

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Implementation of Section 309(j)) PP Docket No. 93-253
of the Communications Act -)
Competitive Bidding)
Narrowband PCS)

and

Amendment of the Commission's)
Rules to Establish New Narrowband) GEN Docket No. 90-314
Personal Communication Services) ET Docket No. 92-100

**THIRD MEMORANDUM OPINION AND ORDER
AND FURTHER NOTICE OF PROPOSED RULEMAKING**

Adopted: August 16, 1994

Released: August 17, 1994

Comment Date: September 16, 1994

Reply Comment Date: October 3, 1994

By the Commission:

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I. INTRODUCTION

1. By this action, we respond to petitions for reconsideration of the Third Report and Order in this proceeding.¹ The Third Report and Order established service-specific rules for competitive bidding for the award of licenses for Personal Communications Services in the 900 MHz band (narrowband PCS). Seven such petitions were received, as well as three oppositions and comments and one reply.²

2. On August 10, 1993, the Omnibus Budget Reconciliation Act of 1993 (the Budget Act) added a new section 309(j) to the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-173 (the Communications Act). This amendment to the Communications Act gave the Commission express authority to employ competitive bidding procedures to choose from among mutually exclusive applications for initial licenses. The Commission's Second Report and Order established general rules and procedures and a broad menu of competitive bidding methods to be used for all auctionable services.³

3. The Third Report and Order established competitive bidding rules for narrowband PCS. The Commission decided that because of the interdependence within certain classes of narrowband PCS licenses and the relatively high expected value of such licenses, where the agency received mutually exclusive applications most narrowband PCS licenses would be awarded through a sequence of simultaneous multiple round auctions. However, we stated that we might alternatively use oral sequential or single round sealed bidding to award certain narrowband PCS licenses if the operational complexity or administrative costs associated with simultaneous auctions proved excessive relative to the expected value of the licenses to be awarded. We stated that in conducting narrowband PCS auctions we would generally follow the payment and procedural rules adopted in the Second Report and Order, and we adopted general procedural and processing rules for the narrowband PCS service based on Parts 22 and 90 of the Commission's rules. We also structured our rules to provide opportunities for

¹ See Third Report and Order in PP Docket No. 93-253, 9 FCC Rcd 2941 (1994) (Third Report and Order).

² Petitions for reconsideration were received from the Association of Independent Designated Entities (AIDE), Mercury Communications, Inc. (Mercury), Paging Network, Inc. (PageNet), Phase One Communications, Inc. (Phase One), the Rural Cellular Association (RCA), Tri-State Radio Co. (Tri-State), and U.S. Intelco Networks, Inc. (USIN). Oppositions or comments were received from United States Telephone Association (USTA), AirTouch Paging (AirTouch), and Paging Network, Inc. (PageNet); a reply was received from American Paging, Inc. (API).

³ Second Report and Order in PP Docket No. 93-253, 9 FCC Rcd 2348 (1994) (Second Report and Order).

small businesses and businesses owned by women and minorities to participate in the auction and in the provision of spectrum based services.

4. On July 29, 1994 we completed the first spectrum auction for the ten available nationwide narrowband PCS licenses. This auction was the first test of the simultaneous multiple round auction design and of our provisions for designated entities. This auction was enormously successful. One indication of the efficiency of the simultaneous multiple round bidding process is the fact that the winning bids were either identical or virtually identical for virtually identical licenses. As we expected, this auction also attracted broad participation by designated entities. Of the 29 registered bidders 9, or 30 percent, indicated status as either minority or woman-owned firms. The strong bidding competition among relatively large firms and incumbent paging companies, however, may have been a factor in the lack of designated entities among the winning bidders. These results have caused us to reexamine some of the auction rules and designated entity provisions previously adopted in the Third Report and Order. In addition, we request comment on a number of possible further changes in the designated entity provisions that might apply to the upcoming MTA and BTA auctions.

II. AUCTION DESIGN

A. Bidding Procedures

5. In the Third Report and Order, the Commission noted its earlier findings 1) that licenses with strong value interdependencies should be auctioned simultaneously, 2) that multiple round auctions will generally yield more efficient allocations of licenses and higher revenues than other auction methodologies because they provide bidders with information regarding other bidders' valuations of licenses, and 3) that simultaneous multiple round auctions become less cost effective as the value of licenses decreases, because they are relatively time-consuming and expensive to implement.⁴ The Commission stated that where the licenses to be auctioned are interdependent and their value is expected to be high, simultaneous multiple round auctions would best achieve the Commission's goals.⁵ We stated, however, that we might use methods other than simultaneous multiple round bidding in cases where license values are expected to be relatively low, where bidder participation is expected to be limited, or where the interdependence of licenses is less significant.⁶ We stated that in selecting the auction method for each narrowband PCS auction, we would

⁴ Third Report and Order at ¶ 12.

⁵ Id. at ¶ 13.

⁶ Id. at ¶ 20.

balance the advantages of more sophisticated auction methods, such as simultaneous multiple round bidding, with the greater complexity and cost they might entail.⁷

6. In the Third Report and Order the Commission decided to auction the 12.5 kHz unpaired MTA and BTA response channel licenses in a single round sealed bid auction because the value of those licenses is low relative to the cost of conducting more complex auctions. We also stated that because only incumbent paging licensees already serving the license area are eligible to bid on these licenses, sealed bid auctions might help to reduce the likelihood of collusion. We further stated that information about license values from earlier narrowband auctions would also be available to assist bidders in valuing these licenses. Moreover, because under the sealed bid approach bidders cannot be certain that they will be the high bidder on the licenses they seek to obtain, we allowed bidders to bid without risking a default penalty on more than the two licenses in each service area, provided they specify in advance the order in which they wish to be awarded such licenses if they are the high bidder on more than they are permitted to hold.⁸

7. Petitions. Paging Network, Inc. (PageNet) and Tri-State Radio Co. (Tri-State) seek reconsideration of the decision to use single round sealed bid auction procedures for assignment of the 12.5 kHz unpaired licenses.⁹ PageNet and Tri-State assert that the Commission has underestimated the likely value of the response channel licenses.¹⁰ PageNet and Tri-State also assert that great value interdependence exists among the response channel licenses.¹¹ They state that there are likely to be numerous bidders for most licenses.¹² In this regard, PageNet claims that collusive behavior is no more likely for these licenses than for other narrowband PCS licenses. PageNet and Tri-State question whether bidders for response channel licenses will obtain useful information about license values from previous narrowband PCS auctions. PageNet asserts that license values will vary from one provider and area to another, and that bidders may have no realistic idea as to the value of the licenses.¹³ PageNet claims that the single sealed bid mechanism will require exorbitantly expensive

⁷ Id.

⁸ Id. at ¶ 29.

⁹ PageNet Petition at 2; Tri-State Petition at 3.

¹⁰ PageNet Petition at 2; Tri-State Petition at 7.

¹¹ PageNet Petition at 5; Tri-State Petition at 3.

¹² PageNet Petition at 10; Tri-State Petition at 8.

¹³ PageNet Petition at 5.

market research on the part of bidders, and the result will still depend on chance.¹⁴ Further, PageNet states that it is important to choose an auction method which provides useful information on license values to bidders during the auction. Therefore, PageNet supports adopting an alternative auction method that is streamlined to minimize cost and complexity, and recommends an ascending bid multiple round methodology.¹⁵

8. Tri-State claims that the rules mandating single round sealed bidding are deficient from an auction design perspective. Tri-State asserts that these rules are poorly structured to allow bidders to obtain a common frequency across regions, and that under the rules bidders cannot know how to prioritize their bids. Tri-State further claims that the sealed bidding procedures require exceedingly complicated bidding strategies, which necessitate the adoption of a clear reallocation mechanism for defaulted licenses. Alternatively, Tri-State recommends a procedure in which bidders submit sealed bids for a given MTA or BTA without specifying which of the available frequencies the bidder is bidding on. Under Tri-State's recommended approach, winning bidders would be ranked for purposes of frequency selection according to the total amount they bid for all the channels on which they hold winning bids. Tri-State claims that this procedure maximizes the number of multiple MTA/BTA bidders who can obtain a common paging response channel in all markets in which they bid.¹⁶ Tri-State argues that its proposed auction procedures will level the playing field between bidders for paging response channels and those for regional and nationwide narrowband PCS authorizations, who do not need to aggregate a common frequency across geographic areas.¹⁷ Tri-State includes a 25 percent bidding credit for minority- and female-owned businesses and small businesses, and states that its plan could be refined by providing that winning bidders pay the highest losing bid for a license.¹⁸ Tri-State asserts that its proposed auction procedures will ensure that the Commission maximizes revenues from paging response license auctions and allow bidders to set priorities more accurately and to adopt relatively simple bidding strategies.¹⁹ AirTouch recommends multiple round simultaneous auctions, and suggests that bids for the response channels be in pool form, such that the highest four bidders would receive a license

¹⁴ Opposition of PageNet at 3.

¹⁵ PageNet reserves comment on more specific procedures pending conclusion of the nationwide narrowband PCS and Interactive Video and Data Service (IVDS) auctions. Id. at 6.

¹⁶ Tri-State Petition at 12-16.

¹⁷ Id. at 17.

¹⁸ Id. at 18-20.

¹⁹ Id. at 21.

and could agree among themselves as to the licenses to be held by each.²⁰ American Paging, Inc. (API) supports multiple-round ascending simultaneous bidding methodologies, at least for the MTA response channel licensing.²¹

9. Discussion. Petitioners have convinced us that paging response channel licenses may have more value interdependency, and higher value, than was apparent at the time of the Third Report and Order. We also recognize that alternative auction methodologies proposed by petitioners may offer a low-cost auction method with desirable characteristics for auctioning interdependent licenses, and thus may prove superior to the sealed bid approach set forth in the Third Report and Order. In addition, the recent nationwide narrowband auction demonstrated that simultaneous multiple round auctions are easier and less expensive to implement than we earlier anticipated, and thus they may prove to be an appropriate procedure for auctioning the response channel licenses. However, we will defer our decision regarding the auction design for the 12.5 kHz MTA and BTA paging response channels until we have gained further experience with simultaneous multiple round auctions. We will announce our final choice of auction design and procedures for the response channels by Public Notice prior to the auction.

B. Minimum Opening Bid

10. In the Third Report and Order, we stated that we believe it is necessary to impose a minimum bid increment to ensure that the auctions conclude within a reasonable period of time in narrowband PCS auctions where simultaneous multiple round bidding is used. The bid increment is the amount or percentage by which the bid must be raised above the previous round's high bid in order to be accepted as a valid bid in the current round. We stated that we might impose a minimum bid increment of 5 percent or \$0.01 per MHz per pop, whichever is greater, in narrowband PCS auctions where multiple round bidding is used. We also retained the discretion to vary the minimum bid increments for individual licenses or groups of licenses over the course of an auction.²²

11. In order to expedite the auction process further, we also reserve the discretion to establish a suggested opening bid or a minimum opening bid on each license in addition to the minimum bid increment.²³ If we were to adopt minimum opening bids, we anticipate that we would seek expedited comments on any figures proposed. Once a minimum bid is established for a license, initial bids will have to be above that level to be considered valid.

²⁰ Opposition of AirTouch at 7-8.

²¹ Reply of API at 2.

²² Third Report and Order at ¶¶ 30-32.

²³ See ex parte submission of Paul Milgrom, May 19, 1994 and Fifth Report and Order ¶45.

The amount of the suggested opening bid or the minimum opening bid, if one is used, will be set forth in the Public Notice announcing the auction. Generally, we will establish suggested opening bids or minimum opening bids in the range of \$.03 - \$.20 per MHz-pop for each license.²⁴ A suggested opening bid or minimum opening bid will provide bidders with an incentive to start bidding at a substantial portion of the license value, thus ensuring a rapid conclusion to the auction.

C. Activity and Stopping Rules

12. In the Third Report and Order, we stated that when we use the three-stage Milgrom-Wilson activity rule, the auction will move from stage I to stage II when, after three rounds of bidding, the high bid has changed on 5 percent or fewer of the licenses (measured in MHz-pops) being auctioned. Stage III will begin when the high bid has changed on 2 percent or fewer licenses over three rounds.²⁵ We conclude after our experience in conducting the nationwide narrowband auction that we may find it important to move the auctions from one stage to the next at a different pace than would occur under this rule. Accordingly, we retain the discretion to determine and announce during the course of an auction when, and if, to move from one auction stage to the next, based on a variety of measures of bidder activity, (e.g., the percentage of licenses on which there are new bids, the number of new bids, and the percentage increase in revenue). Bidders will be notified at least one round prior to the commencement of the next stage of an auction.

13. We also stated that in stage III, a bidder would have to be active on 100 percent of the MHz-pops for which it wishes to retain eligibility.²⁶ In order to allow bidders greater flexibility, we think that it may be beneficial in some auctions to reduce this figure slightly, but in no case below 90 percent. We will announce the required activity levels for stage III in a Public Notice in advance of each auction.

14. In the Third Report and Order, we stated that where we use the Milgrom-Wilson activity rule we intend to use a simplified waiver procedure whereby bidders will be permitted

²⁴ The number of "MHz-pops" is calculated by multiplying the population of the license service area by the amount of spectrum authorized by the license. In its September 1993 Mid-Session Review of the 1994 Budget, the Office of Management and Budget estimated that spectrum auctions would generate \$12.6 billion from 1994 through 1998. A 1992 report by the Congressional Budget Office assumed that \$2 billion would be raised from competitive bidding in services other than PCS. Thus, the approximate value of 120 MHz of PCS spectrum is placed at \$10.6 billion according to these estimates, or 35 cents per pop per MHz.

²⁵ Third Report and Order at n. 16.

²⁶ See Third Report and Order ¶¶38.

five automatic waivers from the activity rule during the course of an auction.²⁷ A waiver permits a bidder to maintain its eligibility at the same level as in the round for which the waiver is submitted, regardless of the bidder's level of bidding activity in that round. Subsequently, we have concluded based on our experience in conducting the nationwide narrowband auction that fewer waivers may be necessary to maintain the pace of the auction and prevent strategic use of waivers. Consequently, we will allow one automatic waiver from the activity rule during each stage of an auction, or one automatic waiver during a number of bidding rounds specified in a Public Notice. We retain the flexibility, however, to change by Public Notice the number of waivers that will be permitted and the frequency with which they may be exercised by public notice prior to a specific narrowband auction. While we may allow bidders to request proactive waivers that will keep the bidding open, under no circumstances will an automatic waiver prevent an auction from closing.

15. In the Second Report and Order, we retained the discretion to declare by announcement at any point during a multiple round auction that the auction will end after a specified number of additional rounds.²⁸ We want to clarify however, that if this procedure is used, we will accept bids in the final rounds only for licenses on which the highest bid increased in at least one of the preceding three rounds. No new bids will be accepted for other licenses.²⁹ There are two reasons not to take bids on licenses on which there has been no recent bidding. First, the fact that bidding on an individual license may close will provide an additional incentive to bid actively and thus speed the conclusion of the auction. If bids are accepted on all licenses in the final rounds there is less cost to a bidder in holding back. Second, closing bidding on licenses for which activity has ceased ensures high bidders for those licenses that they will not lose a license without having an opportunity to make a counter-offer.³⁰ This reduces the uncertainty associated with aggregating licenses that are worth more to a particular bidder as a package than individually. If final bids are accepted on all licenses, a high bidder on an aggregation of licenses may unexpectedly lose a critical part of the aggregation and have no chance to regain it except in the post-auction market, where bargaining or other transaction costs may be high.

²⁷ Third Report and Order at ¶ 40.

²⁸ Second Report and Order at ¶ 132.

²⁹ See reply comments of PacBell, appendix to attachment by Milgrom and Wilson at 5. See also Second Report and Order at ¶ 130, n.106.

³⁰ Either the auction will close only when bidding ceases on all licenses, so the high bidder will have an opportunity to respond to any new bids, or the Commission will call for final bids but not accept new bids on licenses on which there have been no new bids in the previous three rounds, so no other bidder will have the opportunity to outbid the high bidder in a final round.

D. Release of Bidder Information

16. We note that in the reconsideration of the Second Report and Order we reserved additional flexibility with respect to the requirement to release information concerning the identity of bidders, which may affect auctions for narrowband PCS licenses. In the Second Memorandum Opinion and Order we reserved the option to release bidder identities on an auction-by-auction basis, and stated that we would announce by Order and Public Notice prior to each auction whether the identities of bidders would be made public in that auction.³¹ In this regard, we retain the flexibility in the context of narrowband PCS auctions to determine on an auction-by-auction basis whether or not to release bidder identities during the course of the auction.

E. Filing Procedures

17. Petition. Phase One asserts that the Communications Act permits the FCC to employ competitive bidding procedures only where mutual exclusivity exists, and that consequently the FCC is prohibited from establishing specific auction dates until it has determined that a particular application is mutually exclusive with another.³² Phase One states that the FCC must first notify each qualified applicant of its application processing status in advance of scheduling auctions to allow applicants sufficient time to analyze auction strategies and evaluate the competition.³³ Phase One also states that the FCC is obligated to suspend its auctions until each petition in PP Docket No. 93-253 has been addressed.³⁴ Phase One states that our contractor, Tradewinds International, Inc. (Tradewinds) must be prevented from promoting FCC auctions. Because there can be no auctions without mutual exclusivity, according to Phase One the advertising by Tradewinds amounts to false and misleading advertising and raises conflict of interest questions because Tradewinds may benefit if auctions are actually held.³⁵

18. AirTouch Paging (AirTouch) asserts in opposition that the Communications Act only prohibits auctioning of a license for which no mutually exclusive applications have been accepted for filing, and not the establishment of auction dates. In fact, AirTouch notes that mutually exclusive applications were received for each of the nationwide narrowband PCS

³¹ Second Memorandum Opinion and Order at ¶ 46.

³² Phase One Petition at 2.

³³ Id. at 3.

³⁴ Id. at 5.

³⁵ Id. at 5-6.

licenses.³⁶ PacBell states that there is no legal basis for Phase One's argument that the Commission must delay announcing auction dates until mutual exclusivity has been established.³⁷

19. Discussion. The Budget Act provides that if applications are not mutually exclusive no auction will be held.³⁸ We have found, however, that it is important to begin planning for auctions as early as possible to assure that they will run smoothly. To maintain an expeditious auctioning and licensing schedule it is necessary, for instance, to reserve sites for auctions before all applications have been received. Further, we believe that it is important that we schedule auctions far enough in advance to provide applicants with ample time to attract financing and plan their bidding strategies. In any event, we have previously indicated that we will cancel a scheduled auction if we do not receive mutually exclusive applications.³⁹ Consequently we believe that our auction schedule and procedures are fully consistent with the provisions of the Budget Act.

20. We find advertising of auctions desirable and in the public interest, even if, because of lack of mutual exclusivity, no auction takes place for some licenses. Among its other beneficial effects, advertising of auctions may be essential for making potential licensees, and in particular designated entities, aware of the opportunities available to them. In order to make service available as rapidly and efficiently as possible, we must ensure that those who value the license most highly, and will offer the services most valued by the public, have an opportunity to bid on them. Mutual exclusivity cannot be established until applications have been received, and at that point advertising will no longer be useful because the purpose of advertising is to inform potential licensees of the opportunity to file applications. Consequently, we retain our existing filing procedures and continue to permit our contractor to advertise auctions even before mutual exclusivity has been established.⁴⁰

³⁶ Opposition of Airtouch at 4.

³⁷ Opposition of PacBell at 8.

³⁸ 47 U.S.C. § 309(j)(1).

³⁹ See Second Report and Order at ¶ 165. In fact, 29 applicants are eligible to bid for nationwide narrowband PCS licenses; at least 24 applicants are eligible to bid on each of the ten licenses. Thus, mutual exclusivity exists for all nationwide narrowband licenses, and Phase One's petition is moot on this point.

⁴⁰ In this regard we also note that since we find that advertising auctions is in the public interest, no conflict of interest exists between Tradewinds' interests and the Commission's.

F. Application-Processing Rules

21. In the NPRM in this proceeding, the Commission stated:

In order to avoid needless duplication, we propose that the following general filing and processing rules apply to all PCS: Sections 22.3-22.45 and 22.917(f), and 22.918-22.945, 47 C.F.R. §§ 22.3-22.45, 22.917(f), and 22.918-22.945. For those PCS applicants who file on Form 574, we believe that Sections 90.113-90.159 of our rules, 47 C.F.R. §§ 90.113-90.159, could be used to process those applications with appropriate modifications.⁴¹

22. Petition. AIDE asserts in its petition for reconsideration of the Second Report and Order that the Commission acted improperly in proposing substantive PCS application-processing rules in the NPRM because, it argues, such rules are outside the scope of this rulemaking, which is limited to implementation of the competitive bidding requirements of §309(j) of the Communications Act.⁴² AIDE argues that the Commission's proposal of application-processing rules is legally insufficient to constitute a valid notice of proposed rules, and that some of the rules cited have no immediate applicability to PCS service. AIDE asserts that in the Second Report and Order the Commission failed to respond to the merits of the arguments concerning filing and processing rules in AIDE's comments on the NPRM. AIDE concludes that the Commission needs to issue a supplemental Notice of Proposed Rulemaking to adopt license-processing rules for PCS. PacBell states, however, that the Administrative Procedure Act does not prohibit the Commission from issuing more than one order based on a notice and comment period.⁴³ PacBell also states that there is an exception to the Administrative Procedure Act's notice and comment requirements "when the agency for good cause finds (and incorporates the finding. . . in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."⁴⁴

23. Discussion. The Commission adopted few filing or processing rules in the Second Report and Order. Those rules that the Commission did adopt pertaining to the filing and processing of applications and certifications were clearly proposed in the NPRM.⁴⁵ In the Second Memorandum Opinion and Order we stated that we would address AIDE's concerns in the reconsiderations of the service-specific Orders in which the application processing rules were adopted. In the Third Report and Order, we adopted the service-specific narrowband

⁴¹ NPRM at ¶128.

⁴² AIDE Petition at 20-21.

⁴³ PacBell Opposition at 10.

⁴⁴ Id. at 11, citing 5 U.S.C. § 553(c).

⁴⁵ See Second Report and Order at ¶¶ 164-168, NPRM at ¶¶ 96-101.

PCS application processing rules to which AIDE's petition refers and thus, we address the substance of AIDE's arguments below.

24. The competitive bidding process is a means of assigning licenses, and rules and procedures for processing of license applications are an integral and necessary part of that process. By citing in the NPRM the specific Part 22 and Part 90 application processing rules that we would use as the basis for adopting PCS rules, we provided commenters with exceptionally clear notice and an opportunity to comment on the rules we contemplated adopting for narrowband PCS. The few changes that we made from the proposed rules were necessary to adapt them to auctioning narrowband PCS licenses. For example, we adopted certain technical requirements such as restrictions on station antenna structures.⁴⁶ We also deleted any procedures that were related to grants by random selection.⁴⁷ The resulting rules are clearly a logical outgrowth of the rules proposed in the NPRM, applied in the context of the use of competitive bidding to assign narrowband PCS licenses. Rules adopted as a logical outgrowth comply with all Administrative Procedure Act requirements.⁴⁸

III. RULES PROHIBITING SETTLEMENTS AND COLLUSION

25. Petitions and Oppositions. The collusion rules adopted in the Third Report and Order prevent bidders for narrowband PCS licenses from entering into settlement agreements after applications are filed. AIDE asserts that narrowband bidders should be allowed to enter into settlement agreements, as encouraged by Section 24.429(b), and asserts that the Commission's decision to avoid post-filing settlements was impermissibly based on consideration of potential revenues. Quentin L. Breen (Breen) urges us to act on AIDE's petition to liberalize treatment of full market settlements. Breen states that the Budget Act does not relieve the Commission of its obligation in the public interest to continue to use means such as negotiation to avoid mutual exclusivity, nor does the Act oblige us to adopt anti-collusion regulations. Instead of permitting applicants to avoid the uncertainties and inefficiencies of the auction process, Breen states that the rules effectively mandate that parties will go to end of auction without being able to consider settlement.⁴⁹ PageNet, conversely, urges the Commission to prohibit any settlement negotiations during the competitive bidding process.⁵⁰ According to PageNet, there is no way for mutually exclusive

⁴⁶ 47 C.F.R. § 24.416.

⁴⁷ 47 C.F.R. § 22.33.

⁴⁸ Public Service Commission of the District of Columbia v. FCC, 906 F.2nd 713, 717 (D.C. Cir. 1990).

⁴⁹ Breen Opposition at 1-4.

⁵⁰ PageNet Opposition at 20-26.

applicants to come to an agreement on settlement without exchanging the same kinds of information that would be exchanged for the formation of collusive strategies in auction bidding. Accordingly, PageNet asserts that settlement discussions should be prohibited prior to selection of a winner from among the Form 175 applicants⁵¹ Furthermore, PageNet contends, that there is little likelihood of an all-market settlement in any given market, because if any one applicant declines to settle, the settlement is defeated.⁵²

26. Discussion. As stated in our reconsideration of the Second Report and Order, we have decided to retain the existing collusion rules, to the extent that they prevent settlements after applications are filed.⁵³ These rules were designed to avoid formation of anticompetitive agreements among bidders, although we intend to continue reliance on the antitrust laws as our primary method of avoiding bidder collusion.⁵⁴ As we indicated in the Second Report and Order, we believe that our rules prohibiting collusion will serve the objectives of the Budget Act by preventing applicants, especially the largest companies, from entering into agreements to use bidding strategies that divide the market to the disadvantage of other bidders.⁵⁵ We also seek to ensure that entities will not file applications solely for the purpose of demanding payment from other bidders in exchange for settlement or withdrawal of their applications.

27. Accordingly, to ensure that the bidding process is competitive and to encourage formation of a competitive post-auction market structure, we are retaining the collusion rules in the narrowband PCS context.⁵⁶ Furthermore, to make clear that we recognize that these rules effectively prohibit post-filing settlements, we are amending our rules to eliminate Section 24.429(b). We believe that this is the most straightforward approach, given our strong concerns that collusion could have an extremely harmful impact upon competition.

28. However, in order to provide bidders sufficient time and greater flexibility to attract capital, we make several modifications to our collusion rules adopted in the Third Report and Order. First, in the Second Memorandum Opinion and Order, we clarified the applicability of the collusion rules to cases where an applicant has a common ownership

⁵¹ Id. at 22 & n.11.

⁵² Id. at 24.

⁵³ See Second Memorandum Opinion and Order at ¶ 54.

⁵⁴ See Second Report and Order, ¶¶ 221-224.

⁵⁵ Id.

⁵⁶ See id., ¶ 223.

interest with another applicant.⁵⁷ In that item we stated that, unless the second applicant is expressly identified as an entity with whom the first applicant has an agreement concerning bidding, we will prohibit these parties from communicating concerning their bidding strategies. This prohibition will hold even if the other bidder is identified on the applicant's short-form application as having a common ownership interest with the applicant.

29. Furthermore, where common non-controlling ownership exists between two or more bidders, those bidders may win more licenses cumulatively than a single entity is entitled to hold. In such cases we will permit divestiture of non-controlling interests to bring the entities into compliance with the license aggregation limits provided such divestiture is completed within 90 days of grant of the license. Such post-auction divestiture will enable investors to finance more than one bidder without risking default penalties if both bidders win licenses which in combination exceed our aggregation limits.

30. In addition, we wish to modify our rules regarding amendments to short-form applications. Section 24.413 of the Commission's rules requires all applicants to list certain ownership information including all partners, subsidiaries, affiliates and all persons holding five percent or more of the stock, warrants, options or debt securities of the applicant. Section 24.422 (b) currently prohibits amendments to the short-form application to make ownership changes or changes in the parties to bidding consortia after the application filing deadline has passed. As a result of our experience in the nationwide narrowband PCS auction we believe that it is necessary to allow applicants to amend their FCC Form 175 applications to make ownership changes after the filing deadline has passed, provided such changes do not result in a change in control of the applicant and provided that discussions leading up to such changes do not violate our anti-collusion rules. Such amendments must be made within two business days of any such change. Permitting such amendments will provide bidders with flexibility to seek additional capital after applications have been filed, while ensuring that the real party in interest does not change. Accordingly, we will modify rule 24.422 (b) to permit applicants to amend their FCC Form 175 applications to reflect ownership changes that do not result in a change in control of the applicant. Such changes shall not be regarded as major amendments to an application, provided they do not result in a transfer of control of the applicant.

31. In addition, we are modifying our collusion rules, which currently prohibit bidders from communicating with one another after short form applications have been filed regarding the substance of their bids or bidding strategies and which also prohibit bidders from entering into consortia arrangements or joint bidding agreements of any kind after the deadline for short form applications has passed. In order to permit bidders to respond to higher than expected license prices by combining their resources during an auction, we will now permit bidders who have not filed Form 175 applications for any of the same licenses to engage in discussions and enter into bidding consortia or joint bidding arrangements during the course of

⁵⁷ Second Memorandum Opinion and Order at ¶ 55.

an auction. We conclude that where bidders have not applied for any of the same licenses there is little risk of anticompetitive conduct with respect to a single license and therefore we believe that it is appropriate to relax our collusion rules to permit bidders in this context to have greater flexibility to increase their competitiveness in the auction by combining their resources, provided that no change of control of any applicant takes place.

IV. PAGING RESPONSE CHANNEL ELIGIBILITY

32. Mercury submitted a request for clarification that non-incumbent paging licensees will be permitted to apply for only those narrowband paging response channel licenses that remain available after the initial response channel auctions. Eligibility requirements for these channels were adopted in GEN Docket No. 90-314, and therefore we will address this issue as part of the further reconsideration of the narrowband PCS service rules in that docket and in ET Docket No. 92-100.

V. DESIGNATED ENTITY PROVISIONS

33. Background. In the 1993 Omnibus Budget Reconciliation Act, Congress amended the Communications Act to require the Commission to ensure that small businesses, rural telephone companies, and businesses owned by women and minority group members (designated entities) would have an opportunity to obtain licenses and participate in offering spectrum-based services.⁵⁸ We considered numerous alternatives that might ensure opportunities for these designated entities, including installment payment plans, bidding credits, spectrum set-asides, tax certificates, royalty payments, innovator's preferences, and distress sales to designated entities.⁵⁹ After considering the characteristics of the narrowband PCS service, we ultimately adopted installment payments for small businesses acquiring certain regional, MTA or BTA licenses.⁶⁰ We also provided that a 25 percent bidding credit would be available to businesses owned by minorities and/or women on certain nationwide, regional, MTA and BTA licenses.⁶¹ Both installment payments and bidding credits were made available to small businesses owned by minorities and/or women. In addition, we provided that tax certificates would be made available to encourage investment in women- and

⁵⁸ See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(a), 107 Stat. 312, 387-389 (1993) (Budget Act) (adopting 47 U.S.C. §§ 309(j)(3)(B), 309(j)(4)(D)).

⁵⁹ See Second Report and Order, ¶¶ 231-257, See Infra ¶¶64-68 for discussion on why provisions are necessary.

⁶⁰ See Third Report and Order, ¶¶ 68, 86-89.

⁶¹ Id., ¶ 72.

minority-owned businesses.⁶² Our rules, however, did not permit rural telephone companies to obtain bidding credits or installment payments unless they also qualified as small businesses or businesses owned by minorities and/or women.⁶³

34. Petitions. Three petitioners assert that provisions made available for various designated entities, such as bidding credits, installment payments and tax certificates, should also be made available to all designated entity groups, and for all narrowband PCS licenses. The Association of Independent Designated Entities (AIDE) suggests that bidding credits, currently available for all businesses owned by minorities and/or women, should be granted to all small businesses and rural telephone companies, for all narrowband PCS licenses.⁶⁴ AIDE reasons that even if bidding credits are not appropriate for small businesses applying for nationwide licenses (because small businesses can not afford to construct nationwide narrowband PCS systems), the Commission should nevertheless permit small businesses to obtain bidding credits for the smaller, geographically limited narrowband licenses.⁶⁵ AIDE also states that the decision to limit installment payments to certain licenses was impermissibly based on maximizing auction revenues.⁶⁶

35. U.S. Intelco Networks, Inc. (USIN) and the Rural Cellular Association (RCA) assert that the failure to provide any narrowband provisions for rural telephone companies violates the Budget Act⁶⁷ and ensures that narrowband PCS will be unavailable in rural

⁶² Id., ¶¶ 68, 70, 72-85.

⁶³ As discussed further infra, these rules were based on the rationale that rural telephone companies do not face special barriers to entry into this service, nor are special accommodations necessary to ensure service in rural areas. See Third Report and Order, ¶¶ 71, 76. We concluded in the Third Report and Order that, given the relatively modest construction costs for narrowband PCS, even new entrants may choose to provide service to rural areas, and special provisions are not necessary to ensure that rural telephone companies will have the opportunity to participate in provision of service to rural areas. Id., ¶ 71. We noted that women, minorities, and small businesses, in contrast, may face particular financing obstacles that require additional provisions to ensure that they have an opportunity to participate in providing narrowband PCS. Id., ¶¶ 72, 76.

⁶⁴ AIDE Petition at 14-18.

⁶⁵ AIDE Petition at 16-17.

⁶⁶ Id. at 18-19.

⁶⁷ The Budget Act names rural telephone companies as one of the groups whose opportunity to participate in auctioned services must be ensured by our auction procedures. See Budget Act, § 6002, 107 Stat. 388 (adopting 47 U.S.C. § 309(j)(3)(B) and 309(j)(4)(D)).

areas.⁶⁸ RCA states that rural telephone companies should receive bidding credits and tax certificates.⁶⁹ RCA bases this assertion on the rationale that providing special bidding provisions for rural telephone companies would increase the likelihood that narrowband PCS licenses will be awarded to entities that will provide service to rural areas.⁷⁰ RCA also notes that the Budget Act directs that the auction procedures must ensure that licenses for new technologies are awarded in a manner that promotes their rapid deployment "for the benefit of the public, including those residing in rural areas."⁷¹

36. Oppositions. PageNet states that no additional measures should be taken with respect to participation of rural telephone companies or small businesses in narrowband PCS auctions.⁷² As to the availability of provisions for women and minority-owned businesses for only one license per channel grouping, PageNet notes that licenses with bidding credits comprise 37 percent of regional licenses and almost 45 percent of the available narrowband spectrum, thus earmarking a good deal of spectrum for designated entities.⁷³ PageNet states that small businesses have always had ample opportunities in paging, and thus there is no reason to grant them special consideration.⁷⁴ We also request comment on a proposal to redesignate the BTA licenses as regional licenses.

37. Decision. We have decided, in response to petitions and to our experience with the nationwide narrowband auction, to expand the provisions for designated entities in future narrowband auctions. First, we will modify the definition of small business to expand eligibility. Second, for the upcoming regional narrowband auctions we will increase the bidding credit for women- and minority-owned businesses. Finally, as described in Section VI below, we propose, and request comment on, additional designated entity provisions for the MTA and BTA auctions.⁷⁵

38. Congress mandated that the Commission "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are

⁶⁸ See USIN Petition at 1-8, RCA Petition at 2-9.

⁶⁹ RCA Petition at 9.

⁷⁰ RCA Petition at 2

⁷¹ Id. (quoting 47 U.S.C. § 309(j)(3)(A)).

⁷² PageNet Opposition at 12-15.

⁷³ Id. at 14.

⁷⁴ Id. at 14-15.

⁷⁵ See ¶¶64 infra.

given the opportunity to participate in the provision of spectrum-based services."⁷⁶ To achieve this goal, the statute requires the Commission to "consider the use of tax certificates, bidding preferences, and other procedures." Thus, while providing that we may charge for licenses, Congress has ordered that the Commission design its auction procedures to ensure that designated entities have opportunities to obtain licenses and provide service. For that purpose, the law does not mandate the use of any particular procedure, but it specifically approves the use of "tax certificates, bidding preferences, and other procedures." The use of any such procedure is, in our view, mandated where necessary to achieve Congress's objective of ensuring that designated entities have the opportunity to participate in narrowband PCS.

39. In addition to this mandate, the statute sets forth various congressional objectives. For example, it provides that in establishing eligibility criteria and bidding methodologies the Commission shall "promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women."⁷⁷ Further, Section 309(j)(4)(A) provides that to promote the statute's objectives the Commission shall "consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, or other schedules or methods . . . and combinations of such schedules and methods."

40. To satisfy these statutory mandates and objectives, we established in the Second Report and Order eligibility criteria and general rules to govern the special measures for small businesses, and businesses owned by members of minority groups and women. In the Third Report and Order, we employed several measures, including installment payments, bidding credits and tax certificates, to enhance opportunities for designated entities bidding on certain narrowband PCS licenses. We stated that we believed that narrowband PCS would provide significant opportunities for all designated entities to provide a wide variety of new services including advanced paging and messaging services. In adopting the particular measures for designated entities, however, we assumed that narrowband PCS would involve relatively low

⁷⁶ 47 U.S.C. § 309(j)(4)(D).

⁷⁷ 47 U.S.C. § 309(j)(3)(B); see also id. § 309(j)(4)(C) (requiring the Commission when prescribing area designations and bandwidth assignments, to promote "economic opportunity for a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women). As noted in the Second Report and Order, the statute also requires the Commission to promote the purposes specified in Section 1 of the Communications Act, which include, among other things, "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." 47 U.S.C. § 151; Second Report and Order at n.3.

capital entry requirements, and would therefore be well-suited to small entities, which lack access to large amounts of capital.⁷⁸ Accordingly, we found that the measures we selected for narrowband PCS auctions were appropriately tailored to the unique characteristics of narrowband PCS and would therefore "create meaningful incentives for small businesses and businesses owned by minorities and/or women to both bid successfully for available licenses and provide innovative and expeditious service to the public."⁷⁹ In this regard we indicated that installment payments would provide a significant means for small businesses to overcome their main barrier to entry: lack of access to financing. And, a 25 percent bidding credit for minority and women-owned businesses together with a tax certificate program would address the additional obstacles faced by those designated entities. We noted, however, that we would continue to assess the effectiveness of the measures adopted for narrowband PCS, and would apply any knowledge gained to subsequent auctions.

41. Our goal in the narrowband personal communications service is to meet fully the statutory mandate of Section 309(j)(4)(D), as well as the objectives of promoting economic opportunity and competition, of avoiding excessive concentration of licenses, and of ensuring access to new and innovative technologies by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women. As explained more fully below, we believe that it is necessary in some respects to do more to ensure that small businesses and businesses owned by members of minority groups and women have a meaningful opportunity to participate in the provision of narrowband PCS. As a result of our experience in the nationwide narrowband PCS auction, we are concerned that a 25 percent bidding credit and installment payments may not be sufficient to ensure the opportunity of these businesses to compete against the larger, deep pocketed incumbent firms. Therefore, we have decided to expand the provisions for designated entities as described below.

A. Definition of Small Business

42. In the Third Report and Order we adopted a definition for small businesses based on the standard definition used by the Small Business Administration (SBA). This definition permits an applicant to qualify for installment payments based on a net worth not in excess of \$6 million with average net income after Federal income taxes for the two preceding years not in excess of \$2 million. 13 C.F.R. § 121.802(a)(2).⁸⁰ In the Second Memorandum

⁷⁸ Third Report and Order at ¶ 69.

⁷⁹ Id. at ¶ 70.

⁸⁰ The SBA has recently changed its net worth/net income standard as it applies to its Small Business Investment Company (SBIC) Program. See 59 Fed. Reg. 16953, 16956 (April 8, 1994). The new standard for determining eligibility for small business concerns applying for financial and/or management assistance under the SBIC program was increased to \$18 million net worth and \$6 million after-tax net income. 13 C.F.R. § 121.802(a)(3)(i). The

Opinion and Order, we removed our generic "small business" definition, which was based on the original SBA size standard and indicated that we would establish a definition for "small businesses" on a service-specific basis.

43. Many commenters, including the Chief Counsel for Advocacy of the SBA, argue that the SBA net worth/net revenue definition is too restrictive and will exclude businesses of sufficient size to survive, much less succeed, in the competitive PCS marketplace. The SBA's Chief Counsel for Advocacy and the Suite 12 Group advocate adoption of a gross revenue test, arguing that a net worth test could be misleading as some very large companies have low net worth. The SBA's Chief Counsel for Advocacy recommends that the revenue standard be raised to include firms that (together with affiliates) have less than \$40 million in gross revenues. Similarly, Suite 12 suggests a \$75 million in annual sales threshold. As another option, the SBA's Chief Counsel for Advocacy suggests that the Commission consider a higher revenue ceiling or adopt different size standards for different telecommunications markets.⁸¹

44. We now realize that the cost of acquiring a narrowband PCS license will be significant and bidders may be required to expend millions of dollars to acquire a license and construct a system in PCS markets. Thus, we believe that our current narrowband PCS small business definition is overly restrictive because it would exclude most businesses possessing the financial resources to compete successfully in the provision of narrowband PCS services. Accordingly, we modify our small business definition for narrowband PCS auctions to ensure the participation of small businesses with the financial resources to compete effectively in an auction and in the provision of narrowband PCS services.

45. There is substantial support in the record for a \$40 million gross revenue standard. For example, the SBA recommends that for PCS, a small business be defined as

change in this size standard was attributable to an adjustment for inflation and changes in the SBIC program "designed to strengthen and expand the capabilities of SBICs to finance small businesses so that they can increase their contribution to economic growth and job creation." 59 Fed. Reg. at 16955.

⁸¹ Some parties recommend using the SBA's alternative 1500 employee standard. See, e.g., comments of SBA Associate Administrator for Procurement Assistance at 2, CFW Communications at 2, and Iowa Network at 17. A number of other commenters, including the SBA's Chief Counsel for Advocacy, argue, however, that adoption of this alternative SBA definition would open up a huge loophole in the designated entity eligibility criteria. Specifically, they contend that telecommunications is a capital, rather than labor, intensive industry, and that an entity with 1,500 employees is likely to be extremely well capitalized and have no need for the special treatment mandated by Congress in the Budget Act. See, e.g., comments of SBA Chief Counsel for Advocacy at 8, LuxCel Group, Inc. at 4, Suite 12 Group at 10-11.

one whose average annual gross revenues for its past three years do not exceed \$40 million.⁸² It states that this definition isolates those companies that have significantly greater difficulty in obtaining capital than larger enterprises. At the same time, the SBA contends that a company with \$40 million in revenue is sufficiently large that it could survive in a competitive wireless communications market.⁸³ Similarly, the SBA Chief Counsel for Advocacy asserts that a \$40 million threshold will allow participation by firms "of sufficient size to meet demands in almost all small markets and some medium-size markets without significant outside financial assistance."⁸⁴

46. For purposes of narrowband PCS, we shall therefore define a small business as any firm, together with affiliates and certain large investors, with average gross revenues for the three preceding years of less than \$40 million.⁸⁵ In addition, an applicant will not qualify as a small business if any one attributable investor in, or affiliate of, the entity has \$40 million or more in personal net worth.⁸⁶ To ensure that only bona fide small businesses in need of government financing are eligible, we will consider the gross revenues of the applicant, its affiliates, as well as those of "attributable" investors on a cumulative basis. The text that follows discusses what interests are attributable for these purposes. In addition, it sets forth exceptions to these attribution rules for minority and women-owned applicants.

47. Qualified "Small Businesses". As a general rule, the gross revenues of all investors in, and affiliates of, an applicant are counted on a cumulative, fully-diluted basis for

⁸² Ex parte filing of U.S. Small Business Administration, June 24, 1994.

⁸³ Id.

⁸⁴ Comments of SBA Office of Advocacy at 10. Cf. comments of Iowa Network and Telephone Electronics Corporation (advocating a \$40 million annual revenue criterion for telephone companies) and reply comments of North American Interactive Partners and Kingwood Associates (advocating \$40 million gross-revenue criterion for applicants for the fifty most-populous BTAs, based on estimated average build-out cost).

⁸⁵ The establishment of small business size standards is generally governed by Section 3 of the Small Business Act of 1953, as amended, 15 U.S.C. § 642 (a). Recent amendments to that statute provide that small business size standards developed by Federal agencies must be based on the average annual gross revenues of such business over a period of not less than three years. See Pub. L. No. 102-366, Title II, § 222 (a), 106 Stat. 999 (1992); 15 U.S.C. § 632 (a) (2) (B) (ii).

⁸⁶ Unlike our proposed eligibility criteria to bid in the entrepreneurs' blocks, described below, the small business definition does not include a total assets standard. We believe that the \$40 million gross revenue cap for small businesses should be sufficient to ensure that only bona fide small businesses are able to take advantage of the measures intended for them.

purposes of determining whether the \$40 million gross revenue threshold has been exceeded, and on an individual basis regarding the \$40 million personal net worth standard.⁸⁷ There are two exceptions to this rule, however. First, applicants that meet the definition of a small business may, as discussed below, form consortia of small businesses that, on an aggregate basis, exceed the gross revenue cap. Second, the gross revenues, personal net worth, and affiliations of any investor in the applicant are not considered so long as the investor holds 25 percent or less of the applicant's passive equity. For corporations, we shall use the term passive equity investors to mean investors who hold only non-voting stock or voting stock that includes no more than 15 percent of the voting interests. Where different classes of stock are held, however, the total amount of equity must still be no more than 25 percent to meet this requirement. For partnerships, the term means limited partnership interests that do not have the power to exercise control of the entity.⁸⁸ The passive investor exception will be available, however, only so long as the applicant remains under the control of one or more entities or individuals (defined as the "control group") and the control group holds at least 25 percent of the applicant's equity and, in the case of corporate applicants, at least 50.1 percent of the voting stock.⁸⁹ In the case of partnership applicants, the control group must hold all the general partnership interests. Winning bidders are required to identify on their long-form applications the identity of the members of this control group and the means of ensuring control (such as a voting trust agreement). The gross revenues of each member of the control group and each member's affiliates will be counted toward the \$40 million gross revenues threshold and applicants shall certify that each control group member meets the individual \$40 million personal net worth standard, regardless of the size of the member's total interest in the applicant.

48. The attribution levels we have selected here are intended to balance the competing considerations that apply in this particular context and may differ from those we have used in other circumstances. As a general matter, the 25 percent limitation on equity investment interests will serve as a safeguard that the very large entities who are excluded from bidding in these blocks do not, through their investments in qualified firms, circumvent the gross revenue cap. At the same time, it will afford qualified bidders a reasonable measure of

⁸⁷ By "fully-diluted," we mean that agreements such as stock options, warrants and convertible debentures will generally be considered to have a present effect and will be treated as if the rights thereunder already have been fully exercised.

⁸⁸ Applicants must be prepared to demonstrate that the limited partners do not have influence over the affairs of the applicant that is inconsistent with their roles as passive investors. For purposes of our rules, we presume that any general partner has the power to control a partnership. Therefore, each general partner in a partnership will be considered part of the partnership's control group.

⁸⁹ So long as the applicant remains under the de jure and de facto control of the control group, we shall not bar passive investors from entering into management agreements with applicants.

flexibility in obtaining needed financing from other entities, while ensuring that such entities do not acquire controlling interests in the eligible bidders. Similarly, the 15 percent threshold for attributing revenues of investors with voting stock in corporate applicants is designed to keep ineligible parties from exerting undue influence over eligible firms. For all of these reasons, we also will attribute the gross revenues of entities, or the personal net worth of individuals, that otherwise constitute "affiliates" of the applicant.⁹⁰

49. Qualified Woman and Minority-Owned Small Businesses. The record demonstrates that women and minorities have especially acute problems in obtaining financing, due in part to discriminatory lending practices by private financial institutions. To address these special problems and to afford women and minority-owned small businesses more flexibility in attracting financing, it is necessary to provide these entities with an alternative, somewhat more relaxed option regarding the attribution of revenues of passive investors. Under this alternative standard, we will not attribute to the applicant the gross revenues or net worth of any single investor in a minority or woman-owned small business applicant unless it holds more than 49.9 percent of the passive equity (which is defined to include as much as 15 percent of a corporation's voting stock). To guard against abuses, however, the control group of applicants choosing this option would have to own at least 50.1 percent of the applicant's equity, as well as retain control and hold at least 50.1 percent of the voting stock.⁹¹ Winning bidders must identify on their long-form applications a control group (this time consisting entirely of minorities and/or women or entities 100 percent owned and controlled by minorities and/or women) and the gross revenues and net worth of each member of the control group and each member's affiliates will be counted toward the \$40 million gross revenue threshold or the individual \$40 million personal net worth limitation, regardless of the size of the member's total interest in the applicant.

50. Relaxing the attribution standard somewhat in determining the eligibility of women and minority-owned companies to bid as small businesses directly addresses what most commenters have stated to be the biggest obstacle to entry for these designated entities: obtaining adequate financing. By this measure, women and minorities who are eligible to bid as small businesses (i.e., who otherwise meet the \$40 million gross revenue standard) will be required to maintain control of their companies and, at the same time, will have flexibility to attract significant infusions of capital from a single investor. The requirement that the minority and women principals hold 50.1 percent of the company's equity mitigates substantially the danger that a well-capitalized investor with a substantial ownership stake will be able to assume de facto control of the applicant.

⁹⁰ The definition of an "affiliate" is set forth in subsection 118, infra.

⁹¹ As noted previously, the control group of a partnership applicant must hold all of the general partnership interests.

51. Of course, women and minority-owned firms, like any other small business applicant, may sell a larger portion of their companies' equity, provided that they also abide by the general eligibility requirements for small businesses. Specifically, the gross revenues and net worth of all investors holding more than 25 percent of the company's passive equity (as defined to include 15 percent or more of the voting stock) will be attributed toward the \$40 million cap and the \$40 million personal net worth standard. In this event, the control group will be required to hold at least 25 percent of the company's equity and 50.1 percent of its voting stock.

52. De Facto Control Issues. We shall codify in our rules a provision explaining more explicitly the term "control," so that applicants will have clear guidance concerning the requirement that a control group maintains de facto as well as de jure control of the firms that are eligible for special treatment under the rules for narrowband PCS. For this purpose, we shall borrow from certain SBA rules that are used to determine when a firm should be deemed an affiliate of a small business. These SBA rules, which are codified in 13 C.F.R. § 121.401, provide several specific examples of instances in which an entity might have control of a firm even though the entity has less than 50 percent of the voting stock of a concern, and thus provide a useful model for our rules. Through reference to circumstances such as those described in the SBA rules, our rules will expressly alert designated entities that control of the applicant through ownership of 50.1 percent of the firm's voting interests may be insufficient to ensure de facto control of the applicant if, for example, the voting stock of the eligible control group is widely dispersed. In those and other circumstances, ownership of 50.1 percent of the voting stock may be insufficient to assure control of the applicant. Of course, apart from these structural issues relative to control, eligible entities must not, during the license term, abandon control of their licenses through any other mechanism. As we stated in the Second Report and Order, designated entities must be prepared to demonstrate that they are in control of the enterprise.⁹²

53. In the Second Memorandum Opinion and Order, we concluded that designated entities might be permitted to receive benefits based on their participation in consortium on a service specific basis, but believed generally that such a consortium should not be entitled to qualify for measures designed specifically for designated entities. As a general matter, we shall continue to adhere to that principle. We think, however, that in the narrowband PCS service, allowing small businesses to pool their resources in this manner is necessary to help them overcome capital formation problems and thereby ensure their opportunity to participate in auctions and to become strong narrowband PCS competitors. Because of the exceptionally large capital requirements associated with acquiring a license in this service, we agree with the SBA Chief Counsel for Advocacy that, so long as individual members of the consortium satisfy the definition of a small business, the congressional objective of ensuring opportunities for small businesses will be fully met. Individual small entities that join to form consortia, as

⁹² Second Report and Order at ¶ 278, citing Intermountain Microwave, 24 Rad. Reg. 983, 984 (1963).

distinguished from a single entity with gross revenues in excess of \$40 million, still are likely to encounter capital access problems and, thus, should qualify for measures aimed at small businesses. We do not believe however, that this congressional goal will be satisfied if special measures are allowed for consortia that are "predominantly" or "significantly" owned and/or controlled by small businesses. This would have the effect of eviscerating our small business definition criteria and would not further the ability of bona fide small businesses to participate in PCS services.

54. Financial Benefits. To ensure that the control group has a substantial financial stake in the venture, we shall adopt certain additional requirements. As noted previously, we shall require that at least 50.1 percent of the voting stock and at least 25 percent (or 50.1 percent for the alternative option for minority and women-owned businesses) of the aggregate of all outstanding shares of stock to be unconditionally owned by the control group members. In addition, 50.1 percent of the annual distribution of dividends paid on the voting stock of a corporate applicant concern must be paid to these members. Also, in the event stock is sold, the control group members must be entitled to receive 100 percent of the value of each share of stock in his or her possession. Similarly, in the event of dissolution or liquidation of the corporation, the control group members must be entitled to receive at least 25 percent (or 50.1 percent, as the case may be) of the retained earnings of the concern and 100 percent of the value of each share of the stock in his or her possession, subject, of course, to any applicable laws requiring that debt be paid before distribution of equity.

55. Partnerships and other non-corporate entities will be subject to similar requirements. Indicia of ownership that we will consider in non-corporate cases include (but are not limited to) (a) the right to share in the profits and losses, and receive assets or liabilities upon liquidation, of the enterprise pro rata in relationship to the designated entity's ownership percentage and (b) the absence of opportunities to dilute the interest of the designated entity (through capital calls or otherwise) in the venture. As with corporations, our concern is ensuring that the economic opportunities and benefits provided through these rules flow to designated entities, as Congress directed.

56. Abuses. As stated above, we intend by these attribution rules to ensure that bidders and recipients of these licenses are bona fide in their eligibility, and we intend to conduct random audits both before the auctions and during the 10-year initial license period to ensure that our rules are complied with in letter and spirit. If we find that large firms or individuals exceeding our personal net worth caps are able to assume control of licensees that have received small business provisions or otherwise circumvent our rules, we will not hesitate to force divestiture of such improper interests or, in appropriate cases, issue forfeitures or revoke licenses. In this regard, we reiterate that it is our intent, and the intent of Congress, that women, minorities and small businesses be given an opportunity to participate in narrowband PCS services, not merely as fronts for other entities, but as active entrepreneurs.

57. In addition, in view of our new small business definition and the associated maximum investor limits, we are modifying our unjust enrichment rules to prevent any post-auction circumvention of our financial threshold, and to ensure that the ultimate licensees are bona fide designated entities. Accordingly, firms that received installment payments based on their small business status will be subject to repayment if, for example, another entity subsequently purchases an "attributable" interest or becomes a member of the control group and, as a result, the gross revenues of the firm would exceed the \$40 million gross revenues cap, or the personal net worth of an individual investor exceeds the \$40 million personal net worth threshold.

B. Bidding Credits in Regional Narrowband Auctions

58. In the Third Report and Order we established bidding credits of 25 percent for women-and minority-owned businesses on two of the six regional narrowband licenses.⁹³ In order to increase the opportunities for women and minorities to participate in the provision of narrowband service, we have decided to increase the bidding credit on the same two licenses for women-and minority-owned businesses in the upcoming regional narrowband auction from 25 percent to 40 percent. Our experience with the nationwide narrowband PCS auctions, where very high license values coupled with only a 25 percent bidding credit may have contributed to the failure of women-and minority-owned businesses to win licenses, suggests that a credit of this magnitude may be necessary to overcome the disadvantages of these groups in bidding for licenses representing large populations and large geographic areas.⁹⁴ In an ex parte filing, Essence Television Productions, Inc. one of the initial participants in the nationwide narrowband PCS auction, argues that designated entities should receive bidding credits of up to 40 percent when competing in auctions against non-designated entities.⁹⁵ The increased bidding credit combined with installment payments for firms that meet our revised small business definition should enable minority-and women-owned businesses to attract the capital necessary to compete. In addition, we seek comment on whether additional measures such as an entrepreneurs' block should be employed in future auctions (see infra).

C. Rural Telephone Companies

59. In this docket, we established general rules and identified several measures, including installment payments, spectrum set-asides, bidding credits and tax certificates, that we would choose among in establishing rules for auctionable spectrum-based services, on a service-specific basis. In adopting service-specific rules, we have carefully selected provisions to meet the particular needs of each designated entity group, so as to "ensure," pursuant to the

⁹³ Third Report and Order at ¶ 68.

⁹⁴ We have already adopted installment payments for small businesses on regional, MTA and BTA licenses. See Section 24.309 (A).

⁹⁵ Ex parte filing of Essence Television Productions, Inc., August 2, 1994.

statute, that each group has the opportunity to participate in providing spectrum-based services.

60. As we indicated above, it is occasionally necessary to do more to ensure that businesses owned by members of minority groups and women have a meaningful opportunity to participate in provision of personal communications services than is necessary to ensure that other designated entity groups have similar opportunities.⁹⁶ The major problem facing minorities and women who seek to offer PCS is lack of access to capital.⁹⁷ Small businesses also encounter serious funding problems.⁹⁸ In contrast rural telephone companies that are not small businesses (and are not owned by minorities or women) do not face the same difficulties in obtaining capital. Accordingly, we do not believe that any additional provisions for rural telephone companies are necessary or appropriate in the context of narrowband PCS. Moreover, as we stated in the Second Report and Order, limiting installment payments to smaller businesses, including those owned by minorities and women, best comports with the intent of Congress by avoiding auction procedures that tend to favor incumbents with established revenue streams over new companies and entrepreneurs.⁹⁹ Therefore, rural telephone companies that are not eligible as small businesses will not receive installment payment assistance.

61. Finally, we believe that special provisions for rural telephone companies that are not smaller entities are not necessary in this context to encourage service to rural areas.¹⁰⁰ Especially in regions where the lack of wireline service makes wireless alternatives desirable, paging service is provided to rural areas by paging companies as well as telephone companies. We therefore believe that many telecommunications companies, and not only rural telephone

⁹⁶ Fifth Report and Order in PP Docket No. 93-253, FCC 94-178, adopted June 29, 1994, released July 15, 1994 (Fifth Report and Order) at ¶ 96.

⁹⁷ Id.; see also, e.g., Report of the FCC Small Business Advisory Committee to the FCC Regarding Gen. Docket No. 90-314 (Sept. 15, 1993), reprinted at 8 FCC Rcd 7820, 8727 (1993) (SBAC Report); Small Business Credit and Business Opportunity Enhancement Act of 1992, Sections 112(4), 331(a)(4), Pub. Law 102-366, Sept. 4, 1992 (Small Business Credit Act) (finding that minority- and woman-owned businesses encounter particular problems in obtaining capital, and minorities face "extraordinary" obstacles in this regard);

⁹⁸ See Fifth Report and Order ¶¶ 93-108.

⁹⁹ See Second Report and Order, ¶¶ 234 & n.179 (citing H.R. Rep. No. 103-111 at 255), 237. We note, however, that many more rural telephone companies are considered small businesses under our revised small business definition than was the case previously.

¹⁰⁰ Congress did not instruct us to provide for every designated entity group in every service, and we believe that provisions for this particular group are not necessary for narrowband PCS.

companies, will pursue ordinary profit incentives to provide narrowband PCS service to outlying areas. Accordingly, we believe that installment payment plans are not necessary to encourage larger rural telephone companies to provide this relatively low-cost service in rural areas.

D. Other Designated Entity Decisions

62. We make two additional decisions concerning designated entities on our own motion. First, we clarify that, for a partnership to qualify for designated entity status, all general partners in the applicant and its "control group" must be eligible entities, consistent with our revised generic eligibility criteria in the Second Memorandum Opinion and Order in this proceeding. For the purposes of our rules, we presume that all general partners in a partnership have the power to bind the partnership, and therefore have *de facto* control.¹⁰¹ Therefore, to ensure that designated entity provisions are made available only to legitimate eligible entities if the partnership is to receive designated entity benefits, all general partners will be required to be designated entities if the partnership is to obtain designated entity status.

63. In addition, we are adopting for narrowband PCS the requirement that all entities claiming a designated entity benefit must substantiate their eligibility for such benefits. In a related action reconsidering the Second Report and Order in this proceeding, we are requiring applicants that seek designated entity benefits to document their eligibility for such benefits.¹⁰² For narrowband PCS we therefore require designated entity applicants to describe on their long-form applications how they meet the eligibility criteria for designated entity benefits. Applicants must list and summarize on their long-form application all agreements that affect designated entity status, such as all partnership agreements, shareholder agreements, management agreements and other agreements, including oral agreements, which establish that the designated entity will have both *de facto* and *de jure* control of the entity. In addition, we will require that such information be maintained at the licensee's facilities, or by its designated agent, for the term of the license, and that the information be made available to Commission staff upon request. We believe that this provision will prove useful when the Commission conducts its random audits of designated entities providing narrowband PCS to ensure their continuing designated entity status.

¹⁰¹ See, e.g., Fifth Report and Order, ¶ 158 & n.134 (making such a presumption and therefore treating each general partner in a partnership applying for broadband PCS licenses as part of the partnership's control group).

¹⁰² See Second Memorandum Opinion and Order at ¶ 134; Cook Inlet Petition for reconsideration of Second Report and Order at 16.

VI. PROPOSED DESIGNATED ENTITY PROVISIONS FOR MTA AND BTA AUCTIONS

A. Introduction

64. In the Budget Act, Congress recognized the novelty of auctions as a licensing method and encouraged us to experiment with a variety of techniques to ensure that small businesses and those owned by women and minorities have an opportunity to participate in spectrum-based services. While we believe that measures taken with respect to the regional narrowband PCS auctions will provide substantial opportunities for designated entities to participate in narrowband PCS, we seek comment on whether it may be necessary to adopt alternative provisions such as entrepreneurs' blocks or higher bidding credits to encourage investment in minority- and women-owned businesses in future auctions. As we have learned, narrowband PCS licenses may be auctioned for large sums of money in the competitive bidding process. It therefore may be necessary to do more to ensure that designated entities have the opportunity to participate in narrowband PCS than may be necessary in other, less costly spectrum-based services. In our view, we must consider whether these steps and any others we may adopt are required to fulfill Congress's mandate that designated entities have the opportunity to participate in the provision of PCS. We believe that the measures we propose today would increase the likelihood that designated entities will win licenses in the auctions and become strong competitors in the provision of narrowband PCS service. We also will review the results of the regional auction in making our decision on the rules proposed in this Further Notice.

65. As we noted in the Fifth Report and Order, by instructing the Commission to ensure the opportunity for designated entities to participate in auctions and spectrum-based services, Congress was well aware of the difficulties these groups encounter in accessing capital.¹⁰³ Indeed, less than two years ago, Congress made specific findings in the Small Business Credit and Business Opportunity Enhancement Act of 1992, that "small business concerns, which represent higher degrees of risk in financial markets than do large businesses, are experiencing increased difficulties in obtaining credit."¹⁰⁴ Because of these problems, Congress resolved to consider carefully legislation and regulations "to ensure that small business concerns are not negatively impacted" and to give priority to passage of "legislation and regulations that enhance the viability of small business concerns."¹⁰⁵

¹⁰³ Fifth Report and Order in PP Docket No. 93-253, FCC 94-178, adopted June 29, 1994, released July 15, 1994 (Fifth Report and Order) at ¶ 97.

¹⁰⁴ Small Business Credit and Business Opportunity Enhancement Act of 1992, Section 331(a) (3), Pub. Law 102-366, Sept. 4, 1992.

¹⁰⁵ Id., Section 331(b)(2),(3).

66. Congress also recognized that these funding problems are even more severe for minority and women-owned businesses, who face discrimination in the private lending market. For example, Congress explicitly found that businesses owned by minorities and women have particular difficulties in obtaining capital and that problems encountered by minorities in this regard are "extraordinary."¹⁰⁶ A number of studies also amply support the existence of widespread discrimination against minorities in lending practices. As we noted in the Fifth Report and Order, in October, 1992, the year prior to passage of the auction law, the Federal Reserve Bank of Boston released an important and highly-publicized study demonstrating that a black or Hispanic applicant in the Boston area is roughly 60 percent more likely to be denied a mortgage loan than a similarly situated white applicant.¹⁰⁷ The researchers measured every variable mentioned as important in numerous conversations with lenders, underwriters, and examiners and found that minority applicants are more likely to be denied mortgages even where they have the same obligation ratios, credit history, loan to value and property characteristics as white applicants. The lending discrimination that occurs, the study found, does not involve the application of specific rules, but instead occurs where discretionary decisions are made. Based on the Boston study, we found that it is reasonable to expect that race will affect business loans that are based on more subjective criteria to an even greater extent than the mortgage loan process, which uses more standard rules.

67. Similarly, evidence presented in testimony before the House Minority Enterprise Subcommittee on May 20, 1994 indicates that African American business borrowers have difficulty raising capital mainly because they have less equity to invest, they receive fewer loan dollars per dollar of equity investment, and they are less likely to have alternate loan sources, such as affluent family or friends. Assuming two hypothetical college-educated, similarly situated male entrepreneurs, one black, one white, the testimony indicated that the white candidate would have access to \$1.85 in bank loans for each dollar of owner equity invested, while the black candidate would have access to only \$1.16. According to the testimony, the problems associated with lower incomes and intergenerational wealth, as well as the discriminatory treatment minorities receive from financial institutions, make it much more likely that minorities will be shut out of capital intensive industries, such as telecommunications. This testimony also noted that African American representation in communications is so low that it was not possible to generate meaningful summary statistics on underrepresentation.¹⁰⁸

¹⁰⁶ Id., Section 112(4); 331(a)(4).

¹⁰⁷ Mortgage Lending in Boston: Interpreting HMDA Data, Federal Reserve Bank of Boston, Working Paper 92-7 (October 1992).

¹⁰⁸ Testimony of Dr. Timothy Bates, Visiting Fellow, The Woodrow Wilson Center, before the U.S. House of Representatives Committee on Small Business, Subcommittee on Minority Enterprise, Finance, and Urban Development (House Minority Enterprise Subcommittee), May 20, 1994.

68. We also stated in the Fifth Report and Order that inability to access capital is also a major impediment to the successful participation of women in PCS auctions. In enacting the Women's Business Ownership Act in 1988, Congress made findings that women, as a group, are subject to discrimination that adversely affects their ability to raise or secure capital.¹⁰⁹ AWRT documents that these discriminatory barriers still exist today. Indeed, AWRT reports that while venture capital is an important source of funding for telecommunications companies, women-owned companies received only approximately one percent of the \$3 billion invested by institutional venture capitalists in 1993. Citing a 1992 National Women's Business Council report, AWRT further argues that even successful women-owned companies did not overcome these financing obstacles after they had reached a level of funding and profitability adequate for most other businesses.¹¹⁰

69. A study prepared in 1993 by the National Foundation for Women Business Owners (NFWBO) further illustrates the barriers faced by women-owned businesses. For example, it finds that women-owned firms are 22 percent more likely to report problems dealing with their banks than are businesses at large. In addition, the NFWBO study finds that the largest single type of short-term financing used by women business owners is credit cards and that over half of women-owned firms use credit cards for such purposes, as compared to 18 percent of all small to medium-sized businesses, which generally use bank loans and vendor credit for short-term credit needs. With regard to long-term financing, the study states that a greater proportion of women-owned firms are turning, or are forced to turn, to private sources, and to a wider variety of sources, to fulfill their needs. Based on these findings, the NFWBO study concludes that removal of financial barriers would encourage stronger growth among women-owned businesses, resulting in much greater growth throughout the economy.¹¹¹

70. If we are to meet the congressional goals of promoting economic opportunity and competition by disseminating licenses among a wide variety of providers, we must find ways to counteract effectively these barriers to entry. As chronicled in the Fifth Report and Order, both Congress and the Commission have tried various methods to enhance access to the broadcast and cable industries by minorities and women.¹¹² These efforts however, have met

¹⁰⁹ Pub. L. 100-533 (1988). In 1991, Congress enacted the Women's Business Development Act of 1991 to further assist the development of small businesses owned by women. See Pub. L. 102-191 (1991).

¹¹⁰ See Letter of AWRT to the Honorable Kweisi Mfume, Chairman, House Minority Enterprise Subcommittee, June 1, 1994.

¹¹¹ See The National Foundation for Women Business Owners, Financing the Business, A Report on Financial Issues from the 1992 Biennial Membership Survey of Women Business Owners, October 1993.

¹¹² See Fifth Report and Order at ¶¶ 103-106.

with limited success. The record shows that women and minorities have not gained substantial ownership representation in either the broadcast or non-broadcast telecommunications industries. For example, a 1993 report conducted by the National Telecommunications and Information Administration's (NTIA) Minority Telecommunications Development Program shows that, as of August 1993, only 2.7 percent of commercial broadcast stations were owned by minorities. Another study commissioned by the Commerce Department's Minority Business Development Agency in 1991 found that only one half of one percent of the telecommunications firms in the country were minority owned. The study also identified only 15 minority cable operators and 11 minority firms engaged in the delivery of cellular, specialized mobile radio, radio paging or messaging services in the United States.¹¹³ And, according to the last available U.S. Census, only 24 percent of the communications firms in the country were owned by women, and these women-owned firms generated only approximately 8.7 percent of the revenues earned by communications companies.¹¹⁴ When companies without paid employees are removed from the equation, firms with women owners represent only 14.5 percent of the communications companies in the country.¹¹⁵ One result of these low numbers is that there are very few minority or women-owned businesses that bring experience or infrastructure to narrowband PCS. They thus face an additional barrier relative to many existing service providers.

71. Small businesses also have not become major participants in the telecommunications industry. For instance, one commenter asserts that ten large companies -- six Regional Bell Operating Companies (RBOCs), AirTouch (formerly owned by Pacific Telesis), McCaw, GTE and Sprint -- control nearly 86 percent of the cellular industry. This commenter further contends that nine of these ten companies control 95 percent of the cellular licenses and population in the 50 BTAs that have one million or more people.¹¹⁶

¹¹³ See Testimony of Larry Irving, Assistant Secretary for Communications and Information, U.S. Department of Commerce, before the House Minority Enterprise Subcommittee, May 20, 1994. In his testimony at this same hearing, FCC Chairman Reed Hundt cited some of these statistics and noted that in light of this serious underrepresentation, there remains "a fundamental obligation for both Congress and the FCC to examine new and creative ways to ensure minority opportunity." Testimony of Reed E. Hundt, Chairman, Federal Communications Commission, before the House Minority Enterprise Subcommittee, May 20, 1994.

¹¹⁴ See Women-Owned Businesses, 1987 Economic Censuses, U.S. Department of Commerce, issued August 1990, at 7, 147. The census data includes sole proprietorships, partnerships, and subchapter S corporations. We have no statistics regarding women representation among owners of larger communications companies.

¹¹⁵ Id.

¹¹⁶ Ex parte filing of DCR Communications, May 31, 1994.

72. In the new auction law, Congress directed the Commission to remedy this serious imbalance in the participation by certain groups, especially minorities and women. The auction law itself contemplates that requiring payment for initial licenses through competitive bidding, unlike existing licensing methods such as comparative hearings or lotteries, may inhibit participation by those with limited access to capital and could further diminish opportunities for designated entities. The first nationwide auction demonstrated that a 25 percent bidding credit may not be sufficient to ensure that designated entities have the opportunity to participate where narrowband PCS values are high. The regional auctions will demonstrate whether a 40 percent bidding credit for women- and minority-owned firms combined with installment payments for eligible small businesses is sufficient to provide meaningful opportunities for designated entities at the regional level. We further propose to examine the use of measures we specified in the Fifth Report and Order to carry out Congress's directive to provide meaningful opportunities for small entities and businesses owned by women and minorities to provide PCS services. If, based on the results of the regional auction, we conclude that the 40 percent bidding credit is insufficient, we may decide that these measures, which are expressly designed to address the funding problems faced by these groups, may be necessary to achieve Congress's goals with respect to narrowband PCS.

B. Summary of Special Provisions for Designated Entities

73. While there was significant designated entity participation in the nationwide narrowband PCS auction, we are concerned that the high license values in that auction and the substantial involvement by large, incumbent firms with significant financial resources suggests that designated entities may have difficulties in competing in future narrowband PCS auctions. We recognize that larger incumbent firms are able to pay much higher license prices than smaller firms because of the significant infrastructure and cost of capital advantages these firms enjoy. Because of these factors, we believe that additional measures may be necessary to achieve Congress's mandate that we ensure the opportunity for designated entities to participate in the competitive bidding process and in the provision of spectrum-based services. In this regard, we propose additional provisions for businesses owned by woman and/or minorities and small businesses similar to those employed in the auction rules for broadband PCS.

74. To fulfill Congress's mandate that we ensure that designated entities have the opportunity to participate in providing narrowband PCS, we propose to reserve up to four MTA frequency blocks --19, 21, 22 and 24 --, and both BTA frequency blocks -- 25 and 26 - - for bidding exclusively by entities with annual gross revenues of less than \$125 million and total assets of less than \$500 million ("entrepreneurs' blocks"). We believe that excluding large companies from bidding in the proposed entrepreneurs' blocks, and limiting the total number of licenses that one entity can obtain in these blocks, would significantly enhance opportunities for smaller entities to become PCS providers and thereby ensure that narrowband PCS licenses will be disseminated "among a wide variety of applicants," as required by Section 309(j)(3)(B).

75. We recognize, however, that reserving blocks for bidding only by relatively small companies may not, by itself, be sufficient to ensure that small businesses and businesses owned by members of minority groups and women have the opportunity to obtain narrowband PCS licenses. Businesses owned by members of minority groups and women face discrimination that poses additional obstacles for these firms. Accordingly, we propose a number of related steps to assist small businesses and businesses owned by woman and/or minorities in attracting the capital necessary to obtain a narrowband PCS license.

76. First, to encourage large companies to invest in designated entities and to assist designated entities without large investors to overcome the additional hurdle presented by auctions, we propose to make bidding credits available to designated entities within the entrepreneurs' blocks. More specifically, we propose to provide small businesses with a 10 percent bidding credit. Businesses owned by minorities and women would receive a 15 percent bidding credit to compensate for the substantial problems they face in attracting capital.¹¹⁷ The credits would be cumulative, so that a business owned by minorities or women that also qualified as a small business would receive a 25 percent bidding credit. Second, we propose to allow most successful bidders within the entrepreneurs' blocks to pay for their licenses in installments and to "enhance" those installment payments for small businesses and businesses owned by minorities and women by varying the moratorium on principal and the interest rate. Third, we propose to continue to extend our tax certificate policies to promote participation by minorities and women in the provision of narrowband PCS. Fourth, we propose to reduce the upfront payment for all eligible bidders in the entrepreneurs' blocks from \$0.02 per MHz per pop to \$0.015 per MHz per pop.

77. Finally, we propose to redesignate the two BTA licenses as regional licenses organized in the same configuration set forth in Section 24.102 of the rules. We also seek comment on other means to achieve larger geographic license sizes such as designating these BTA licenses as nationwide licenses or by maintaining the BTA designation, but allowing combinatorial bidding for the designated regions. We also seek comment on whether some of the MTA and BTA response channels should be redesignated as larger license areas with bidding limited only to those entities eligible to bid for entrepreneurs' block licenses.

78. The following chart highlights the major provisions proposed for businesses bidding in the proposed entrepreneurs' blocks.¹¹⁸

¹¹⁷ Although this bidding credit would be less than the bidding credit available for selected nationwide and regional licenses (25 percent and 40 percent respectively), the 15 percent bidding credit would be available within the entrepreneurs' blocks rather than in a block where all companies could participate.

¹¹⁸ This table is not comprehensive and therefore it does not present all the provisions established for designated entities, especially those available outside the entrepreneurs' blocks.

	<u>Bidding Credits</u>	<u>Installment Payments</u>	<u>Tax Certificates for Investors</u>
Entrepreneurial Businesses (in excess of \$40 MM and less than or equal to \$125 MM in revenue and less than \$500 MM in total assets)	0	Interest only for 1 year; rate equal to 10-year Treasury note plus 2.5%; (for businesses with revenues greater than \$75 MM, available only in regional and MTA markets)	No
Small Businesses (not in excess of \$40 MM in revenues and less than \$500 MM in total assets, see ¶ 45)	10%	Interest only for 2 years; rate equal to 10-year Treasury note plus 2.5%;	No
Businesses Owned by Minorities and/or Women (in excess of \$40 MM and less than or equal to \$125 MM in revenues and less than \$500 MM in total assets)	15%	Interest only for 3 years; rate equal to 10-year Treasury note;	Yes
Small Businesses Owned by Minorities and/or Women (not in excess of \$40 MM in revenues and less than \$500 MM in total assets)	25%	Interest only for 5 years; rate equal to 10-year treasury note;	Yes

C. Summary of Eligibility Requirements and Definitions

1. Entrepreneurs' Blocks and Small Business Eligibility

79. The following points summarize the principal rules we propose regarding eligibility to bid in the entrepreneurs' blocks and have adopted above to qualify as a small business. In addition, they summarize the attribution rules we will propose to use to assess

whether an applicant satisfies the various financial thresholds. More precise details are discussed in the subsections that follow.

Proposed Financial Caps:

- Entrepreneurs' Blocks: To bid in the entrepreneurs' blocks, the applicant, including attributable investors and affiliates, must cumulatively have less than \$125 million in gross revenues and less than \$500 million in total assets. No individual attributable investor or affiliate may have \$100 million or more in personal net worth.
- Small Business: To qualify for special measures accorded a small business, the applicant, including attributable investors and affiliates, must cumulatively have not in excess of \$40 million in gross revenues. No individual attributable investor or affiliate may have in excess of \$40 million in personal net worth. (Note: this is the small business definition we have adopted above). We seek comments on whether in an entrepreneur's block we should define small businesses differently.

Proposed Attribution Rules:

- Control Group. The gross revenues, total assets and personal net worth of certain investors are not considered so long as the applicant has a "control group" consisting of one or more individuals or entities that control the applicant, hold at least 25 percent of the equity and, for corporations, at least 50.1 percent of the voting stock.
- The gross revenues, total assets and personal net worth of each member of the control group are counted toward the financial caps.
- Other Investors. Where the applicant has a control group, the gross revenues, total assets and personal net worth of any other investor are not considered unless the investor holds 25 percent or more of the applicant's passive equity (which, for corporations, will include as much as 15 percent of the voting stock).
- Passive Equity. Passive equity is limited partnership or non-voting stock interests or voting stock interests of 15 percent or less of the issued and outstanding voting stock.
- Proposed Option for Minority or Woman-Owned Applicants. If the control group (consisting entirely of women and/or minorities) owns at least 50.1 percent of the equity and, for corporations, at least 50.1 percent of the voting stock, then the gross revenues, total assets and personal net worth of any other investor are not considered unless the investor holds more than 49.9 percent of the applicant's passive equity (which, for corporations, includes no more than as 15 percent of the voting stock).

- **Affiliates.** The gross revenues, assets and personal net worth of outside interests held by the applicant (and the attributable investors in the applicant) are counted toward the financial caps if the applicant (or the attributable investors in the applicant) control or have power to control the outside interests or if the applicant (or the attributable investors in the applicant) is under the control of the outside interests. The financial interests of spouses are also attributed to each other.

2. Definition of Women and/or Minority-Owned Business

80. The points below summarize the two structural options proposed to be available to firms that wish to qualify for the special provisions adopted for businesses owned by minorities and women. These options will be discussed in more detail in the text that follows.

50.1 Percent Equity Option:

- If women and/or minority principals control the applicant and own at least:
 - 50.1 percent of the equity, and
 - 50.1 percent of the voting stock, in the case of corporations
- Then any other investor may hold:
 - not more than 49.9 percent of the passive equity (which, for corporations, includes as much as 15 percent of the voting stock).

25 Percent Equity Option:

- If women and/or minority principals control the applicant and own at least:
 - 25 percent of the equity, and
 - 50.1 percent of the voting stock, in the case of corporations
- Then any other investor may hold:
 - 25 percent or less of the passive equity (which, for corporations, includes as much as 15 percent of the voting stock).

81. We also request comment on alternatives intended to deter shams and fronts and to prevent abuse of the incentives for designated entities. The Commission would enforce vigorously any requirements adopted. These proposals include a holding and limited transfer period for licensees in the entrepreneurs' blocks and repayment provisions associated with bidding credits and installment payments. These steps and our eligibility and affiliation rules are intended to ensure that the benefits of any measures we take flow to the entities Congress intended. Ultimately, we believe that we will best fulfill our statutory mandate by creating

powerful incentives for bona fide designated entities to attract the capital necessary to compete both in auctions for narrowband PCS and in the provision of service. We therefore specifically request that commenters address in detail the impact any of these alternatives would likely produce on the opportunity for designated entities to acquire narrowband PCS licenses.

D. The Entrepreneurs' Blocks

82. As discussed above, because the auction process itself requires additional expenditures of capital to acquire licenses, this new licensing procedure in many respects holds the potential to erect an additional barrier to entry that had not existed even under the Act's previous licensing methods, comparative hearings and lotteries. As reflected in the House Committee Report, Congress was well aware of that possibility and wanted to ensure that competitive bidding should not exclude smaller entities from obtaining licenses.¹¹⁹ The inability of small businesses and businesses owned by women and minorities to obtain adequate private financing creates a serious imbalance between these companies and large businesses in their prospects for competing successfully in narrowband PCS auctions.

83. We anticipate that the results of the narrowband regional auctions as well as the comments we seek in this Notice will be relevant to our final conclusion of whether an entrepreneurs' block is appropriate in narrowband PCS. We seek comments on what results in the regional auction would or would not justify the use of an entrepreneurs' block in subsequent narrowband auctions. The \$125 million gross revenue/\$500 million asset caps have the effect of excluding the large companies that would easily be able to outbid designated entities and frustrate Congress's goal of disseminating licenses among a diversity of licensees. At the same time, this restriction does not exclude many firms that, while not large in comparison with other telecommunications companies, nevertheless are likely to have the financial ability to provide sustained competition for the PCS licensees. For example, the \$125 million gross revenue figure corresponds roughly to the Commission's definition of a Tier 2, or medium-sized, local exchange carrier,¹²⁰ and would include virtually all of the

¹¹⁹ See H.R. Rep. No. 103-111 at 255.

¹²⁰ Local exchange carriers are categorized as Tier 1 and Tier 2 companies by applying the criterion that Sections 32.11(a) and 32.11(e) of the Commission's Rules use to distinguish Class A and Class B companies, respectively. Class A companies are those companies having annual revenues from regulated telecommunications operations of \$100 million or more; Class B companies are those companies having annual revenues from regulated telecommunications operations of less than \$100 million. The initial classification of a company is determined by its lowest annual operating revenues for the five immediately preceding years. A company's classification is changed when its annual operating revenue exceeds or is under the \$100 million mark in each of five consecutive years. The Commission imposes more relaxed regulatory requirements on Tier 2 LECs than on Tier 1

independently owned rural telephone companies, while excluding the largest incumbent paging licensees. Limiting the personal net worth of any individual investor or affiliate of the applicant to \$100 million would prevent a very wealthy individual from leveraging his or her personal assets to allow the applicant to circumvent the size limitations of the entrepreneurs' blocks.

84. In determining which of the blocks in each market should constitute the entrepreneurs' blocks, we seek to make sufficient opportunity available to businesses that would qualify for the entrepreneurs' blocks and to those that would not. We seek comment on whether it would be appropriate to include all of those remaining blocks designated for bidding credits and to add one additional MTA block and one additional BTA block if we decide to adopt the proposal. We seek comment on the choice of blocks and the number of blocks that should be included in the entrepreneurs' blocks. We want to choose blocks to provide adequate amounts of spectrum and geographic territory necessary to ensure that the eligible bidders will be able to compete effectively. We believe that designating a variety of frequency blocks as entrepreneurs' blocks would satisfy the needs of those parties who believe they must have larger amounts of spectrum to compete effectively as well as the needs of other designated entities who require smaller blocks. Finally, it would not foreclose opportunities for other parties.¹²¹

85. Holding and Limited Transfer Period. Because we interpret the congressional goal of giving designated entities the opportunity to provide spectrum-based services to extend beyond merely obtaining a license, we seek comment on whether we should prohibit licensees in the entrepreneurs' blocks from voluntarily assigning or transferring control of their licenses for a period of three years from the date of the license grant.¹²² We further ask commenters

LECs. See Automated Reporting Requirements for Certain Class A and Tier 1 Telephone Companies, 2 FCC Rcd 5770, 5772 (1987), Commission Requirements for Cost Support Material to be Filed with 1994 Annual Access Tariffs and for Other Cost Support Material, 9 FCC Rcd 1060 n. 3 (Comm. Carr. Bur. 1994); Commission Requirements for Cost Support Material to be Filed with Access Tariffs on March 1, 1985, Public Notice, Mimeo No. 2133 (Comm. Carr. Bur. released Jan. 25, 1985).

¹²¹ In addition, incumbent paging licensees would have the opportunity to bid on 2,176 MTA and BTA response channel licenses reserved for existing paging licensees.

¹²² We propose considering exceptions to this three-year holding period rule on a case-by-case basis in the event of a judicial order decreeing bankruptcy or a judicial foreclosure if the licensee proposes to assign or transfer its authorization to an entity that meets the financial thresholds for bidding in the entrepreneurs' blocks. In addition, we note that a transfer is considered "involuntary" if it is made pursuant to a court decree requiring the sale or transfer of the licensee's stock or assets. Paramount Pictures, Inc., 43 FCC 453 (1949); Cf. William Penn Broadcasting, 16 FCC 2d 1050 (1969).

to address whether, for the next two to seven years of the license term, we should permit the licensee to assign or transfer control of its authorization only to an entity that satisfies the entrepreneurs' blocks entry criteria.¹²³ Comments should address whether any restrictions of this type would accurately balance the goal of promoting access to capital by designated entities with the need to assure the integrity of our process. During this limited transfer period, licensees would continue to be bound by the financial eligibility requirements, as set forth below.¹²⁴ In addition, a transferee or assignee who receives an entrepreneurs' block license during this period would remain subject to the transfer restrictions for the balance of the holding period.¹²⁵ Should any of these proposals be adopted, the Commission would conduct random pre- and post-auction audits to ensure that applicants receiving preferences are in compliance with the FCC's rules.

86. Our goals are to create significant opportunities for entrepreneurs, small businesses, and businesses owned by minorities and women to compete in auctions for licenses and attract sufficient capital to build-out those licenses and provide service. We recognize the critical need to attract capital, which requires flexibility. We are very concerned, however, that such flexibility not undermine our more fundamental objective, which is to ensure that designated entities retain de facto and de jure control of their companies. The holding and limited transfer period upon which we seek comment, may help promote this objective. We seek comment on the effect that any rules of this sort are likely to have on the achievement of our goals of meaningful long-term participation by designated entities and how such a rule would impact the ability to raise capital.

E. Bidding Credits

87. In the Third Report and Order we adopted a 25 percent bidding credit for businesses owned by minorities and women. We concluded that the use of bidding credits would be an effective tool to ensure that women and minority-owned businesses have opportunities to participate in the provision of narrowband services.¹²⁶ And, in this Order, we

¹²³ We note that a licensee assigning its authorization pursuant to this limited transfer period might be subject to the repayment provisions associated with installment payments and bidding credits. See infra ¶¶ 91, 98.

¹²⁴ See infra ¶¶ 101-106. In addition, for purposes of the installment payment and bidding credit provisions set forth below, licensees will continue to be bound by the financial eligibility requirements throughout the term of the license.

¹²⁵ For example, if an entrepreneurs' block authorization is assigned to an eligible business in year four of the license term, it would be required to hold that license until the original holding period expires, subject to the same exceptions that applied to the original licensee.

¹²⁶ See Third Report and Order at ¶ 72.

raised this bidding credit to 40 percent for the regional narrowband auctions. While we do not think that a bidding credit of this magnitude is required when used in conjunction with an insulated entrepreneurs' block, we continue to believe that a bidding credit is necessary to ensure that women and minority-owned businesses have the opportunity to participate in narrowband PCS. In addition, we believe that a small bidding credit is warranted to help small businesses overcome financing obstacles. Accordingly, we propose to continue to provide a bidding credits in the proposed entrepreneurs' blocks that would give small businesses a 10 percent credit, women and minority-owned businesses a 15 percent credit, and small businesses owned by women and minorities an aggregate credit of 25 percent.

88. In ex parte presentations to the Commission, many commenters have indicated that, without spectrum set-asides for narrowband PCS, bidding credits would not be sufficient to assist designated entities in outbidding very large entities who are likely to bid for licenses in this service. PCSD states, for example, that all of the existing large paging companies can justify much larger payments for licenses than could an individual entrepreneur, regardless of a bidder's credit. Therefore, it believes no entrepreneur will win a bid for any PCS market that is desirable to any of the large companies.¹²⁷ As described above, in order to afford designated entities a realistic opportunity to obtain licenses in the narrowband PCS service, we propose to exclude very large businesses from bidding for licenses in the entrepreneurs' blocks. These measures would enhance the value of the bidding credits for small businesses and businesses owned by minorities and women. In this context, we believe that bidding credits can have a significant effect on the ability of small businesses and businesses owned by women and minorities to participate successfully in auctions for licenses in entrepreneurs' blocks.

89. As explained above, the capital access problems faced by small firms and women and minority-owned firms make special provisions like bidding credits appropriate for these designated entities in narrowband PCS.¹²⁸ In effect, the bidding credit would function as a discount on the bid price a firm would actually have to pay to obtain a license and, thus, will address directly the financing obstacles encountered by these entities. Moreover, as noted previously, women and minorities face discrimination in lending and other barriers to entry not encountered by other firms, including other designated entities. Therefore, as one of the measures designed to counter these increased capital formation difficulties, we propose to provide them with a slightly higher bidding credit than small businesses. Thus, women and minorities would receive a 15 percent payment discount that is applied against the amounts they bid on licenses. Absent such measures targeted specifically to women and minorities, it

¹²⁷ Ex parte filing of PCSD Development Corporation (PCSD), August 9, 1994.

¹²⁸ Although we did not previously grant bidding credits to small businesses in the Third Report and Order, we now believe that, given the exponentially greater expense likely to be incurred in acquiring broadband PCS licenses, bidding credits might be a proper means to ensure that these firms have the opportunity to participate in this service.

might be impossible to assure that these groups achieve any meaningful measure of opportunity for actual participation in the provision of narrowband PCS. Similarly, it is reasonable to assume that small firms owned by women and minorities suffer the problems endemic to both groups. Therefore, we propose a cumulative bidding credit of 25 percent for these groups. We believe that these measures will help women and minorities to attract the capital necessary for obtaining a license and constructing and operating a narrowband PCS system, consistent with the intent of Congress. We seek comments on these proposals.

90. As discussed below, we have also proposed to modify the definition of a minority and women-owned firm.¹²⁹ To receive a 10 percent bidding credit, we propose that a small business must satisfy the same gross revenue test adopted for installment payments. As explained more fully in the small business definition section, we propose that a consortium consisting entirely of small businesses also be eligible for a 10 percent bidding credit even if the combined gross revenues of the consortium exceed the small business gross revenues threshold. In addition, we propose that a small business that is owned by women and minorities must satisfy the definition of a business owned by minorities and women as well as the small business definition to receive a 25 percent bidding credit. Finally, we propose that a consortium of small firms owned by women and/or minorities is eligible for a 25 percent bidding credit, provided that each member of the consortium meets the definition of a small business and a minority and/or women-owned firm.

91. Repayment Policies Applicable to Bidding Credits To ensure that bidding credits benefit the parties to whom they are directed, we inquire whether we should adopt strict repayment policies: if, within the original 10-year term, a licensee applies to assign or transfer control of a license to for example, an entity that is not eligible for as high a level of bidding credit, then the difference between the bidding credit obtained by the assigning party and the bidding credit for which the acquiring party would qualify would have to be paid to the U.S. Treasury as a condition of approval of the transfer. Thus, an assignment of a license from a small minority-owned firm to a women-owned firm with revenues greater than \$40 million would require repayment of 10 percent of the original bid price (25 percent less 15 percent) to the Treasury. A sale to an entity that would not qualify for bidding credits would entail full repayment of the original bidding credit as a condition of transfer. Small businesses also would be bound by the financial eligibility rules during the entire license term as set forth below. Thus, if after licensing an investor purchases an "attributable" interest in the business and, as a result, the gross revenues of the firm exceed the \$40 million small business cap, this repayment provision would apply.¹³⁰ If such a proposal were to be adopted, we would envision that these repayment provisions apply throughout the original term of the license to help promote the long-term holding of licenses by those parties receiving bidding

¹²⁹ See *infra* ¶¶ 107-117.

¹³⁰ See *infra* ¶¶ 102-106, for a discussion of which investor interests would be "attributable" for purposes of calculating the gross revenues caps.

credits. Nevertheless, as in the case of the holding period and transfer restrictions discussed at ¶¶88-89 above we seek comment on any effects such rules may have on the ability of designated entities to attract capital. We therefore ask commenters to address in detail whether this type of restriction would further the goal of increasing the number of designated entities participating in the provision of narrowband PCS services.

F. Installment Payments

92. A significant barrier for most businesses small enough to qualify to bid in the proposed entrepreneurs' blocks would be access to adequate private financing to ensure their ability to compete against larger firms in the PCS marketplace.¹³¹ In the Third Report and Order, we concluded that installment payments are an effective means to address the inability of small businesses to obtain financing and will enable these entities to compete more effectively for the auctioned spectrum. We also determined that small businesses eligible for installment payments would only be required to pay half of the down payment (10 percent of the winning bid, as opposed to 20 percent) five days after the auction closes, with the remaining 10 percent payment deferred until five days after grant of the license. Finally, we indicated that installment payments should be made available to small businesses at an interest rate equal to the rate for U.S. Treasury obligations.¹³²

93. In light of the expected substantial capital required to acquire narrowband PCS licenses, we propose that installment payments be available to most businesses that obtain narrowband PCS licenses in the proposed entrepreneurs' blocks. By allowing payment in installments, the government would in effect be extending credit to licensees, thus reducing the amount of private financing needed prior to and after the auction. Such low cost government financing would promote long-term participation by these businesses, which, because of their smaller size, lack access to sufficient capital to compete effectively with larger PCS licensees. Under the rules we propose today, installment payments would be available to smaller entities that do not technically qualify as small businesses for purposes of other measures we have proposed, such as bidding credits. We believe, however, that, given the significant costs of narrowband PCS licenses and the likelihood of very large participants in the other blocks, this option would be fully consistent with the congressional intent in enacting Section 309(j)(4)(A) to avoid a competitive bidding program that has the effect of favoring incumbent providers of other communications services, with established revenue streams, over smaller entities.¹³³

¹³¹ See e.g., comments of SBA Chief Counsel of Advocacy at 6, 20-21, NTIA at 27; SBAC Report at 2 (September 15, 1993).

¹³² See Third Report and Order at ¶¶ 86-90.

¹³³ See H.R. Rep. No. 103-111 at 255 (Commission has the authority to design alternative payment schedules in order that the auction process does not inadvertently favor only those with "deep pockets" over new or small companies).

94. Under the plan we propose here, all licensees that satisfy the gross revenues, total assets and personal net worth criteria to bid in the entrepreneurs' blocks would be allowed to pay in installments for regional and MTA licenses granted in those blocks. With respect to the BTA licenses in those blocks, however, only businesses owned by women and minorities and those licensees with less than \$75 million in gross revenues would be able to use installment payments.¹³⁴ This distinction is based on the expected lower costs to acquire licenses and construct systems in the BTAs. However, if we adopt our proposal to redesignate BTA licenses as nationwide or regional licenses, we propose extending installment payments on those blocks to all parties eligible for the entrepreneurs' blocks. Thus, with the exception of companies owned by women or minorities, which face additional problems accessing capital, we do not think that a firm with gross revenues exceeding \$75 million would require government financing to be competitive for the BTA licenses.¹³⁵

95. The installment payment option would enable qualified businesses to pay their winning bid over time. These businesses would still make the applicable upfront payment in full before the auction, but would be required to make a post-auction down payment equaling only ten percent of their winning bids, half of which will be due five business days after the auction closes. Payment of the other half of the down payment would be deferred until five business days after the license is granted. In general, the remaining 90 percent of the auction price would be paid in installments with interest charges to be fixed at the time of licensing at a rate equal to the rate for ten-year U.S. Treasury obligations plus 2.5 percent. Under this general rule, only payments of interest would be due for the first year with principal and interest payments amortized over the remaining nine years of the license. Timely payment of all installments would be a condition of the license grant and failure to make such timely payment would be grounds for revocation of the license.¹³⁶ We seek comment on this installment payment proposal.

96. Enhanced Installment Payments As explained previously, small businesses and businesses owned by minorities and women face capital access difficulties not encountered by other firms and, thus, require special measures to ensure their opportunity to participate in

¹³⁴ We will apply the same \$500 million total assets and \$100 million personal net worth standards for purposes of determining eligibility for installment payments in the BTA entrepreneurs' blocks. The attribution rules set forth with regard to eligibility to bid will also apply in all of the BTA entrepreneurs' blocks.

¹³⁵ We note that a consortium of small businesses would be eligible for installment payments in any market so long as each member of the consortium satisfies the definition of a small business, as set forth in Section V.A., infra.

¹³⁶ As described in the Second Report and Order, the Commission may, on a case-by-case basis, permit a three to six month grace period within which a licensee may seek a restructuring of the payment plan.

narrowband PCS. Accordingly, we propose an "enhanced" installment payment plan for these entities. Pursuant to this enhanced installment payment plan, small businesses who win licenses in the proposed entrepreneurs' blocks would be required to pay interest only for the first two years of the license term at the same interest rate as set forth in the general rule. Businesses owned by women and/or minorities would be able to make interest-only payments for three years. Interest would accrue at the Treasury note rate without the additional 2.5 percent.¹³⁷ And, finally, businesses that are both small and owned by women and/or minorities would be required to pay only interest for five years. Interest would accrue at the Treasury note rate.

97. These proposed enhanced installment payments are narrowly tailored to the needs of the various designated entities, as reflected in the record in this proceeding. We believe that varying the moratorium on principal in the early years of the loan and varying the interest rate based on these needs would allow small businesses and companies owned by women and/or minorities to bid higher in auctions, thereby increasing their chances for obtaining licenses. In addition, it would allow them to concentrate their resources on infrastructure build-out and, therefore, it would increase the likelihood that they become viable narrowband PCS competitors. We request comment on these proposed enhancements to the installment payment plan.

98. Unjust Enrichment Applicable to Installment Payments To ensure that large businesses do not become the unintended beneficiaries of measures meant for smaller firms, we propose to retain the unjust enrichment provisions adopted in the Third Report and Order applicable to installment payments. Specifically, if a licensee that was awarded installment payments seeks to assign or transfer control of its license to an entity not meeting the applicable eligibility standards set out above during the term of the license, we would require payment of the remaining principal and any interest accrued through the date of assignment as a condition of the license assignment or transfer.¹³⁸ Moreover, if an entity seeks to assign or transfer control of a license to an entity that does not qualify for as favorable an installment payment plan, the installment payment plan, if any, for which the acquiring entity qualifies would become effective immediately upon transfer. Thus, a higher interest rate and earlier payment of principal may begin to be applied. For example, a transfer of a license in the fourth year after license grant from a small minority-owned firm to a small non-minority owned firm would require that the firm begin principal payments and the balance would begin accruing interest at a rate 2.5 percent above the rate that had been in effect. Finally, if an investor subsequently purchases an "attributable" interest in the businesses and, as a result, the

¹³⁷ To be eligible for these "enhanced" installment payments, a firm would have to satisfy either of the two alternative definitions of a woman or minority-owned business, as set forth in ¶¶107-117, infra, as well as the applicable financial caps.

¹³⁸ See Third Report and Order at ¶ 89.

gross revenues or total assets of the business exceed the applicable financial caps, this unjust enrichment provision would also apply.¹³⁹ We seek comment on these proposals.

G. Upfront Payments

99. As previously indicated in the Third Report and Order, the upfront payment requirement was designed to ensure that bidders are qualified and serious and to provide the Commission with a source of funds in the event that it becomes necessary to assess default or bid withdrawal penalties.¹⁴⁰ The upfront payment ensures that bids during the course of the auction are bona fide and convey information about the value of the underlying licenses. Our standard upfront payment for narrowband PCS is \$0.02 per MHz per pop. As an additional means of enhancing the opportunity of designated entities to participate in competitive bidding we propose to reduce the required upfront payment for those applicants. As we concluded in the Fifth Report and Order, we are concerned that the \$0.02 per MHz per pop upfront payment requirement might impose a barrier for smaller entities wishing to participate in the auctions. Moreover, we note that most bidders in the proposed entrepreneurs' blocks would be entitled to pay for their licenses in installments, which would require a down payment of only five percent of the winning bid. We are concerned that requiring an upfront payment that may be larger than the down payment that the winning bidder is required to tender could discourage auction participation.

100. For these reasons, we propose to reduce the upfront payment requirement to \$0.015 per MHz per pop for bidders in the entrepreneurs' blocks. This 25 percent discount should facilitate auction participation by capital-constrained companies and would permit them to conserve resources for infrastructure development after winning a license. Moreover, since the upfront payment is still substantial, we believe that insincere bidding would be discouraged and the Commission would have access to funds if it must collect default or bid withdrawal penalty payments.

H. Definitions and Eligibility

1. Eligibility to Bid in the Proposed Entrepreneurs' Blocks

101. As noted previously, eligibility to bid in the proposed entrepreneurs' blocks would be limited to companies that, together with their affiliates and investors, had gross revenues of less than \$125 million in each of the last two years and have total assets of less than \$500 million at the time their short form applications are filed. In addition, we propose to prohibit an applicant from bidding in these blocks if any one attributable individual

¹³⁹ See infra ¶¶ 102-106, for a discussion of which investor interests would be "attributable" for purposes of calculating the gross revenues and total assets thresholds.

¹⁴⁰ Third Report and Order, ¶¶ 41-45.

investor or principal in the applicant has \$100 million or greater in personal net worth at the short form application filing date.

2. Attribution Rules for the Proposed Entrepreneurs' Blocks

102. For purposes of determining whether an entity qualifies to bid in the entrepreneurs' blocks, we propose to follow the control group and attribution rules set forth with regard to eligibility to bid as a small business.¹⁴¹ In particular, winning bidders would be required to identify on their long-form applications a control group that controls the applicant, owns at least 25 percent of the equity, and in the case of a corporation, holds at least 50.1 percent of the voting stock. For partnership applicants, we propose that every general partner be considered part of the group. The gross revenues and total assets of each member of the control group and each member's affiliates would be counted toward the \$125 million/\$500 million thresholds, regardless of the size of the member's total interest in the applicant. The \$100 million personal net worth limitation would also apply to each member of the control group. We would not consider the gross revenues or personal net worth of any other investor unless the investor holds 25 percent or more of the outstanding passive equity in the applicant, which, as defined above, includes as much as fifteen percent of the voting stock in a corporate applicant.

103. We also propose the more relaxed attribution standard set forth in ¶¶ 49-51 with regard to investors in small businesses owned by minorities and women. Specifically, we would not consider the gross revenues or personal net worth of a single passive investor in a minority or female-owned small business unless the investor holds in excess of a 49.9 percent passive interest (which includes as much as fifteen percent of a corporate applicant's voting stock), provided the women or minority control group maintains at least 50.1 percent of the equity and, in the case of a corporate applicant, at least 50.1 percent of the voting stock. We believe that such revenue attribution would ensure that only bona fide small businesses are able to take advantage of the special provisions we have proposed, but would allow those businesses to attract sufficient equity capital to be truly viable contenders in the PCS industry.

104. In addition, we propose to allow a consortium of small businesses to qualify for any of the measures adopted in this order applicable to individual small businesses including the ability to bid in the entrepreneurs' block. As used here, the term "consortium" means a conglomerate organization formed as a joint venture among mutually-independent business firms, each of which individually satisfies the definition of a small business.

105. We explain how these attribution rules would apply with regard to any holding and limited transfer period for entrepreneurs' block licensees should such rules ultimately be adopted. During this holding period, an entrepreneurs' block licensee could not sell more than 25 percent of its passive equity to a single investor if the resulting attribution of that

¹⁴¹ See supra ¶¶ 41-47.

investor's gross revenues or total assets would bring the company over the \$125 million gross revenues/\$500 million total assets thresholds, or if that investor's personal net worth exceeds the \$100 million personal net worth cap. Similarly, while individual members of the control group could change (if it would not result in a transfer of control of the company), the control group would have to maintain control and at least 25 percent of the equity and 50.1 percent of the voting stock.¹⁴² A company would be permitted to grow beyond these gross revenues/total assets caps, however, through equity investment by non-attributable (i.e. passive) investors, debt financing, revenue from operations, business development or expanded service.¹⁴³

106. We seek comment on these proposed eligibility requirements for the entrepreneurs' blocks. In particular, parties should discuss the equity and control requirements for the control group and investors in both the corporate and partnership context. In addition, commenters should discuss the alternative option for women and minority-owned companies and the ability of small businesses to form consortia. With regard to all of these issues, parties are asked to comment on the proposals' impact on the ability of entities to obtain financing as well as on the Commission's goals of deterring shams and fronts.

3. Definition of Women and Minority-Owned Business

107. As discussed above, we have proposed steps in this order to address the special funding problems faced by minority and women-owned firms and thereby to ensure that these groups have the opportunity to participate and become strong competitors in the narrowband PCS service.¹⁴⁴ We previously adopted a tax certificate program for women and minorities to allow more sources of potential funding, and in this Order have relaxed the attribution standard used to determine eligibility as a qualified small business.

108. For purposes of implementing these steps, we propose to depart from the definition of a minority and woman-owned firm that was adopted in the Third Report and

¹⁴² A minority or woman-owned company would have to continue to adhere to the attribution rules applicable to it, set out above.

¹⁴³ These rules would continue to apply in this manner throughout the license term with regard to a firm's continuing eligibility for installment payments, "enhanced" installment payments and bidding credits.

¹⁴⁴ We propose to use the same criteria set forth in the Second Report and Order, and consider the members of the following groups "minorities" for purposes of our rules: "[T]hose of Black, Hispanic Surnamed, American Eskimo, Aleut, American Indian and Asiatic American extraction." See Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 FCC 2d 979, 980 n.8 (1978); Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, 92 FCC 2d 849, 489 n.1 (1982). Moreover, as adopted in the Second Report and Order, minority and women-owned businesses would be eligible for special measures only if the minority and women principals are also United States citizens.

Order. We have adopted relaxed attribution standards for businesses owned by women and minorities for purposes of qualifying for small business provisions (§ 46). We are proposing relaxed standards for businesses owned by women and minorities to qualify for the entrepreneurs' blocks. In the Third Report and Order, we found generally that to establish ownership by minorities and women, a strict eligibility standard should be adopted that required minorities or women to have at least a 50.1 percent equity stake and a 50.1 percent controlling interest in the designated entity. Third Report and Order at ¶68; 47 C.F.R. § 1.2110(b)(2). For future narrowband PCS auctions, we propose to retain the requirement that minorities and/or women control the applicant and hold at least 50.1 percent of a corporate applicant's voting stock. However, to establish their eligibility for certain benefits, summarized below, we propose an additional requirement that, even where minorities and women hold at least 50.1 percent of the applicant's equity, other investors in the applicant may own only passive interests, which, for corporate applicants, is defined to include as much as fifteen percent of the voting stock. In addition, provided that certain restrictions are met, we propose to allow women and minority-owned firms the option to reduce to 25 percent the 50.1 percent minimum equity amount that must be held.

109. We emphasized in the Third Report and Order that we did not intend to restrict the use of various equity financing mechanisms and incentives to attract financing, provided that the minority and women principals continued to own 50.1 percent of the equity, calculated on a fully-diluted basis, and that their equity interest entitled them to a substantial stake in the profits and liquidation value of the venture relative to the non-controlling principals. We noted, however, in the Second Report and Order that different standards that meet the same objectives may be appropriate in other contexts. Second Report and Order at ¶ 278. In view of the evidence of discriminatory lending experiences faced by minority and women entrepreneurs and the exceptionally great financial resources believed to be required by narrowband PCS applicants, we conclude that it may be appropriate to allow more flexibility with regard to the 50.1 percent equity requirements for this service in order to open doors to more sources of equity financing for women and minority-owned firms.

110. We propose therefore to allow women and minority-owned firms the following options. First, they may satisfy the general definition set forth in the Second Report and Order, which requires the minority and/or female principals to control the applicant, own at least 50.1 percent of its equity and, in the case of corporate applicants, hold at least 50.1 percent of the voting stock. Under this option, other investors may own as much as a 49.9 percent passive equity interest. As noted above regarding eligibility to bid in the entrepreneurs' blocks, passive equity in the corporate context means only non-voting stock may be held, or stock that includes no more than fifteen percent of the voting interests.¹⁴⁵ For

¹⁴⁵ For example, under this option, a corporate applicant with two classes of issued and outstanding stock, 100 shares of voting stock and 100 shares of non-voting stock, could sell to a single non-eligible entity 49.9 percent of the applicant's equity, consisting of 5 shares of the corporation's voting stock and 94 shares of its non-voting stock. Under this scenario,

partnerships, the term means limited partnership interests that do not have the power to exercise control of the entity. We ask commenters specifically to address whether the proposed fifteen percent voting interest limitation strikes the correct balance, or whether a higher percentage would facilitate capital formation without unduly contributing to a proliferation of shams. In addition, the Second Report and Order, all investor interests would be calculated on a fully-diluted basis, meaning that agreements such as stock options, warrants and convertible debentures generally would be considered to have a present effect and would be treated as if the rights thereunder already have been fully exercised.¹⁴⁶ We recognize that the requirement that other investors own only passive interests would be a departure from the definition of a minority or women-owned business adopted in the Second Report and Order, but because of the very significant financial contribution that may be made by such other investors in designated entities, we believe that the passive equity requirement may be appropriate as an additional safeguard. In addition, we seek comments on whether these rules as currently framed may affect the ability of legitimate designated entities to obtain the capital needed to participate in the auction.

111. As a second proposed option, women and minority-owned firms would be able to sell up to 75 percent of the company's equity, provided that no single investor may hold 25 percent or more of the firm's passive equity, which is defined in the same manner as above. For example, a corporation with 100 shares of voting stock and 100 shares of non-voting stock, with the 200 shares representing the total outstanding shares of the company, could qualify as a minority or women-owned business under the following circumstances. The minority or women principals would have to own at least 51 shares of voting stock, which satisfies the requirement that they have voting control and, in this case, also meets the requirement that they hold at least 25 percent of the equity. Two other investors could each own 34 shares of non-voting stock and fifteen shares of voting stock, which represents 24.5 percent of the company's equity for each of the shareholders. A third investor could own the remaining 32 shares of non-voting stock and fifteen shares of the voting stock, or 23.5 percent of the equity. The remaining 4 shares of voting stock may be sold to other investors.

112. Whichever option is chosen, we would require establishment of a "control group" for women and minority-owned firms in much the same way we did for purposes of eligibility

eligible minorities or women, in order to retain at least 50.1 percent of the value of all outstanding shares of the corporation's stock, must own all of the corporation's remaining shares of stock; that is, 95 shares of voting stock and six shares of non-voting stock.

¹⁴⁶ As also noted in the Second Report and Order, we will consider departing from the requirement that the equity of investors in minority and women-owned businesses must be calculated on a fully-diluted basis only upon a demonstration, in individual cases, that options or conversion rights held by non-controlling principals will not deprive the minority and women principals of a substantial financial stake in the venture or impair their rights to control the designated entity. See Second Report and Order at ¶ 277.

to bid in the entrepreneurs' blocks. Specifically, winning bidders, transferees or assignees would have to identify on their long-form applications a control group (consisting entirely of minorities and/or women or entities 100 percent owned and controlled by minorities and women) that has de jure and de facto control of the applicant and holds either at least 50.1 or 25 percent of the applicant's equity, depending upon which option is elected.

113. We believe that a modification of our 50.1 percent equity requirement would best achieve the Congressional objective of providing effective and long-term economic opportunities for women and minority-owned firms in narrowband PCS. At the same time, we propose to maintain strict enforcement of the requirement that actual control reside with the qualified designated entities. Thus, to establish their eligibility for tax certificates, enhanced installment payments, bidding credits and relaxed cellular attribution rules, women and minority-owned applicants electing to use the 25 percent equity option could not in any instance allow an individual investor who is not in the control group to own more than a 25 percent passive equity interest. This restriction would apply even in circumstances in which allowing an investor to exceed these limitations would not result in the applicant's exceeding the gross revenues and other financial standards that apply to other bidders in the entrepreneurs' blocks and other situations involving financial caps. These structural safeguards, as well as the general requirement that other investors hold only passive interests in women and minority-owned applicants, would help to ensure that control truly remains with the women and minority designated entities.

114. For example, a women or minority-owned firm electing to use the 25 percent option may have a non-eligible investor with more than a 25 percent passive stake and still qualify to bid in the entrepreneurs' blocks or for benefits that apply to small businesses, as long as the attributable revenues of the investor do not cause the applicant to exceed the gross revenues/total assets caps. In these contexts, no additional restrictions would be necessary, because women and minority-owned applicants, like other applicants, would be eligible to bid in these blocks and to qualify as small businesses so long as they comply with the same restrictions on financial eligibility that apply to other applicants. Since the attribution rule itself operates to ensure compliance with size limitations, it would not be necessary to impose additional restrictions on the size of interests held by investors with attributable interests. This firm would not qualify, however, for special measures applicable only to women and minority-owned businesses, such as "enhanced" installment payments or the 15 or 25 percent bidding credits, because it has a single non-eligible investor with more than a 25 percent passive interest. In circumstances in which women and minorities are required to retain only 25 percent of the firm's equity, this additional structural restriction would be appropriate because the objective in this context is to ensure not merely financial eligibility, but that women and minorities retain control of the license.

115. We set forth previously rules defining more explicitly the term "control" for purposes of determining whether a "control group" maintains de facto as well as de jure

control of an applicant.¹⁴⁷ We propose to apply those rules equally to the minority and women principals of minority and women-owned applicants. Consistent with our general policies with regard to women-owned applicants for purposes of our multiple ownership and cross-ownership rules in this broadcast context, we do not propose to adopt, at this time, any special rules or presumptions to determine whether women-owned applicants exercise independent control of their firms. See In the Matter of Clarification of Commission Policies Regarding Spousal Attribution, 7 FCC Rcd. 1920 (1992)

116. We also note here that we are proposing to depart from the provision in the Third Report and Order that bars publicly traded companies from qualifying as minority and woman-owned businesses for purposes of participating in auctions. Most of the steps proposed to assist these designated entities in this Further Notice (e.g., bidding credits and installment payments) are confined to winning bidders in the entrepreneurs' blocks, where there would be a financial limit on the size of participants. Because of the large capital entry costs of narrowband PCS, we now believe that even publicly traded companies owned by women and minorities that qualify to bid in entrepreneurs' blocks require additional measures, such as bidding credits and installment payments, to be able to participate successfully.

117. As noted above, we propose that applicants owned by women and minorities must meet the limitations on gross revenues, total assets and personal net worth to qualify for entry into the entrepreneurs' blocks. The size limitations would not apply, however, to all measures designed to assist applicants owned by minorities and or women. The tax certificate policy applies to all narrowband PCS licenses and would not be limited to licenses in the entrepreneurs' blocks. Therefore, businesses owned by minorities and women need not meet the gross revenue and other financial restrictions to qualify for tax certificates. But minority and women-owned firms would have to satisfy the Commission's structural ownership requirements to receive the benefits of tax certificates; that is, they would be subject to the limitation that interests held by investors who are not women and minorities must be passive.

4. Definition of an Affiliate

118. In the Second Report and Order, we referenced the SBA's affiliation rules for purposes of defining generally whether an entity qualifies as a small business and gave examples of how the affiliation rules would be applied. In the Fifth Report and Order, we expanded on the SBA's affiliation rules in establishing detailed affiliation standards for narrowband PCS to be used when designated entities must include "affiliates" to determine their eligibility for special designated entity provisions. In the Second Memorandum Opinion and Order that we adopted in this docket, we incorporate into our generic auction rules the affiliation standards that we established for narrowband PCS in the Fifth Report and Order. We propose to apply these affiliation standards would also apply to narrowband PCS for purposes of determining any of the above described, sized-based eligibility criteria for

¹⁴⁷ See supra ¶ 112.

designated entities seeking special treatment under the provisions adopted herein. These standards would give applicants clear guidance regarding the relationships that we will attribute for purposes of applying any of our sized-based eligibility criteria.

I. Limit on Licenses Awarded in Entrepreneurs' Blocks

119. The special provisions which we propose for designated entities are based, in part, on our mandate to fulfill the congressional goal that we disseminate licenses among a wide variety of applicants. 47 U.S.C. § 309(j)(3)(B). Therefore, in proposing the financial assistance measures set forth in this Further Notice, we are concerned about the possibility, even if remote, that a few bidders will win a very large number of the licenses in the entrepreneurs' blocks. As a consequence, the benefits that Congress intended for designated entities would be enjoyed, in disproportionate measure, by only a few individuals or entities. Congress, in our view, did not intend that result. We therefore propose steps to ensure that the financial assistance provided through our rules is dispersed to a reasonable number of applicants who win licenses in these blocks.

120. To achieve a fair distribution of the benefits intended by Congress, we propose a limit on the total number of licenses within the entrepreneurs' blocks that a single entity could win at auction. In setting this limit, we would avoid imposing a restriction that would prevent applicants from obtaining a sufficient number of licenses to create large and efficient nationwide or regional services. Specifically, we propose a limitation that no single entity may win more than 10 percent of the licenses available in the entrepreneurs' blocks. These licenses could be in any combination of frequency blocks. Such a limit would ensure that at least 10 winning bidders enjoy the benefits of the entrepreneurs' blocks. At the same time, it would allow bidders to effectuate aggregation strategies that include large numbers of licenses and extensive geographic coverage.

121. Further, this limitation would apply only to the total number of licenses that may be won at auctions in these proposed entrepreneurs' blocks; it would not be an ownership cap that applies to licenses that might be obtained after the auctions. For purposes of implementing this restriction, we would consider licenses to be won by the same entity if an applicant (or other entity) that controls, or has the power to control licenses won at the auction, controls or has the power to control another license won at the auction.

J. Redesignation of Certain Narrowband PCS Spectrum Blocks

122. Finally, we are concerned that there are companies that would be eligible for an entrepreneurs' block license that may desire larger license areas than MTAs and BTAs. It appears that over half of the bidders in the nationwide auction would have qualified for an entrepreneurs' block license. As a result, we propose to redesignate the two BTA licenses as regional licenses organized in the same configuration set forth in Section 24.102 of the rules. Doing so would give designated entities an opportunity to bid on a larger and more valuable

license under the rules for entrepreneurs' blocks. We also seek comment on other means to achieve larger geographic license sizes such as designating these BTA licenses as nationwide licenses or by maintaining the BTA designation, but allowing combinatorial bidding for the designated regions. Commenters should also address the appropriate premium we should adopt for comparison of combinatorial and BTA license bids if we allow combinatorial bidding. We also seek comment on whether some of the MTA and BTA response channels should be redesignated as larger license areas with bidding limited only to those entities eligible to bid for entrepreneurs' block licenses.

VII. PROCEDURAL MATTERS AND ORDERING CLAUSE

A. Regulatory Flexibility Analysis

123. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. § 604, the Commission's final analysis for the Memorandum Opinion and Order and the Commission's initial regulatory flexibility analysis for the Further Notice is as follows:

Memorandum Opinion and Order -- Final Analysis

124. Need for, and Purpose of, this Action. As a result of new statutory authority, the Commission may utilize competitive bidding mechanisms in the granting of certain initial licenses. The Commission published an Initial Regulatory Flexibility Analysis, see generally 5 U.S.C. § 603, within the Notice of Proposed Rule Making in this proceeding, and published Final Regulatory Flexibility Analyses within the Second Report and Order (at ¶¶ 299-302) and the Third Report and Order (at ¶¶ 91-94). As noted in these previous final analyses, this proceeding will establish a system of competitive bidding for choosing among certain applications for initial licenses, and will carry out statutory mandates that certain designated entities, including small entities, be afforded an opportunity to participate in the competitive bidding process and in the provision of spectrum-based services.

125. Summary of the Issues Raised by the Public Comments. In regard to the specific narrowband PCS issues addressed by this Third Memorandum Opinion and Order, no comments were submitted in response to our Initial Regulatory Flexibility Analysis.

126. Significant Alternatives Considered. Although, as described in (B) above, no comments were received pertaining to narrowband PCS, the Second Report and Order and Third Report and Order addressed at length the general policy considerations raised as a result of the Commission's new auction authority.

Further Notice -- Initial Analysis

127. Reason for the Action. The purpose of the Further Notice is to implement competitive bidding rules and regulations rules consistent with the Commission's competitive bidding authority that will carry out the statutory mandates that certain designated entities,

including small entities, are afforded an opportunity to participate in the competitive bidding process and in the provision of spectrum-based services.

128. Objectives of this Action. The Omnibus Budget Reconciliation Act of 1993 and the subsequent Commission actions to implement it are intended to establish a system of competitive bidding for choosing among certain applications for initial licenses, and will carry out statutory mandates that certain designated entities, including small entities, are afforded an opportunity to participate in the competitive bidding process and in the provision of narrowband PCS services.

129. Legal Basis. Authority for the for the Further Notice can be found in the Omnibus Budget Reconciliation Act of 1993 and in Sections 2(a), 4(i) 303(r), 309(i) and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 152 (a), 154 (i), 303(r), 309(i) and 309(j).

130. Reporting, Recordkeeping and Other Compliance Requirements. The proposals under consideration in this Further Notice include the possibility of new reporting and recordkeeping requirements for a number of small business entities.

131. Federal Rules Which Overlap, Duplicate or Conflict With These Rules. None.

132. Description, Potential Impact, and Number of Small Entities Involved. The rule changes proposed in this Further Notice could effect smaller entities if they have mutually exclusive applications for initial licenses or permits for narrowband PCS licenses. The Further Notice proposes to establish certain narrowband PCS spectrum blocks for bidding exclusively by smaller entities and to provide installment payments and bidding credits to certain eligible entities bidding within those blocks.

133. Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives. The Further Notice proposes certain provisions for smaller entities designed to ensure that such entities have the opportunity to participate in the competitive bidding process and in the provision of narrowband PCS services.

B. Ex Parte Rules

134. This is a non-restricted notice and comment rule making proceeding. Ex Parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. See generally 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

C. Comment Dates

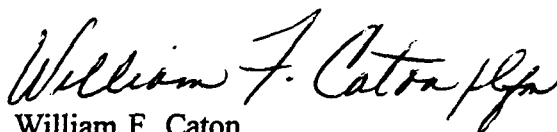
135. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before September 16, 1994 and reply comments on or before October 3, 1994. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center of the Federal Communications Commission, Room 239, 1919 M Street, N.W., Washington, DC 20554. The complete text of this document may be purchased from the Commission's copy contractor, International Transcription Service, 1919 M Street, Room 236, Washington, DC 20554, telephone (202) 857-3800.

D. Ordering Clause

136. Accordingly, IT IS ORDERED, That the petitions for reconsideration ARE GRANTED to the extent described above and DENIED in all other respects.

137. IT IS FURTHER ORDERED, that Part 24 of the Commission's Rules IS AMENDED as set forth in the attached Appendix. IT IS ORDERED, that the rule changes made herein WILL BECOME EFFECTIVE 30 days after their publication in the Federal Register. This action is taken pursuant to 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).

FEDERAL COMMUNICATIONS COMMISSION



William F. Caton
Acting Secretary

APPENDIX RULES

Part 24 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 24 continues to read as follows:

AUTHORITY: Secs. 4, 301, 302, 303, 309 and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. §§ 154, 301, 302, 303, 309 and 332, unless otherwise noted.

2. Section 24.129 is revised to read as follows:

Section. 24.129 Frequencies.

The following frequencies are available for narrowband PCS. All licenses on channels indicated with an (*) will be eligible for bidding credits of 25 percent, and all licenses indicated with an (**) will be eligible for bidding credits of 40 percent, as set forth in Section 24.309(b) of this Part if competitive bidding is used to award such licenses.

(a) Eleven frequencies are available for assignment on a nationwide basis as follows:

(1) Five 50 kHz channels paired with 50 kHz channels:

Channel 1: 940.00-940.05 and 901.00-901.05 MHz;
Channel 2: 940.05-940.10 and 901.05-901.10 MHz;
Channel 3: 940.10-940.15 and 901.10-901.15 MHz;
Channel 4: 940.15-940.20 and 901.15-901.20 MHz; and,
Channel 5: 940.20-940.25 and 901.20-901.25 MHz.*

(2) Three 50 kHz channels paired with 12.5 kHz channels:

Channel 6: 930.40-930.45 and 901.7500-901.7625 MHz;
Channel 7: 930.45-930.50 and 901.7625-901.7750 MHz; and,
Channel 8: 930.50-930.55 and 901.7750-901.7875 MHz;*

(3) Three 50 kHz unpaired channels:

Channel 9: 940.75-940.80 MHz;
Channel 10: 940.80-940.85 MHz; and,

Channel 11: 940.85-940.90 MHz.*

(b) Six frequencies are available for assignment on a regional basis as follows:

(1) Two 50 kHz channels paired with 50 kHz channels:

Channel 12: 940.25-940.30 and 901.25-901.30 MHz; and,
Channel 13: 940.30-940.35 and 901.30-901.35 MHz.**

(2) Four 50 kHz channels paired with 12.5 kHz channels:

Channel 14: 930.55-930.60 and 901.7875-901.8000 MHz;
Channel 15: 930.60-930.65 and 901.8000-901.8125 MHz;
Channel 16: 930.65-930.70 and 901.8125-901.8250 MHz; and,
Channel 17: 930.70-930.75 and 901.8250-901.8375 MHz.**

(c) Seven frequencies are available for assignment on a MTA basis as follows:

(1) Two 50 kHz channels paired with 50 kHz channels:

Channel 18: 940.35-940.40 and 901.35-901.40 MHz; and,
Channel 19: 940.40-940.45 and 901.40 -901.45 MHz.*

(2) Three 50 kHz channels paired with 12.5 kHz channels:

Channel 20: 930.75-930.80 and 901.8375-901.8500 MHz;
Channel 21: 930.80-930.85 and 901.8500-901.8625 MHz; and,
Channel 22: 930.85-930.90 and 901.8625-901.8750 MHz.*

(3) Two 50 kHz unpaired channels:

Channel 23: 940.90-940.95 MHz; and,
Channel 24: 940.95-941.00 MHz.*

(d) Two 50 kHz channels paired with 12.5 kHz channels are available for assignment on a BTA basis:

Channel 25: 930.90-930.95 and 901.8750-901.8875 MHz; and,
Channel 26: 930.95-931.00 and 901.8875-901.9000 MHz.*

Note 1: Operations in markets or portions of markets which border other countries, such as Canada and Mexico, will be subject to on-going coordination arrangements with neighboring countries.

3. Section 24.130 is amended by revising paragraphs (b) and (c) to read as follows:

* * * * *

(b) The following four 12.5 kHz unpaired channels are available for assignment on a MTA basis:

- A: 901.9000-901.9125 MHz;
- B: 901.9125-901.9250 MHz;
- C: 901.9250-901.9375 MHz; and
- D: 901.9375-901.9500 MHz.

(c) The following four 12.5 kHz unpaired channels are available for assignment on a BTA basis:

- E: 901.9500-901.9625 MHz;
- F: 901.9625-901.9750 MHz;
- G: 901.9750-901.9875 MHz; and
- H: 901.9875-902.0000 MHz.

4. Section 24.303 is revised to read as follows:

Sec. 24.303 Competitive Bidding Mechanisms.

(a) Sequencing. The Commission will establish and may vary the sequence in which narrowband PCS licenses will be auctioned.

(b) Grouping. In the event the Commission uses either a simultaneous multiple round competitive bidding design or combinatorial bidding, the Commission will determine which licenses will be auctioned simultaneously or in combination.

(c) Reservation Price. The Commission may establish a reservation price, either disclosed or undisclosed, below which a license subject to auction will not be awarded.

(d) Minimum Bid Increments. The Commission may, by announcement before or during an auction, require minimum bid increments in dollar or percentage terms. The Commission may also establish by Public Notice a suggested opening bid or a minimum opening bid on each license.

(e) Stopping Rules. The Commission may establish stopping rules before or during multiple round auctions in order to terminate an auction within a reasonable time.

(f) Activity Rules. The Commission may establish activity rules which require a minimum amount of bidding activity. In the event that the Commission establishes an activity rule in

connection with a simultaneous multiple round auction, each bidder will be entitled to request and will be automatically granted one activity rule waiver during each stage of an auction, or one automatic waiver during a specified number of bidding rounds. The Commission may change by Public Notice the number and frequency of such automatic activity rule waivers for a specific auction.

(g) Bidder Identification During Auctions. The Commission may choose, on an auction-by-auction basis, to release the identity of the bidders associated with bidder identification numbers. The Commission will announce by Public Notice before each auction whether bidder identities will be revealed.

5. Section 24.308 is revised to read as follows:

Sec. 24.308 License Grant, Denial, Default, and Disqualification.

(a) Unless eligible for installment payments and/or a bidding credit, each winning bidder is required to pay the balance of its winning bid in a lump sum payment within five (5) business days following the award of the license. Grant of the license will be conditioned upon full and timely payment of the winning bid amount.

(b) A bidder who withdraws its bid, defaults on a payment or is disqualified will be subject to the penalties specified in Section 1.2109 of this Chapter.

6. Section 24.309 is revised to read as follows:

Sec. 24.309 Designated Entities.

(a) Designated entities entitled to preferences in the narrowband PCS service are small businesses and businesses owned by members of minority groups and/or women as defined in §§ 24.320(b) and 24.320(c) of this Subpart.

(b) Designated entities will be eligible for certain special narrowband PCS provisions as follows:

(1) **Installment payments.** Small businesses, including small businesses owned by members of minority groups and women, will be eligible to pay the full amount of their winning bid on any regional, MTA or BTA license in installments over the term of the license pursuant to the terms set forth in Section 1.2110(d) of this Chapter.

(2) **Bidding Credits.** Businesses owned by members of minority groups and women, including small businesses owned by members of minority groups and women, will be eligible for a twenty-five (25) percent bidding credit when bidding on the following licenses: (1) the nationwide licenses on Channel 5, Channel 8 and Channel 11; (2) all MTA licenses on Channel 19, Channel 22, Channel 24; and (3) all BTA licenses on Channel 26. This bidding

credit will reduce by 25 percent the bid price that businesses owned by members of minority groups and women will be required to pay to obtain a license. Businesses owned by women and/or minorities, including small businesses owned by women and/or minorities will be eligible for a forty (40) percent bidding credit when bidding on all regional licenses on Channel 13 and Channel 17. In section 24.129 above, the licenses that will be eligible for 25 percent bidding credits are indicated by an (*); the licenses that will be eligible for 40 percent bidding credits are indicated by an (**).

(3) Tax Certificates. Any non-controlling initial investor in a business owned by members of minority groups and/or women and who provides "start-up" financing, which allows such business to acquire a narrowband PCS license(s), and any non-controlling investor who purchases an interest in a narrowband PCS license held by a business owned by members of minority groups and/or women within the first year after license issuance, may, upon the sale of such investment or interest, request from the Commission a tax certificate. Any narrowband PCS licensee who assigns or transfers control of its license to a business owned by members of minority groups and/or women may request that the Commission issue the licensee a tax certificate.

(c) Short-Form Application Certification; Long-Form Application Disclosure.

(1) All applicants for licenses under the designated entity provisions set forth in this section shall certify on their short-form applications (Form 175) that they are eligible for those preferences pursuant to this section.

(2) In addition to the requirements in subpart I, all designated entity applicants that are winning bidders shall, in an exhibit to their long-form applications --

(i) identify each member of the applicant's control group, regardless of the size of the member's total interest in the applicant, and each member's minority group or gender classification, if applicable;

(ii) disclose the gross revenues of the applicant and its affiliates, and other persons that hold interests in the applicant and their affiliates (including all members of the applicant's control group); and

(iii) certify that the personal net worth of the applicant (if an individual), each affiliate and each person that hold an interest in the applicant is less than \$40 million.

(d) Audits. Applicants and licensees claiming eligibility under this section shall be subject to random audits by the Commission.

(e) Definitions. The terms *affiliate*, *business owned by members of minority groups and women*, *consortium of small businesses*, *control group*, *gross revenues*, *members of minority groups*, *passive equity*, *personal net worth*, and *small business* used in this section are defined in § 24.320.

(f) **Unjust Enrichment.** Designated entities using installment payments, bidding credits or tax certificates to obtain a narrowband PCS license will be subject to the following unjust enrichment provisions:

(1) If a small business paying for a narrowband PCS license in installment payments seeks to transfer a license to a non-small business entity during the term of the license, the remaining principal balance must be repaid as a condition of the license transfer.

(2) If a licensee that utilizes installment financing under this section seeks to make any change in ownership structure that would result in the licensee losing eligibility for installment payments, the licensee shall first seek Commission approval and must make full payment of the remaining unpaid principal and any unpaid interest accrued through the date of the change as a condition of approval. Increases in gross revenues that result from equity investments that are not attributable to the licensee under § 24.320(b)(2)(iv), revenues from operations, business development or expanded service shall not be considered changes in ownership structure under this paragraph.

7. Section 24.320 is added to read as follows:

§ 24.320 Definitions.

(a) **Scope.** The definitions in this section apply to §§ 24.309-24.315 of this subpart, unless otherwise specified in those sections.

(b) **Small Business; Consortium of Small Businesses.**

(1) A *small business* is an entity that (i) together with its affiliates has average annual gross revenues that are not more than \$40 million for the preceding three calendar years; (ii) has no attributable investor or affiliate that has a personal net worth of \$40 million or more; (iii) has a control group all of whose members and affiliates are considered in determining whether the entity meets the \$40 million annual gross revenues and personal net worth standards; and (iv) such control group holds 50.1 percent of the entity's voting interest, if a corporation, and at least 25 percent of the entity's equity on a fully diluted basis, except that a business owned by members of minority groups and/or women (as defined in subsection (c)) may also qualify as a small business if a control group that is 100 percent composed of members of minority groups and/or women holds 50.1 percent of the entity's voting interests, if a corporation, and 50.1 percent of the entity's total equity on a fully diluted basis and no single other investor holds more than 49.9 percent of passive equity in the entity.

(2) **Attribution and Aggregation of Gross Revenues and Personal Net Worth.**

(i) Except as specified in paragraphs (iii) and (iv), the gross revenues of the applicant (or licensee) and its affiliates, and other persons that hold interests in the applicant (or

licensee) and their affiliates shall be considered on a cumulative basis and aggregated for purposes of determining whether the applicant (or licensee) is a small business.

(ii) The personal net worth of individual applicants (or licensees) and other persons that hold interests in the applicant (or licensee), and their affiliates, if less than \$40 million, shall not be considered for purposes of determining whether the applicant (or licensee) is eligible to bid as a small business.

(iii) Where an applicant (or licensee) is a consortium of small businesses, the gross revenues of each small business shall not be aggregated.

(iv)(a) The gross revenues and personal net worth of a person that holds an interest in the applicant (or licensee) shall not be considered so long as (1) such person holds no more than 25 percent of the applicant's (or licensee's) passive equity and is not a member of the applicant's or control group; and (2) the applicant has a control group that owns at least 25 percent of the applicant's total equity and, if a corporation, holds at least 50.1 percent of the applicant's voting interests.

(b) The gross revenues, total assets and personal net worth of a person that holds an interest in the applicant shall not be considered so long as (1) such person holds no more than 49.9 percent of the applicant's (or licensee's) passive equity and is not a member of the applicant's control group; and (2) the applicant has a control group that consists entirely of members of minority groups and/or women and that owns at least 50.1 percent of the applicant's total equity and, if a corporation, at least 50.1 percent of the applicant's voting interests.

Note: Ownership interests shall be calculated on a fully diluted basis; all agreements such as warrants, stock options and convertible debentures will generally be treated as if the rights thereunder already have been fully exercised, except that the such agreements may not be used to appear to terminate or divest ownership interests before they actually do so.

(3) A *small business consortium* is a conglomerate organization formed as a joint venture between mutually-independent business firms, each of which individually satisfies the definition of a small business.

(c) Business Owned by Members of Minority Groups and/or Women. A *business owned by members of minority groups and/or women* is an entity (i) that has a control group composed 100 percent of members of minority groups and/or women who are United States Citizens, and (ii) such control group owns and holds 50.1 percent of the voting interests, if a corporation, and (A) owns and holds 50.1 percent of the total equity in the entity, provided that all other investors hold passive interests; or (B) holds 25 percent of the total equity in the entity, provided that no single other investor holds more than 25 percent passive equity interests in the entity. In a partnership, all general partners must be members of minority

groups and/or women. Ownership interests shall be calculated on a fully diluted basis; all agreements such as warrants, stock options and convertible debentures will generally be treated as if the rights thereunder already have been fully exercised, except that the such agreements may not be used to appear to terminate or divest ownership interests before they actually do so.

(d) Gross Revenues. *Gross revenues* shall mean all income received by an entity, whether earned or passive, before any deductions are made for costs of doing business (e.g., cost of goods sold), as evidenced by audited quarterly financial statements for the relevant period.

(e) Personal Net Worth. *Personal net worth* shall mean the market value of all assets (real and personal, tangible and intangible) owned by an individual, less all liabilities (including personal guarantees) owed by the individual in his individual capacity or as a joint obligor.

(f) Members of Minority Groups. *Members of minority groups* includes individuals of African American, Hispanic-surnamed, American Eskimo, Aleut, American Indian and Asian American extraction.

(g) Passive Equity. *Passive equity* shall mean (i) for corporations, non-voting stock or stock that includes no more than fifteen percent of the voting equity; (ii) for partnerships, joint ventures and other non-corporate entities, limited partnership interests and similar interests that do not afford the power to exercise control of the entity.

(h) Control Group. A *control group* is an entity, or a group of individuals or entities, that possesses de jure control and de facto control of an applicant or licensee, and as to which the applicant's or licensee's charters, articles of incorporation, bylaws, agreements and any other relevant documents (and amendments thereto) provide (i) that the entity and/or its members own unconditionally at least 50.1 percent of the total voting interests of a corporation; (ii) that the entity and/or its members receive at least 50.1 percent of the annual distribution of any dividends paid on the voting stock of a corporation; (iii) that, in the event of dissolution or liquidation of a corporation, the entity and/or its members are entitled to receive 100 percent of the value of each share of stock in its possession and a percentage of the retained earnings of the concern that is equivalent to the amount of equity held in the corporation; and (iv) that the entity and/or its members have the right to receive dividends, profits and regular and liquidating distributions from the business in proportion to its interest in the total equity of the applicant or licensee.

Note: Voting control does not always assure de facto control, such as, for example, when the voting stock of the control group is widely dispersed (see, e.g., § 24.720 (e) (2) (iii)).

(i) Affiliate. (1) Determinations regarding whether an individual or entity will be considered an *affiliate* of (a) an applicant or (b) a person holding an attributable interest in an applicant

under paragraph (b) (2) will be made pursuant to the general affiliation rules set forth in section 24.720 (l) of this part.

8. Section 24.406 is revised to read as follows:

Sec. 24.406 Filing of Narrowband PCS applications, fees, and numbers of copies.

(a) As prescribed by Sections 24.305, 24.307, and 24.409 of this part, standard formal application forms applicable to the narrowband PCS may be obtained from either:

(1) Federal Communications Commission, Washington, DC 20554; or

(2) by calling the Commission's Forms Distribution Center, (202) 418-3676.

(b) Applications for the initial provision of narrowband PCS service must be filed on FCC Form 175 in accordance with the rules in Section 24.305 and Part 1, Subpart Q. In the event of mutual exclusivity between applicants filing FCC Form 175, only auction winners will be eligible to file subsequent long form applications on FCC Form 401 for initial narrowband PCS licenses. Mutually exclusive applications filed on Form 175 are subject to competitive bidding under those rules. Narrowband PCS applicants filing Form 401 need not complete Schedule B.

(c) All applications for Narrowband PCS radio station authorizations (other than applications for initial provision of narrowband PCS service filed on FCC Form 175) shall be submitted for filing to: Federal Communications Commission, Washington, DC 20554, Attention: Narrowband PCS Processing Section. Applications requiring fees as set forth at Part 1, Subpart G of this chapter must be filed in accordance with Sec. 0.401(b).

(d) All correspondence or amendments concerning a submitted application shall clearly identify the name of the applicant, applicant identification number or Commission file number (if known) or station call sign of the application involved, and may be sent directly to the Common Carrier Bureau, Narrowband PCS Processing Section.

(e) Except as otherwise specified, all applications, amendments, correspondence, pleadings and forms (including FCC Form 175) shall be submitted on one original paper copy and with three microfiche copies, including exhibits and attachments thereto, and shall be signed as prescribed by Sec. 1.743. Unless otherwise provided by the FCC, filings of five pages or less are exempt from the requirement to submit on microfiche, as well as emergency filings like letters requesting special temporary authority. Those filing any amendments, correspondence, pleadings, and forms must simultaneously submit the original hard copy which must be stamped "original". In addition to the original hard copy, those filing pleadings, including pleadings under Section 1.2108 of the rules shall also submit 2 paper copies as provided in Sec. 1.51 of the rules.

(1) Microfiche copies. Each microfiche copy must be a copy of the signed original. Each microfiche copy shall be a 148mm X 105mm negative (clear transparent characters appearing on an opaque background) at 24X to 27X reduction for microfiche or microfiche jackets. One of the microfiche sets must be a silver halide camera master or a copy made on silver halide film such as Kodak Direct Duplicatory Film. The microfiche must be placed in paper microfiche envelopes and submitted in a B6 (125 mm x 176 mm) or 5 x 7.5 inch envelope. All applicants must leave Row "A" (the first row for page images) of the first fiche blank for in-house identification purposes.

(2) All applications and all amendments must have the following information printed on the mailing envelope, the microfiche envelope, and on the title area at the top of the microfiche:

- (i) The name of the applicant;
- (ii) The type of application (e.g. nationwide, regional, MTA, BTA, response channel);
- (iii) The month and year of the document;
- (iv) Name of the document;
- (v) File number, applicant identification number, and call sign, if assigned; and
- (vi) The identification number and date of the Public Notice announcing the auction in response to which the application was filed (if applicable).

Each microfiche copy of pleadings shall include:

- (A) The month and year of the document;
- (B) Name of the document;
- (C) Name of the filing party;
- (D) File number, applicant identification number, and call sign, if assigned;
- (E) The identification number and date of the Public Notice announcing the auction in response to which the application was filed (if applicable). Abbreviations may be used if they are easily understood.

9. Section 24.422 is revised to read as follows:

Sec. 24.422 Amendment of application for Narrowband Personal Communications Service filed on FCC Form 175.

(a) The Commission will provide bidders a limited opportunity to cure defects in FCC Form 175 specified herein except for failure to sign the application and to make certifications. These are defects which may not be cured. See also Section 1.2105.

(b) In the Narrowband PCS, applicants will be permitted to amend their Form 175 applications to make minor amendments to correct minor errors or defects such as typographical errors. Applicants will also be permitted to amend FCC Form 175, to make ownership changes or changes in the identification of parties to bidding consortia, provided such changes do not result in a change in control of the applicant and do not involve another applicant (or parties in interest to an applicant) who has applied for any of the same licenses as the applicant. Amendments which change control of the applicant will be considered major amendments. An FCC Form 175 which is amended by a major amendment will be considered to be newly filed and cannot be resubmitted after applicable filing deadlines. See also Section 1.2105.

10. Section 24.429 is amended by deleting paragraph (b) and redesignating paragraphs (c) and (d) as (b) and (c), respectively, to read as follows:

Sec. 24.429 Ownership changes and agreements to amend or to dismiss applications or pleadings.

(a) Applicability. Subject to the provisions of Sec. 1.2105 (Bidding Application and Certification Procedures; Prohibition of Collusion), this section applies to applicants and all other parties interested in pending applications who wish to resolve contested matters among themselves with a formal or an informal agreement or understanding. This section applies only when the agreement or understanding will result in:

(1) A major change in the ownership of an applicant to which Sec. 24.423 (c) and 24.423 (g) would apply or which would cause the applicant to lose its status as a designated entity under Section 24.309, or

(2) The individual or mutual withdrawal, amendment or dismissal of any pending application, amendment, petitioner or other pleading.

(b) If the amendment would cause the applicant to lose its status as a designated entity under Section 24.309, the applicant must notify the Commission of this change in status and must comply with the obligations imposed by Sections 24.308, including increasing its down payment to the level required as a non-designated entity.

(c) The provisions of Section 22.927 will apply in the event of the individual or mutual withdrawal, amendment or dismissal of any pending application, amendment, petitioner or other pleading.

11. Section 24.430 is revised to read as follows:

Sec. 24.430 Opposition to applications.

(a) Petitions to deny (including petitions for other forms of relief) and responsive pleadings for Commission consideration must comply with Section 1.2108 and must:

(1) Identify the application or applications (including applicant's name, station location, Commission file numbers and radio service involved) with which it is concerned;

(2) Be filed in accordance with the pleading limitations, filing periods, and other applicable provisions of Secs. 1.41 through 1.52 except where otherwise provided in Section 1.2108;

(3) Contain specific allegations of fact which, except for facts of which official notice may be taken, shall be supported by affidavit of a person or persons with personal knowledge thereof, and which shall be sufficient to demonstrate that the petitioner (or respondent) is a party in interest and that a grant of, or other Commission action regarding, the application would be prima facie inconsistent with the public interest;

(4) Be filed within thirty (30) days after the date of public notice announcing the acceptance for filing of any such application or major amendment thereto (unless the Commission otherwise extends the filing deadline); and

(5) Contain a certificate of service showing that it has been mailed to the applicant no later than the date of filing thereof with the Commission.

(b) A petition to deny a major amendment to a previously filed application may only raise matters directly related to the amendment which could not have been raised in connection with the underlying, previously filed application. This does not apply to petitioners who gain standing because of the major amendment.

(c) parties who file frivolous petitions to deny may be subject to sanctions including monetary forfeitures, license revocation, if they are FCC licensees, and may be prohibited from participating in future auctions.