Washington, D.C. 20554. Copies of all comments also should be provided to (1) the Commission's copy contractor, and (2) Policy and Rules Branch, Commercial Wireless Division, Wireless Telecommunications Bureau, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554.

19. Comments may also be filed using the Commission's Electronic Comment Filing System (ECFS).³⁷ Comments filed through the ECFS can be sent as an electronic file via the Internet to <<http://www.fcc.gov/e-file/ecfs.html>>. Generally, only one copy of an electronic submission must be filed. 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, 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. Or you may obtain a copy of the ASCII Electronic Transmittal Form (FORM-ET) at <<http://www.fcc.gov/e-file/email.html>>.

20. Comments and reply comments will be available for public inspection during regular business hours at the FCC Reference Information Center, Room CY-A257, at the Federal Communications Commission, 445 12th St., S.W., Washington, D.C. 20554. Copies of comments and reply comments are available through the Commission's duplicating contractor: International Transcription Service, Inc. (ITS, Inc.), 1231 20th Street, N.W., Washington, D.C. 20037, (202) 857-3800.

C. Regulatory Flexibility Act

³⁷

See Electronic Filing of Documents in Rulemaking Proceedings, 63 Fed. Reg. 24,121 (1998).

21. Pursuant to the Regulatory Flexibility Act, 5 U.S.C. § 603, the Initial Regulatory Flexibility Act Analysis is set forth at Appendix B. We request written public comments on the Initial Regulatory Flexibility Analysis. These comments must be filed in accordance with the same filing deadlines as the comments on the rest of the *Notice of Proposed Rule Making*, but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Commission's Consumer Information Bureau, Reference Information Center, shall send a copy of this *Notice of Proposed Rule Making*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with the Regulatory Flexibility Act.

D. Ordering Clauses

22. Authority for the issuance of this *Notice of Proposed Rule Making* is contained 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).

23. IT IS ORDERED that the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this *Notice of Proposed Rule Making*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

F. Further Information

24. For further information, contact Katherine M. Harris, Wireless Telecommunications Bureau, Commercial Wireless Division, at (202) 418-0609.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

APPENDIX A**PARTIES COMMENTING ON THE CCPR PETITION****COMMENTS**

Applicants Against Lottery Abuse (AALA)
Bell Atlantic NYNEX Mobile, Inc. (BANM)
Committee to Preserve Lottery Selection (CPLS)
Crystal Communications Systems (Crystal)
Darsh Aggarwal (Aggarwal)
Thomas Domencich/Committee for a Fair Lottery (Domencich)
Great Western Cellular Partners (Great Western)
JMC Enterprises/SDK Enterprises/Donald J. Kunkle/Formula I Cellular (JMC)
Miller Communications, Inc./Skywave Communications Partners (Miller)
Moving Phones Partnership, L.P./FutureWave General Partners, L.P. (Moving Phones)
Price Communications Cellular, Inc. (Price)
RSA Applicants (RSAA)
RSA Operators Group (RSAOG)
Richard L. Vega Group (Vega)
TME Cellular Partners (TME)
Telephone and Data Systems, Inc. (TDS)
Terradyne, Ltd. (Terradyne)
Western Wireless Corporation (WWC)

LATE-FILED COMMENTS

American Cellular Services (American Cellular)

REPLY COMMENTS

Applicants Against Lottery Abuse (AALA)
Bell Atlantic NYNEX Mobile, Inc. (BANM)
Blackwater Cellular Corp. (Blackwater)
Cellular Communications of Puerto Rico (CCPR)
Century Cellunet Inc. (Century)
Committee to Preserve Lottery Selection (CPLS)
Crystal Communications Systems (Crystal)
Thomas Domencich/Committee for a Fair Lottery (Domencich)
Moving Phones Partnership, L.P./FutureWave General Partners, L.P. (Moving Phones)
RSA Operators Group (RSAOG)
Tri-Coastal Cellular II (Tri-Coastal)

APPENDIX B**INITIAL REGULATORY FLEXIBILITY ANALYSIS
Regulatory Flexibility Act**

As required by Section 603 of the Regulatory Flexibility Act (RFA),³⁸ the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities of the policies and rules proposed in this *Notice of Proposed Rule Making*. Written public comments are requested on the IRFA. Comments must be identified as responses to this IRFA and must be filed by the deadlines for comments on the *Notice of Proposed Rule Making* provided above in Section V. The Commission will send a copy of the *Notice of Proposed Rule Making*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration. *See* 5 U.S.C. § 603(a). In addition, the *Notice of Proposed Rulemaking* and IRFA (or summaries thereof) will be published in the Federal Register. *See id.*

A. Need for and Objectives of the Proposed Rules:

We originally initiated this rulemaking proceeding in response to a petition filed by Cellular Communications of Puerto Rico, Inc. (CCPR) on September 9, 1996, which requested that the Commission award certain RSA licenses through competitive bidding, rather than random selection.³⁹ However, we dismissed CCPR's petition as moot in response to the enactment of the Balanced Budget Act of 1997, which requires the Commission to resolve mutually exclusive applications for initial licenses through competitive bidding instead of random selection, with certain exceptions not applicable here.⁴⁰ Our objective in this rulemaking proceeding is to determine, for cellular RSA markets for which a tentative selectee has been disqualified, whether to allow all eligible applicants to participate in the auction of licenses, which competitive bidding rules to use, and the type of market area to be used for licensing.

B. Legal Basis:

The proposed action is authorized under the Communications Act of 1934 as amended, Sections 4(i), 303(r), 303(c) and 309(j), 47 U.S.C. §§ 154(i), 303(c), 303(r) and 309(j), as amended.

³⁸ *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et seq.*, has been amended by the Contract with American Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

³⁹ Cellular Communications of Puerto Rico, Inc. Petition for Declaratory Ruling, Or, in the Alternative, for Rulemaking, RM-8897 (filed Sept. 9, 1996).

⁴⁰ *See* Certain Cellular Rural Service Area Applications, *Order*, 14 FCC Rcd 4619 (1999); Certain Cellular Rural Service Area Applications in Market Nos. 599A and 672A, *Order*, DA 99-814 (rel. April 29, 1999).

C. Description and Estimate of the Number of Small Entities To Which the Proposed Rules Will Apply:

The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.⁴¹ The Regulatory Flexibility Act defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small business concern” under section 3 of the Small Business Act.⁴² A small business concern is one which (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.⁴³

The Commission is required to estimate in its Final Regulatory Flexibility Analysis the number of small entities to which any new rules would apply, provide a description of such entities, and assess the impact of the rule on such entities. To assist in this analysis, commenters are requested to provide information regarding how many total entities, existing and potential, will be considered small businesses.

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 Services (PCS), which are placed together in that data.⁴⁴ The rules proposed in the *Notice of Proposed Rule Making* would affect all small entities that seek to acquire any of the four cellular RSA licenses discussed therein. In the *Notice of Proposed Rule Making*, we propose to define three tiers of small businesses for the purpose of providing bidding credits to small entities. We propose to define these three tiers of small businesses as follows: an “entrepreneur” would be an entity with average annual gross revenues not exceeding \$40 million for the preceding three years; a “small business” would be an entity with average annual gross revenues not exceeding \$15 million for the preceding three years; and a “very small business” would be an entity with average annual gross revenues not exceeding \$3 million for the preceding three years.⁴⁵ We will not know how many entities meeting these proposed definitions will apply for or win cellular RSA licenses until an auction is held. In view of our lack of knowledge about the entities that will seek to acquire the cellular RSA licenses in question, we assume that, for purposes of our evaluations and conclusions in this IRFA, all prospective licensees are entrepreneurs, small businesses, or very small businesses under our proposed definitions. We invite comment on this analysis.

⁴¹ 5 U.S.C. § 603(b)(3).

⁴² *Id.* § 601(3).

⁴³ *Id.* § 632.

⁴⁴ Trends in Telephone Service, Table 19.3 (March 2000).

⁴⁵ The Small Business Administration approved these proposed small business definitions on January 30, 2001. See Letter from Fred P. Hochberg, Acting Administrator, Small Business Administration, to Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, dated Jan. 30, 2001.

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

In making the transition to award the cellular RSA licenses at issue in this proceeding by competitive bidding, the *Notice of Proposed Rule Making* proposes (1) to accept new license applications, and (2) to use our general Part 1 competitive bidding rules to conduct the auction. If adopted, these proposals would require all applicants to electronically submit FCC Form 175 in order to participate in the auction and, at the conclusion of the auction, all high bidders to electronically submit FCC Form 601 to apply for a license. The purposes of these forms are to ensure that applicants are eligible to participate in the auction and that high bidders are eligible to hold the cellular RSA licenses at issue. The Office of Management and Budget has already approved both of these forms. Under our Part 1 rules, any entity wishing to receive a bidding credit for serving qualifying lands must comply with 47 C.F.R. § 1.2110(f)(3).

E. Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered:

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.

To provide opportunities for small entities to participate in the auction of cellular RSA licenses discussed in the *Notice of Proposed Rule Making*, we propose to provide bidding credits for entrepreneurs, small businesses, and very small businesses as defined in Section C of this IRFA. The bidding credits proposed are 15 percent for entrepreneurs, 25 percent for small businesses, and 35 percent for very small businesses. We believe these bidding credits will benefit a range of small entities. In the *Notice of Proposed Rule Making*, we seek comment on these proposed small business definitions and bidding credits, thus providing interested parties with an opportunity to suggest alternatives.

F. Federal Rules That May Overlap, Duplicate, or Conflict With The Proposed Rules:

None.