FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 20 and 24

[PP Docket No. 93–253, GN Docket No. 90–314, GN Docket No. 93–252, FCC 95–301]

Race and Gender Based Provisions for Auctioning C Block Broadband Personal Communications Services Licenses

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission adopts this *Sixth Report and Order* amending its competitive bidding rules to eliminate race- and gender-based provisions for the auctioning of C block broadband Personal Communications Services licenses. The Commission adopts the rule changes to prevent potential legal delays in conducting the C block auction, while minimizing disruptions to existing business relationships that were formed under the current rules.

EFFECTIVE DATE: July 21, 1995.

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SUPPLEMENTARY INFORMATION: This is the Commission's *Sixth Report and Order* in PP Docket No. 93–253, GN Docket No. 90–314, GN Docket No. 93–252, adopted July 18, 1995 and released July 18, 1995. The full text of Commission decisions are available for inspection and copying during normal business hours in the FCC Docket Branch (Room 230), 1919 M. Street, N.W., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Service, Inc., (202) 857–3800, 2100 M Street, NW., Washington, DC 20037.

Summary of Sixth Report and Order

Introduction

1. In this *Sixth Report and Order,* we modify our competitive bidding rules for the ''C block'' of Personal Communications Services in the 2 GHz band (broadband PCS) to eliminate race- and gender-based provisions that we believe raise legal uncertainties in the aftermath of the Supreme Court's decision in *Adarand Constructors, Inc. v. Peña,* 115 S.Ct. 2097 (1995). We take this action to accomplish three goals: (1) promotion of rapid delivery of additional competition to the wireless marketplace by C block licensees; (2) reduction of the risk of legal challenge; and (3) minimal disruption to the plans of as many applicants as possible who were in advanced stages of planning to participate in the C block auction when *Adarand* was announced. While taking action to ensure that the auction commences quickly, we also want the maximum number of existing business relationships formed under our prior rules and in anticipation of the C block auction—including those of women and minority applicants—to remain viable. We emphasize that our action today does not indicate that race- and gender-based provisions at issue here could not be sustained without further development of the record. Nor do we believe that such measures generally are inappropriate for future auctions of spectrum-based services. We are considering the means we should take to develop a supplemental record that will support use of such provisions in other spectrum auctions held post-*Adarand.*

Background

2. *Legislation and Commission Action.* In the Omnibus Budget Reconciliation Act of 1993, Congress authorized the competitive bidding of spectrum-based services and mandated that small businesses, rural telephone companies, and businesses owned by members of minority groups and women (collectively known as ''designated entities'') be ensured the opportunity to participate in the provision of such services. In the *Fifth Report and Order,* in PP Docket No. 93–253, we adopted competitive bidding rules designed to encourage designated entity participation in broadband PCS (59 Fed. Reg. 5532). Specifically, we established ''entrepreneurs' blocks'' (the C and F frequency blocks allocated for broadband PCS) for which eligibility is limited to individuals and entities under a certain financial size. We also adopted special provisions for businesses owned by members of minority groups or women and we analyzed their constitutionality utilizing the ''intermediate scrutiny'' standard of review articulated in *Metro Broadcasting, Inc. v. FCC,* 497 U.S. 547, 564–565 (1990). We made subsequent changes to the entrepreneurs' block rules and special provisions for designated entities in the *Fifth MO&O* (59 Fed. Reg. 53,364).

3. *Litigation and Auction Schedule.* On March 15, 1995, in response to a request filed by Telephone Electronic Corp. (TEC) alleging that our broadband PCS competitive bidding rules violated equal protection principles under the Constitution, the U.S. Court of Appeals for the District of Columbia Circuit issued an *Order* stating that ''those portions'' of the Commission's *Order* ''establishing minority and gender preferences, the C block auction employing those preferences, and the application process for that auction shall be stayed pending completion of judicial review.'' As a result, the C block auction, then scheduled to commence 75 days after the March 13, 1995 close of the A and B block auction, was postponed. The court's stay was subsequently lifted on May 1, 1995, pursuant to TEC's motion, after TEC decided to withdraw its appeal. The Commission established August 2, 1995 as the new auction date.

4. On June 12, 1995, three days before initial short form applications (FCC Form 175) for the August 2nd C block auction were due, the Supreme Court decided *Adarand.* The Supreme Court decided to overrule *Metro Broadcasting* ''to the extent that *Metro Broadcasting* is inconsistent with'' *Adarand*'s holding that ''all racial classifications . . . must be analyzed by a reviewing court under strict scrutiny.'' As a result of the *Adarand* decision, the constitutionality of any federal program that makes distinctions on the basis of race must serve a compelling governmental interest and must be narrowly tailored to serve that interest. By Public Notice released June 13, 1995, the Commission postponed the C block auction again in order to give interested bidders and the Commission time to evaluate the impact of *Adarand.* We later established an August 29, 1995 date for the auction.

5. *Further Notice of Proposed Rule Making.* On June 23, 1995, we adopted a *Further Notice of Proposed Rule Making,* in which we identified four race- and gender-based measures in our C block auction rules and two similar provisions in our commercial mobile radio service (CMRS) and broadband PCS rules that were affected by the Court's ruling in *Adarand* (60 Fed. Reg. 34200–34201). In the *Further Notice,* we proposed to eliminate these race- and gender-based provisions and instead modify such measures to be race- and gender-neutral (60 Fed. Reg. 34202–34203). We, at the same time, stated that we remain committed to the mandates and objectives of the Budget Act.

6. In the *Further Notice,* we set forth our specific proposals and our rationale for these C block auction rule changes. While we stressed our commitment to the goal of ensuring broad participation in PCS by designated entities, particularly minority- and women-owned businesses, we indicated that *Adarand* required us to reevaluate our

method for accomplishing this Congressional objective (60 Fed. Reg. 34202). Although we stated in the *Further Notice* that our current record concerning adoption of the race- and gender-based measures contained in our C block auction rules is strong, we tentatively concluded that additional evidence may be necessary to meet the strict scrutiny standard of review required by *Adarand*. We cautioned that development of such a supplemental record would further delay the C block auction, putting the C block winners at a greater competitive disadvantage in the CMRS market vis-a-vis existing wireless carriers such as the A and B block winners, cellular and Specialized Mobile Radio (SMR) carriers (60 Fed. Reg. 34202).

7. Additionally, we indicated that without changes to our race- and gender-based rules, there was a substantial likelihood that the C block auction would be the subject to legal challenge based on the holding in *Adarand*. We stated that a stay would delay both the auctioning and licensing of the C block, and that such a result might harm competition overall in the CMRS marketplace. Also, we recognized that even if the C block auction were not stayed beforehand, there is a high likelihood that minority applicants and possibly female applicants (who utilize bidding credits and other provisions available solely to members of those groups) would be subject to license challenges (*i.e.*, in the form of petitions to deny and judicial appeals). Such challenges could potentially delay their entry into the market and postpone competition.

8. In addition, we recognized that many of the C block applicants have already attracted capital and formed business relationships in anticipation of the C block auction. We observed that these relationships are more likely to survive if the auction is not significantly delayed, and our rule changes are minimally disruptive to existing business plans. We suggested that by eliminating race- and gender-based provisions from our C block auction rules, we would not only reduce the legal uncertainty associated with C block licensing, but we would also further competition and ownership diversity by adopting provisions based on economic size only. By virtue of such rule changes, potential C block bidders, including minority and women bidders, would have a better chance of becoming successful PCS providers. We also indicated that elimination of the race- and gender-based measures from the C block auction rules would be consistent with our duty to implement the Budget Act, since we believe that many designated entities would qualify as small businesses under our rules. Furthermore, as small businesses, such entities would be entitled to a small business bidding credit and favorable installment payment terms.

9. Accordingly, we sought comment on amending six rule provisions as follows:

- Amend Section 24.709 of the Commission's Rules to make the 50.1/49.9 percent ''control group'' equity structure available to all entrepreneurs' block applicants.
- Amend Section 24.720 of the Commission's Rules to eliminate the exception to the affiliation rules that excludes the gross revenues and total assets of affiliates controlled by investors who are members of a minority-owned applicant's control group.
- Amend Section 24.711 of the Commission's Rules to provide for three installment payment plans for entrepreneurs' block applicants that are based solely on financial size.
- Amend Section 24.712 of the Commission's Rules to provide for a 25 percent bidding credit for small businesses.
- Amend Section 24.204 of the Commission's Rules to make the 40 percent cellular attribution threshold applicable to ownership interests held by small businesses and rural telephone companies, and to non-controlling ownership interests held by investors in broadband PCS applicants/licensees that are small businesses.
- Amend Section 20.6 of the Commission's Rules to make the 40 percent attribution threshold for the CMRS ''Spectrum Cap'' applicable to ownership interests held by small businesses and rural telephone companies.

We received 41 timely-filed comments in response to the *Further Notice*. In addition, after announcement of the *Adarand* decision and prior to release of the *Further Notice*, we received 42 informal comments addressing various issues regarding our C block competitive bidding rules, the impact of *Adarand*, and the need for the C block auctions to proceed expeditiously.

Discussion

A. Rationale for Rule Changes

10. The overwhelming majority of commenters support the proposed rule changes set forth in the *Further Notice*. A few commenters, however, generally oppose our proposals on the basis that *Adarand* does not require us to change the race- and gender-based provisions contained in our C block competitive bidding rules. Specifically, BET contends that *Adarand* does not wholly invalidate such provisions but merely requires that their constitutionality be determined utilizing a strict scrutiny standard of review. BET and NABOB argue that the race- and gender-based provisions can and should be retained because they would survive a strict scrutiny standard of review and comply with the congressional mandate of the Budget Act. Similarly, Giles contends that the proposed rule changes contravene the spirit and mandate of the Budget Act. BET also proposes alternative rule changes that it contends will satisfy the Congressional goals outlines in the Budget Act, flow from the Commission's record, and comport with the standards pronounced in *Adarand*.

11. Upon careful review we remain concerned that our present record would not adequately support the race- and gender-based provisions in our C block competitive bidding rules under a strict scrutiny standard of review. Significantly, the D.C. Circuit previously stayed the C block auction in response to a constitutional equal protection challenge against these provisions when a less strict standard of review was applicable. As a result, we strongly believe that there is a substantial likelihood of further legal challenge to the C block auction in the wake of *Adarand* if such provisions remain unchanged. None of the commenters have challenged this belief. Furthermore, as we indicated in the *Further Notice*, we would need additional evidence to sufficiently develop our record to support these race- and gender-based provisions consistent with the dictates of *Adarand* (60 Fed. Reg. 34,200). Any efforts to obtain this additional evidence would require additional time and, therefore, further delay the commencement of the C block auction. The legal uncertainty associated with the race- and gender-based provisions, combined with the views of potential C block bidders that the auction not be subject to any further delay, prompt us to modify our rules in a fashion which would be minimally disruptive to as many of the interested parties, potential bidders as well as members of the financial and investment communities as possible. We also disagree with the assertion by BET and Giles that today's rule changes are inconsistent with the Budget Act. As we concluded in the *Further Notice*, today's rule changes would allow small businesses to benefit from the most

favorable bidding credits and installment payment plans contained in our rules (60 Fed. Reg. 34200). As a result, because we have evidence which supports a conclusion that many designated entities, including minority and women-owned businesses, would qualify as small businesses and, thus, benefit from such provisions, we believe that our action is fully consistent with the Budget Act. We further conclude that the proposals we adopt today are necessary under the circumstances and indeed will best serve the public interest.

12. With respect to alternative rule change proposals presented by the commenters, we conclude, as discussed more fully below, that because they draw distinctions based upon race, most of these proposals would engender the same danger of constitutional infirmity and would result in the same legal uncertainties that we week to mitigate by these decisions. To the extent that the commenters have presented race- and gender-neutral rule changes, we conclude, as discussed herein, that the proposals set forth in the *Further Notice*, which are broadly supported by numerous commenters, constitute the more prudent and expedient course of action for proceeding with the auctioning of the C block licenses post-*Adarand*.

B. Control Group Equity Structures

13. *Background.* Our current rules permit broadband PCS applicants for licenses in the C block to utilize one of two equity ''control group'' structures, so that the gross revenues and total assets of persons or entities holding interests in such applicants will not be considered. These two equity structures are the *Control Group Minimum 25 Percent Equity Option* (which is available to all applicants) and the *Control Group Minimum 50.1 Percent Equity Option* (which is currently available only to minority or women applicants). In the *Further Notice*, we proposed to modify our rules to permit all C block applicants, including small businesses and entrepreneurs, to avail themselves of the *Control Group Minimum 50.1 Percent Equity Option*. When we adopted the *Control Group Minimum 50.1 Percent Equity Option* in the *Fifth R&O*, we determined that making such a mechanism available to minority- or women-owned businesses would better enable them to attract adequate financing (59 Fed. Reg. 5532). We have previously noted that the primary impediment to participation by businesses owned by women and minorities in broadband PCS is a lack of access to capital. We tentatively concluded that such a rule change would cause the least disruption and open up additional financing options for other applicants in the C block auction. The *Further Notice* sought comment on this proposed rule change and tentative conclusion (60 Fed. Reg. 34,200).

14. *Comments.* Most commenters agree that the *Control Group Minimum 50.1 Percent Equity Option* should be made available to all C block applicants. Several commenters express concerns about further delay of the auctioning and licensing of the C block and agree that this minimal rule change would not unduly disrupt existing business relationships. Other commenters support the proposed rule change on the basis that it would substantially reduce, if not eliminate, the possibility of legal challenges to the C block auction based on the *Adarand* decision. DCR Communications and Small Business PCS argue that elimination of minority- and gender-based provisions would provide meaningful opportunity for small businesses, as well as minority- and women-owned businesses, to participate in the C block auction.

15. Other commenters, however, oppose extending availability of the *Control Group Minimum 50.1 Percent Equity Option* to all entrepreneurs. K&M proposes that this equity structure only be available to ''very small businesses,'' defined as businesses with revenues up to $20 million. Omnipoint argues that because the *Control Group Minimum 50.1 Percent Equity Option* was created to address the problems experienced by women- and minority-owned companies in accessing capital, the Commission should either justify the measure under the strict scrutiny standard of review or eliminate is completely. Omnipoint expresses concern that extension of the *Control Group Minimum 50.1 Percent Equity Option* equity structure to all C block applicants would increase the number of ''shams'' financed by big companies. Similarly, Silverman and Century oppose allowing large companies, whether minority- or women-owned, as a general matter, to own more than 25 percent of a C block applicant's equity.

16. *Decision.* We have decided to amend our rules to permit all C block applicants to avail themselves of the *Control Group Minimum 50.1 Percent Equity Option.* This amendment enables minority- or women-owned applicants structured under our prior rule to retain the *Control Group Minimum 50.1 Percent Equity Option,* while extending this option to other applicants in the entrepreneurs' block as well. We recognize that we originally established the *Control Group Minimum 50.1 Percent Equity Option* as a race- and gender-based measure aimed at addressing the unique financing problems experienced by women- and minority-owned businesses. All C block applicants, as well as the public, will be better served if we proceed expeditiously in a manner which both reduces the likelihood of legal challenges and enhances the opportunities for a wide variety of applicants, including designated entities, to obtain licenses and rapidly deploy broadband PCS service. Thus, we conclude that use of this equity structure should now be dependent upon economic size, a factor not implicated by the Court's decision in *Adarand.* Moreover, retaining the *Control Group Minimum 50.1 Percent Equity Option* should help to preserve existing business relationships formed in reliance on our prior rules and encourage participation in the C block auction.

17. We disagree with Omnipoint's position on the *Control Group Minimum 50.1 Percent Equity Option* rule change. In the *Fifth R&O* and the *Fifth MO&O*, we indicated that the equity structure options provided under our rules are designed to provide qualified bidders with a reasonable amount of flexibility in attracting needed financing from other entities, while ensuring that such entities do not acquire controlling interests in the qualified bidders (59 Fed. Reg. 5532, 59 Fed. Reg. 53,364). With respect to the *Control Group Minimum 50.1 Percent Equity Option,* we previously explained that in order to guard against abuses, the control group of applicants choosing this option must 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. We have previously concluded that this requirement reduces substantially the danger that a well-capitalized investor with substantial ownership stake will be able to assume *de facto* control of the applicant. In addition, we previously clarified our rules so that persons or entities that are affiliates of one another, or that have an ''identity of interests,'' as well as their other investors pursuant to Sections 24.709(c) and 24.813 will be treated as though they are one person or entity and their ownership interests aggregated for purposes of determining compliance with our nonattributable equity limits. This clarification was aimed at discouraging large investors from circumventing our equity limitations for nonattributable investors. We believe that these measures will be effective in deterring the type of ''sham'' deals

described by Omnipoint. Moreover, we will have the opportunity to review these structures through the application process when bidders who elect to utilize such equity structures are required to identify the members of their control groups. Consequently, we believe that our rules adequately protect against ''sham'' deals.

18. Accordingly, under Section 24.709 of the rules, all applicants in the C block auction selecting a ''control group'' structure in order to exclude the total assets and gross revenues of certain investors will have two options for raising capital through the distribution of equity among ''qualifying investors,'' other eligible investors in the control group (*e.g.*, management and institutional investors) and other non-attributable ''strategic'' investors. In light of the fact that we have eliminated the eligibility dichotomy in the two control group equity options, we specify and clarify here how both options apply to C block applicants.

19. First, we note that under both options the following control and voting requirements continue to apply: (1) the control group must own at least 50.1 percent of the applicant's voting stock, if a corporation, or all of the applicant's general partnership interests, if a partnership; (2) qualifying investors, as defined in the rules, must hold at least 50.1 percent of the voting stock and all general partnership interests within the control group, and must have *de facto* control of the control group and the applicant; and (3) the investor(s) holding ''nonattributable equity'' (up to 25 percent or 49.9 percent) are limited to 25 percent of a corporate applicant's voting equity (including the right to vote such interests through a voting trust or other arrangement) and may hold only limited partnership interests, if the applicant is a partnership.

20. *Control Group Minimum 25 Percent Equity Option.* This equity structure option requires the control group to hold at least 25 percent of the applicant's total equity. Of this 25 percent equity, at least 15 percent must be held by ''qualifying investors.'' A ''qualifying investor'' is generally defined as a member of, or a holder of an interest in a member of, the applicant's or licensee's control group whose gross revenues and total assets, when aggregated with those of all other attributable investors and affiliates, do not exceed the gross revenues and total assets restrictions specified in our rules with regard to eligibility for entrepreneurs' block licenses or status as a small business. With regard to the remaining 10 percent of the control group's equity, this may be held by four types of noncontrolling investors without these investors' assets and revenues being attributed to the applicant, as is the case with other control group members. These are (1) qualifying investors (small businesses or entrepreneurs); (2) individuals who are members of the applicant's management team; (3) existing investors in a preexisting entity that is a member of the control group; and (4) institutional investors. The minimum equity amounts within the control group vary slightly three years after the license is received and for applicants whose sole control group member is a preexisting entity. As for the remaining 75 percent of the applicant's equity (assuming the control group holds no more than the minimum 25 percent), the gross revenues and total assets (and other affiliations) of an investor holding a portion of this remaining equity are not considered so long as such investor (together with its affiliates) holds no more than 25 percent of the applicant's total equity.

21. *Control Group Minimum 50.1 Percent Equity Option.* This equity structure option requires the control group to hold at least 50.1 percent of the applicant's total equity. Of this 50.1 percent equity, at least 30 percent must be held by ''qualifying investors.'' The remaining 20.1 percent of the control group's equity may be held by the same four types of investors specified above. As with the *Control Group Minimum 25 Percent Equity Option*, the minimum equity amounts within the control group vary slightly three years after the license is received and for applicants whose sole control group member is a preexisting entity. As for the remaining non-control group equity, the gross revenues and total assets (and affiliates) of the investor(s) holding this remaining equity is not considered so long as such investor(s) (together with its affiliates) holds no more than 49.9 percent of the applicant's total equity. The reasoning behind these two options and their advantages to applicants for purposes of raising capital are set forth in our *Fifth R&O* and *Fifth MO&O* (59 Fed. Reg. 5532, 59 Fed. Reg. 53,364). We affirm here that this reasoning and the advantages for maintaining both options remain applicable. We note that, under our prior rules, businesses owned by minorities and women had the option to use either equity structure. It is our understanding that such businesses, depending on their particular circumstances, were forming applicants based on the option that best met their needs for outside investment and what the capital markets were seeking from them in the form of equity interests. We now provide both options to all C block applicants and we anticipate that each applicant will pursue (or switch to) the option that best suits its particular capital needs and equity ownership situation.

22. *Qualifying Investors.* The modification in the *Fifth MO&O* and here of the control group minimum equity requirements to allow certain other investors to own ''control group equity''—and not have their assets and revenues attributed to the applicant—may not be clear in light of the definition of ''qualifying investor'' in section 24.702(n) of the Commission's rules. Specifically, in the *Fifth MO&O*, we modified the rules to allow certain noncontrolling investors who do not qualify for the entrepreneurs' block or as a small business to be investors in an applicant's control group (59 Fed. Reg. 53,364). In making these limited changes to the control group equity requirements, we said that this added, but limited, flexibility will (1) promote investment in designated entities generally; (2) attract and promote skilled management for applicants; and (3) encourage involvement by existing firms that have valuable management skills and resources to contribute to the success of applicants.

23. We stated that the first category for inclusion in this 10 percent or 20.1 percent portion of the control group is ''investors in the control group that are women, minorities, small businesses or entrepreneurs.'' The text of the rules adopted in the *Fifth MO&O* and the *erratum* to the *Fifth MO&O* capsulized this category as ''qualifying investors,'' but the definition of ''qualifying investors'' in the rules failed to reflect the broader nature and purpose for allowing ''women, minorities, small businesses or entrepreneurs'' hold shares or options in the 10 percent or 20.1 percent portion of the control group even though they—like the other categories—''if attributed, would cause the applicant to exceed the small business or entrepreneurs' block financial caps * * *.'' (59 Fed. Reg. 53,364) Consistent with our intent in the *Fifth MO&O*, we clarify that, so long as the minimum equity requirements for ''qualifying investors'' (15 percent or 30 percent) under our new rules are met, the remaining control group equity (10 percent or 20.1 percent) may be held by investors that meet either the small business or entrepreneur eligibility requirements. We continue to believe that such entities, if they wish to provide financial support to C block applicants, should not be precluded from doing so because their financial

status would, if considered with other control group members, make the applicant ineligible for the C block or small business status. Accordingly, we clarify our definition of ''qualifying investor'' for purposes of Section 24.709(b) (5)(i)(C) and (6)(i)(C).

C. Affiliation Rules

24. *Background.* We adopted affiliation rules for purposes of identifying all individuals and entities whose gross revenues and assets must be aggregated with those of the applicant in determining whether the applicant exceeds the financial caps for the entrepreneurs' blocks or for small business size status. There are two exceptions to our broadband PCS affiliation rules. Under one exception, applicants affiliated with Indian tribes and Alaska Regional or Village Corporations organized pursuant to the Alaska Native Claims Settlement Act, 43 U.S.C. 1601 *et seq.*, are generally exempt from the affiliation rules for purposes of determining eligibility to participate in bidding on C block licenses. These applicants additionally qualify as a small business with a rebuttable presumption that revenues derived from gaming, pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. 2701 *et seq.* will be included in the applicant's eligibility determination. Under the second exception, the gross revenues and assets of affiliates controlled by minority investors who are members of the applicant's control group are not attributed to the applicant for purposes of determining compliance with the eligibility standards for entry into the entrepreneurs' block.

25. In the *Further Notice*, we proposed to eliminate the exception pertaining to minority investors (59 Fed. Reg. 34,204). In crafting this exception, we anticipated that it would permit minority investors that control other business entities to be members of an applicant's control group and to bring their management skills and financial resources to bear in its operation without the assets and revenues of those other concerns being counted as part of the applicant's total assets and revenues. We further anticipated that such an exception would permit minority applicants to pool their resources with other minority-owned businesses and draw on the expertise of those who have faced similar barriers to raising capital in the past. In the *Further Notice*, we tentatively concluded that it would be imprudent to respond to *Adarand* by extending this exception to all entrepreneurs because to do so would frustrate the Commission's goals in establishing the entrepreneurs' block—namely, to ensure that broadband PCS will be disseminated among a wide variety of applicants including small businesses and rural telephone companies (60 Fed. Reg. 34,200).

26. The *Further Notice* proposed to retain the affiliation exception for Indian tribes and Alaska Regional or Village Corporations (60 Fed. Reg. 34,204). We tentatively concluded that the ''Indian Commerce Clause'' of the United States Constitution provides an independent basis for this exception that is not implicated by the *Adarand* decision.

27. *Comments.* The commenters overwhelmingly support elimination of the exception to our affiliation rules that excludes the gross revenues and total assets of affiliates controlled by minority investors who are members of an applicant's control group. Some commenters agree that this rule change would reduce the likelihood of a further delay to the C block auction resulting from legal challenges premised on the *Adarand* decision. Other commenters argue that the Court's ruling in *Adarand* requires elimination of the affiliation rule exception applicable solely to investors who are members of minority groups. With respect to the effect of such rule change, Central Alabama & Mobile Tri-States argue that by virtue of the current rule, well-financed entities who might otherwise not qualify as an entrepreneur or as small businesses are allowed to participate in the C block which is ultimately to the detriment of those C block applicants who actually experience difficulties in accessing capital. DCR Communications contends that the proposed rule change would not deprive women and minority-owned businesses of investment from other minorities whose affiliates would exceed the financial size limitations imposed under our rules; rather, it would limit such investment to 25 percent before it becomes attributable.

28. BET, NABOB, and O.N.E. oppose elimination of the affiliation rule exception pertaining to investors who are members of minority groups. NABOB argues that such elimination will prevent many bidders from including experienced, successful minority entrepreneurs in their control groups, which, in turn, may cause them to lose financing dependent upon such alliances, and, thus, prevent them from participating in the C block auctions. Similarly, BET argues that this rule change would not only exclude several minority entrepreneurs, but, because the A and B blocks already have been licensed, such minorities would be precluded from any meaningful participation in broadband PCS. BET further argues that elimination of the affiliation rule exception would be inconsistent with the congressional mandate given in the Budget Act and the record established by the Commission regarding those problems experienced by minority-owned businesses that the exception was specifically designed to address. Also, BET contends that *Adarand* does not require such a rule change.

29. Some commenters generally propose alternative modifications to the affiliation rule exception for minority investors. NABOB proposes that the exception be modified so that an entity controlled by a member of the control group of a small business applicant or licensee would not be considered an affiliate of the applicant if the entity would qualify as an entrepreneur. Spectrum Resources proposes that investors who have affiliates with gross revenues and total assets sufficiently large to disqualify a small business applicant would still be allowed to invest in the application if their investment was capped at a relatively low level, such as $100,000. Spectrum Resources argues that this modification would increase the pool of investors for small businesses while ensuring that the applicant remains a small business.

30. BET suggests four alternative affiliation rule exceptions. Under BET's first alternative exception, it proposes that the exception be made available only when the revenues and assets of each of the affiliates of minorities in a control group separately qualify as entrepreneurs under our rules. If, however, any of the affiliates exceeded the financial limitations for the C block, then the minority-owned applicant would not be allowed to participate in the C block auction. BET argues that this proposal is analogous to the Commission's treatment of small business consortia in the C Block. Under BET's second proposal, the revenues and assets of affiliates of minority members of an applicant's control group would be excluded if the average revenues of the affiliates over the past two years are less than the C block financial limits. BET argues that without such modification, Native Americans are being singled out for special treatment in violation of the Equal Protection Clause. Under these proposals, BET suggests that aggregation of the gross revenues and total assets of these affiliates would not be required in determining whether the applicant qualifies as an entrepreneur or a small business. BET's other affiliation rule exception proposals consist of making the first two proposals described above

applicable to all members of a control group regardless of race. BET argues that these proposals would exclude large telecommunications companies, allow otherwise excluded minority applicants to participate in the C block auction, and provide for the limited growth of small companies.

31. With regard to the affiliation rule exception pertaining to Native Americans, CIRI, the Oneida Tribe, and Prairie Island agree that such exception should be retained. These commenters also agree that this exception is authorized by the Indian Commerce Clause of the Constitution. Furthermore, CIRI and Prairie Island contend that the affiliation rule exception is not a race-based measure implicated by *Adarand*. Prairie Island argues that the exception is an outgrowth of an accommodation by the federal government of several Indian tribes as sovereign political entities in a trust relationship with the United States. CIRI and Prairie Island also argue that this exception is part of federal Indian law and policy. CIRI also argues that elimination of the affiliation rule exception pertaining to Indian tribes would be: (1) inconsistent with the Small Business Administration's treatment of tribal entities; and (2) without record support since the record supports the exception's underlying purpose and the essential circumstances justifying such exception have not changed.

32. *Decision.* Although we proposed to eliminate the exception to our affiliation rules pertaining to minority-controlled affiliates, we now decide to modify it in a manner similar to BET's proposal. When we originally crafted this exception for minority-owned applicants, we anticipated that it would permit minority investors who control other concerns to be members of a minority-owned applicant's control group and to bring their management skills and financial resources to bear in its operation without the assets and revenues of those other concerns being counted as part of the applicant's total assets and revenues. We further anticipated that such an exception would permit minority-owned applicants to pool their resources with other minority-owned businesses and draw on the expertise of those who have faced similar barriers to raising capital in the past. However, as we recognized in allowing small business consortia to apply in the C block and in granting small businesses special measures, all small businesses, including those owned by minorities and women, should not be precluded from pooling their resources in this capital intensive service. We believe that to some extent, these firms face barriers to raising capital not faced by the larger firms. In addition, small businesses experienced in managing smaller businesses should not be penalized because they own or are otherwise affiliated with other businesses whose assets and revenues must be considered on a cumulative basis and aggregated for purposes of qualifying for the C block auction.

33. Our modification will benefit small business applicants only where the financial position of their affiliates or their qualifying control group member's affiliates, when considered individually and on a cumulative basis, would not present an unfair competitive advantage in the auction. Thus, to achieve the objectives outlined above—including minimizing the adverse impact on existing business relationships, mitigating the risk of legal challenges, and ensuring that the auctions are fair and do not present any bidder with an unfair competitive advantage—we modify this exclusion from affiliation coverage as follows:

- For purposes of the affiliation rules, a small business applicant can exclude from coverage of the affiliation rules any affiliate of the small business applicant if the following conditions are met:

(1) the affiliate would otherwise qualify as an entrepreneur pursuant to section 24.709(a)(1) ($125 million in gross revenues and $500 million in total assets); and

(2) the total assets and gross revenues of all such affiliates, when considered on a cumulative basis and aggregated with each other, do not exceed these amounts.

This exemption will apply for purposes of qualifying for both the C block auction and small business status.

34. We will also retain the affiliation exception for Indian tribes and Alaska Regional or Village Corporations. In the *Fifth MO&O*, we stated that our decision to exempt Indian tribes generally from our affiliation rules was premised on the fact that Congress has imposed unique legal constraints on the way they can utilize their revenues and assets (59 Fed. Reg. 53,364). We recognized that as a result of such constraints imposed by the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 *et seq.*, Native American corporations are precluded from utilizing two important means of raising capital: (1) the ability to pledge the stock of the company against ordinary borrowings, and (2) the ability to issue new stock or debt securities. We further recognized that Congress has mandated that the Small Business Administration determine the size of a business concern owned by a tribe without regard to the concern's affiliation with the Indian tribe and determined that the affiliation exception contained in our C block affiliation rules mirrored this congressional mandate. Although Indian tribes are minorities under our C block auction rules, we conclude that their affiliation rule exception is different from the exception applicable only to minority investors in that it is premised on their unique legal status as recognized in the ''Indian Commerce Clause'' of the United States Constitution.

D. Installment Payments

35. *Background.* Five different installment payment plans are available to C block applicants under Section 24.711 of the Commission's Rules. In the *Further Notice,* we sought comment on our proposal to allow all small businesses, regardless of racial or gender classification, the opportunity to use the most favorable installment payment plan to pay for their licenses (60 Fed. Reg. 34,200). This proposal provides for interest-only payments for six years and payments of principal and interest amortized over the remaining four years of the license term. We indicated that this approach would allow many prospective bidders to maintain their pre-*Adarand* business arrangements.

36. *Comments.* A majority of the comments support the elimination of installment payment plans that are tied to an applicant's status as a minority- or women-owned business, and to provide for three installment payment plans that are based solely on financial size. Several commenters note that our proposal will result in the least amount of delay to the auction and grant of C block licenses. GO Communications asserts that delays and threats of delay to the C block auction will irrevocably damage all entrepreneurs. Airlink expresses a similar opinion when it notes that there is a direct link between auction delays, market competitiveness and investor confidence. Airlink further maintains that auction delays inhibit the ability of applicants to keep and find sources of investment. Small Business PCS was even more adamant that any other alternative would result in further delay and no viable licenses for any small businesses. Although the majority of commenters favor our proposal, Minority Media *et al.* also suggests allowing any applicant who can demonstrate ''good cause'' to request a waiver under Sections 1.3 and 24.819(a) of our rules to be eligible for small business preferences and the bidding credit under our proposed rule. Under Minority Media *et al.*'s proposed alternative, any waiver requests by women and minorities would receive a

''plus'' factor since there is record evidence in this proceeding and in congressional legislation that establishes compelling governmental interests in diversity of ownership.

37. Several commenters oppose our proposal to modify our installment payment plan. InTouch asserts that we are raising barriers to accessing capital by minority-owned businesses. By eliminating the race and gender preference, BET argues that we are not assisting minority-owned small businesses in overcoming obstacles to entry into the PCS marketplace. BET further maintains that the *Further Notice* must still satisfy Congress' directive to disseminate licenses among a wide variety of applicants and to ensure that minorities are not excluded from the auction process. O.N.E. charges that we are wrong to eliminate all race- and gender-based preferences without proposing a race- and gender-neutral solution. Specifically, O.N.E. argues that our proposals do not create a size standard that is race and gender neutral yet small enough to ensure that businesses owned by members of minority groups and women are given the opportunity to participate in the provision of PCS. As a result, they assert that our proposals have the effect of restricting opportunities to only an elite handful of minorities and women.

38. RTC disagrees with our installment plans as set forth in the *Further Notice* and suggests two proposals of its own. First, RTC would make the same installment payment terms available to all small businesses that qualify to participate in the C block auction. Alternatively, RTC would maintain the existing differentials available to small businesses that meet the $40 million gross revenues test vis-a-vis other small businesses that qualify as ''entrepreneurs.'' RTC asserts that the effect of the proposals creates a massive gulf between small businesses whose control groups can meet the $40 million gross revenues test versus those whose control group cannot meet that test.

39. *Decision.* We will amend our rules concerning installment payments as set forth in the *Further Notice* (60 Fed. Reg. 34,200). We have concluded that revision of our installment payment program in this manner, is minimally disruptive to the established business arrangements of the applicants. All small businesses, including minority- or women-owned small businesses, will continue to be eligible for the most favorable installment plan.

40. We further conclude that our installment payment plan designed solely for small businesses will give designated entities an opportunity to participate in the provision of spectrum-based services. By allowing all small businesses to pay for their licenses in this manner (*i.e.,* using installments, at a rate equal to ten-year U.S. Treasury obligations applicable on the date the license is granted and requiring that payments include interest only for the first six years with payments of principal and interest amortized over the remaining four years of the license term), we will provide the most favorable plan to the smallest companies. We are not, as O.N.E. suggests, restricting opportunities to a handful of minorities and women. We are complying with our statutory obligations in a manner that we believe is necessary under the circumstances. We reject RTC's alternatives to make the same installment plan available to all applicants. Our record shows that smaller companies need more assistance accessing capital for broadband licenses and, therefore, the Commission decided these businesses should receive more favorable treatment than the medium to large companies participating in the C block auction.

41. Based on our experience, we conclude that Minority Media *et al.*'s waiver proposal as described in its comments is administratively burdensome, and potentially has its own legal risks since it is based in part on an applicant's status as a woman or minority. A major purpose of our proposals is to avert further delays in the auction and grant of C block licenses. The waivers would give losing applicants a built-in reason to challenge the auction results with petitions to deny if a winning applicant utilized the bidding credit solely as a result of a waiver for ''good cause.'' Therefore, for purposes of the C block auction, we will not adopt such a waiver proposal.

42. Although the revised rules do not specifically target minorities and women, we realize that because a large number of minority- or women-owned businesses are small businesses, our new rules will nonetheless, afford designated entities opportunities to participate in the C block auction. We recognize that this amendment to the installment payment plan will not allow some minority- and women-owned businesses to elect the most favorable installment payment plan because these businesses exceed our small business threshold. We further recognize that these businesses may have to restructure agreements to obtain additional capital to participate in the C block auction.

43. We weighed the risks of litigation to the Commission and to winning bidders, the need to preserve competition, and our commitment to providing service to the public as expeditiously as possible against the additional financial burden this rule change will have on minority- and women-owned businesses that do not qualify as small businesses under our rules. After carefully considering these issues, we determined that the need to mitigate litigation risks, enhance market competition, and encourage prompt service to the public far out-weigh the additional financial burden this rule change would create for potential bidders.

E. Bidding Credits

44. *Background.* Our current rules provide three tiers of bidding credits ranging between 10 percent and 25 percent. Small businesses are eligible for a 10 percent bidding credit. Businesses owned by women or minorities are eligible for a 15 percent bidding credit and small businesses owned by women or minorities are eligible for a 25 percent total bidding credit. The bidding credit acts as a discount on the winning bid amount that a licensee actually pays for the license. In the *Further Notice,* we proposed increasing the bidding credit for small businesses from 10 percent to 25 percent and eliminating the remaining bidding credits (60 Fed. Reg. 34,200). We recognized that this proposal would enhance the competitiveness of all small businesses which will receive a 15 percent increase in their bidding credits. The positions of minority- or women-owned businesses will remain the same because they are already eligible for a 25 percent bidding credit.

45. *Comments.* Commenters generally advocate increasing the small business bidding credit to 25 percent and the elimination of bidding credits based upon an applicant's race or gender. Some commenters supported our proposal to differentiate between applicants on the basis of size in order to avert any *Adarand* or *TEC* legal challenges to our rules. Minority Media *et al.* repeated its ''good cause'' waiver argument under Sections 1.3 and 24.819(a) of our rules.

46. Two commenters oppose the proposed bidding credit modification. Both BET and InTouch argue that race neutral alternatives serve only to reinforce the barriers to capital that many minority-owned businesses face. BET specifically states that the bidding credit is meant to ''address directly the financing obstacles encountered by minorities.'' Two commenters presented alternative proposals for consideration. RTC wants to either (1) make the same bid credits available to all small

businesses that qualify to participate in the C block auction or (2) maintain the existing differentials available to small businesses that meet the $40 million gross revenues test vis-a-vis other small businesses that qualify as ''entrepreneurs.'' O.N.E. proposes increasing the bidding credit for small businesses to 40 percent.

47. *Decision.* We amend our rules to provide for a 25 percent small business bidding credit only. Restructuring our biding credits in this manner is consistent with our post-*Adarand* concerns about the C block auction. While small businesses, in general, will benefit with a higher credit (*i.e.,* from 10 to 25 percent), their rule change will allow the Commission and prospective bidders to avoid litigation, allow the auction to proceed as close to its original schedule as possible and permit prospective bidders to maintain previously negotiated business arrangements and financial agreements.

48. We understand BET's and InTouch's concerns, but believe our proposals do not contradict our statutory obligations. Many commenters have noted that the elimination of minority- and gender-based preferences is necessary in light of recent court challenges to race-based statutes if the C block auction is to proceed without significant delay. Specifically, GO Communications comments that our bidding credit proposal strikes an appropriate balance by leveling benefits upward in a manner that mitigates potential harm to all affected parties. Spectrum Resources contends that the proposal is reasonable and viable although a slight negative effect will result because of the additional competition into the bidding process and a diminishing number of successful minority and women bidders. DCR Communications argues that the proposal is the most sensible and is necessary to ensure participation by designated entities in the auction for, and offering of, PCS. We agree that we are striking an appropriate balance between varied interests to retain our statutory mandate to provide opportunities for designated entities.

F. Cellular PCS Cross-Ownership and CMRS Spectrum Aggregation Limit

49. *Background.* Our cellular-PCS cross-ownership rule prohibits entities with attributable interests in cellular licenses from holding more than 10 MHz of PCS spectrum in an overlapping PCS service area. For purposes of this rule, a 20 percent or greater interest in a cellular license is considered to be attributable, except in the case of cellular interests held by designated entities. In the latter case, we permit small businesses, rural telephone companies, and businesses owned by minorities or women to hold up to a 40 percent noncontrolling interest in a cellular licensee without being subject to the cellular-PCS cross-ownership restriction. We also apply a 40 percent cellular attribution threshold to any entity with a non-controlling interest in a PCS license controlled by minorities or women. The same attribution rules apply to our 45 MHz spectrum cap, which restricts any entities from holding interests in more than 45 MHz of broadband PCS, cellular, and SMR spectrum in the same geographic area. Thus, while interests of 20 percent or more in a broadband PCS, cellular, or SMR license are generally attributable for purposes of the spectrum cap, small businesses, rural telephone companies, and businesses owned by minorities or woman are subject to a 40 percent attribution threshold.

50. In the *Further Notice,* we proposed to modify both the cellular-PCS cross-ownership and the PCS/cellular/SMR spectrum cap rule with respect to the C block by eliminating the use of the 40 percent attribution threshold on the basis of race or gender (60 Fed. Reg. 34,200). Thus, in the cellular-PCS context, we proposed to apply the 40 percent attribution threshold only to cellular interests held by small businesses and rural telephone companies, but to apply the 20 percent threshold to all other cellular interests, including those held by minority and women-controlled entities that are not small business or rural telephone companies. We further proposed to eliminate the rule allowing 40 percent cellular attribution for non-controlling investors in minority- or women-controlled PCS applicants or licensees and instead proposed to apply the 40 percent threshold to non-controlling investors in PCS applicants or licensees controlled by small businesses. In this regard, we noted that the extension of the 40 percent threshold to non-controlling investors in small businesses might result in additional investment in small business PCS applicants. Similarly, with respect to the PCS/cellular/SMR spectrum cap, we proposed to use the 40 percent attribution threshold where PCS/cellular/SMR interests are held by small businesses and rural telephone companies, but to use the 20 percent threshold in all other cases. Although we noted that the cellular-PCS and spectrum cap rules applied to more than just the C block, we proposed to change the rules with respect to the C block only.

51. *Comments.* The comments generally support our proposals for modifying the cellular-PCS cross-ownership and CMRS spectrum aggregation limit rules. Most of the comments mirror earlier comments concerning the commenter's desire to avoid delay; to avoid *Adarand* and *TEC* type legal challenges; and to minimize disruption. DCR Communications notes that our proposal will promote investment. Only two commenters object to our proposal. O.N.E. reasserts its argument that we should not eliminate all race- and gender-based preferences without proposing a race- and gender-neutral solution. Radiofone challenges both the 40 percent cellular-PCS cross-ownership rule and our proposed amendment as unlawful and discriminatory.

52. *Decision.* We will amend our cellular PCS cross-ownership and PCS/cellular/SMR spectrum aggregation limit rules with respect to C block as proposed in the *Further Notice* (50 Fed. Reg. 34,200). These changes will help to avoid further delay or legal challenges to the C block auction and are strongly supported by the comments. We reject Radiofone's argument that the cellular-PCS cross-ownership rule should be eliminated. This argument has been fully addressed previously in the PCS docket and is not an issue raised in this proceeding. Specifically, we modify Section 24.204(d)(2)(ii) with respect to the C block to eliminate the provision in the cellular-PCS cross-ownership rule that increases the attribution threshold to 40 percent on the basis of the race or gender of the holder of the ownership interest, but we will continue to apply the 40 percent threshold to cellular interests held by small businesses and rural telephone companies. We also modify Section 24.204(d)(2)(ii) to provide that non-controlling investors in C block PCS applicants or licensees controlled by small businesses may hold up to a 40 percent interest in a cellular licensee without being subject to the cellular-PCS cross-ownership restrictions. Finally, we make the same modification to the attribution provisions in our spectrum cap rule in Section 20.6(d)(2) that we have made to our cellular-PCS rule. Thus, small businesses or rural telephone companies may hold up to a 40 percent interest in broadband PCS, cellular, or SMR licenses without such interests being attributable under the 45 MHz spectrum cap, but minority- and women-controlled interest holders who are not small businesses or rural telephone companies will be subject to the 20

percent attribution rule for purposes of determining C block eligibility under the spectrum cap. To avoid any apparent inconsistency, Section 206(d)(2) will also reflect the modification with respect to non-controlling investors in C block PCS applicants and licensees that are small businesses.

G. Miscellaneous Issues

53. *Information Collection*. With respect to our proposal to continue requesting information on the short-form applications (FCC Form 175) regarding minority- or women-owned status, both Spectrum Resources and Central Alabama & Mobile Tri-States agree that we should continue to collect such information. Central Alabama & Mobile Tri-States believe that collection of the status data will enable the Commission to analyze the applicant pool and auction results to determine if small business provisions alone were sufficient to achieve the participation of all designated entities, including businesses owned by minorities or women. Central Alabama & Mobile Tri-States further state that in the event that such participation is not obtained, then the collected information would be helpful in establishing a record supporting race- and gender-based preferences for future auctions. Similarly, Spectrum Resources believes that such information could prove valuable in supporting the Commission's actions in any ensuing litigation.

54. We agree that continuing to request information on the short-form applications (FCC Form 175) concerning the minority- or women-owned status of applicants will assist us in analyzing the applicant pool and the auction results to determine whether we have accomplished substantial participation by minorities and women through provisions available to small businesses as required by the Budget Act. We conclude that such information will be helpful and probative in two respects: (1) our preparation of a report to Congress on the participation of designated entities in the auctions and in the provision of spectrum-based services; and, (2) our development of a supplemental record should we find that special provisions for small businesses in the C block PCS auctions prove unsuccessful in ensuring participation by businesses owned by members of minority groups and women in broadband PCS. In this connection, we emphasize that those applicants who indicate that they are minority- or women-owned must meet the applicable definitions as set forth in Section 24.720(c) of our rules.

55. *Other.* Several commenters addressed issues regarding the auctioning and licensing of the C block other than the specific rule changes proposed in the *Further Notice* (60 Fed. Reg. 34,200). These issues included the following: (a) scheduled commencement of the C block auction; (b) proposals of special provisions for entrepreneurs with gross revenues between $40 and $75 million; (c) proposals of circumstances under which upfront payments and down payments can earn interest and be withdrawn; (d) definition of small businesses; (e) criteria for determining C block eligibility; (f) the rebuttable presumption concerning Indian gaming revenues; and (g) effect of business growth and development on C block small business status. We have adequately considered these issues previously and we find no basis to revisit them here in this narrowly-focused rule making. Therefore, we will not make the rule changes proposed by commenters pertaining to such issues.

56. On our own motion, however, we clarify the measurement of gross revenues. Section 24.720 (f) specifies that gross revenues shall be measured ''for the relevant number of calendar years preceding January 1, 1994, or if audited financial statements were not prepared on a calendar-year basis, for the most recently completed fiscal years preceding the filing of the applicant's short-form application (Form 175).'' For purposes of qualifying for the C block, an entity, together with its affiliates and persons or entities that hold an attributable interest in such entity and their affiliates, must have gross revenues of less than $125 million in each of the last two years. Therefore, such an entity would measure its annual gross revenues for the calendar years 1992 and 1993, or for its two most recently completed fiscal years. For purposes of qualifying as a small business, an entity, together with its affiliates and persons or entities that hold an attributable interest in such entity and their affiliates, must have average annual gross revenues of not more than $40 million for the preceding three years. Therefore, such an entity would calculate its average annual gross revenues for the years 1991, 1992, and 1993, or for its three most recently completed fiscal years.

57. We note that this definition of gross revenues was adopted when the C block applications were to be filed in early 1995, when audited calendar year 1994 financial statements for most firms were not yet available and when it was unlikely that there would be a substantial difference between calendar and fiscal years for accounting purposes. If our rule's distinction between calendar years and fiscal years results in undue hardship due to a company's particular accounting practices, we will entertain waiver requests to use *either* a calendar-year or a fiscal-year measurment of gross revenues to determine compliance with the financial caps. We did not intend to discriminate based upon a company's particular accounting practices. We delegate authority to the Wireless Telecommunications Bureau to decide such waivers on a case-by-case basis and to grant such upon an affirmative showing pursuant to Section 24.419 of the Commission's rules.

IV. Procedural Matters and Ordering Clauses

58. The Final Regulatory Flexibility Analysis, as required by Section 604 of the Regulatory Flexibility Act, is set forth in the Appendix.

59. It is ordered that the rule changes specified below are adopted.

60. It is further ordered that the rule changes set forth below will become effective upon publication in the **Federal Register**. Pursuant to 5 U.S.C. § 553(d)(3) we find ''good cause'' exists to have the rule amendments set forth herein take effect immediately upon publication in the **Federal Register**. The C block auction for broadband PCS is scheduled to commence on August 29, 1995, and initial short-form applications are due July 28, 1995. Our revised rules need to be effective prior to receipt of the short-form applications in order to avoid the delays and litigation risks associated with prior rules.

61. It is further ordered that the Wireless Telecommunications Bureau has delegated authority to decide waiver requests pertaining to our C block competitive bidding rules as specified in paragraph 57 of this *Sixth Report and Order.*

62. 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.

Final Rules

Parts 20 and 24 of Chapter I of Title 47 of the Code of Federal Regulations are amended as follows:

PART 20—COMMERCIAL MOBILE RADIO SERVICES

1. The authority citation for part 20 continues to read as follows:

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

2. Section 20.6 is amended by revising paragraph (d)(2) to read as follows:

§ 20.6 CMRS spectrum aggregation limit.

* * * * *

(d) * * *

(2) Partnership and other ownership interests and any stock interest amounting to 20 percent or more of the equity, or outstanding stock, or outstanding voting stock of a broadband PCS, cellular or SMR licensee shall be attributed, except that ownership will not be attributed unless the partnership and other ownership interests and any stock interest amount to at least 40 percent of the equity, or outstanding stock, or outstanding voting stock of a broadband PCS, cellular or SMR licensee if the ownership interest is held by a small business, a rural telephone company or a business owned by minorities and/or women, as these terms are defined in § 1.2110 of this chapter or other related provisions of the Commission's rules, or if the ownership interest is held by an entity with a non-controlling equity interest in a broadband PCS licensee or applicant that is a business owned by minorities and/or women. For purposes of broadband PCS licenses for frequency block C, the 40 percent attribution levels shall only apply to interests held by a small business or a rural telephone company and interests held by an entity with a non-controlling equity interest in a licensee or applicant that is a small business.

* * * * *

PART 24—PERSONAL COMMUNICATIONS SERVICES

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 24.204 is amended by revising paragraph (d)(2)(ii) to read as follows:

* * * * *

§ 24.204 Cellular eligibility.

* * * * *

(d) * * *

(2) * * *

(ii) Partnership and other ownership interests and any stock interest amounting to 20 percent or more of the equity, or outstanding stock, or outstanding voting stock of a cellular licensee will be attributable, except that ownership will not be attributed unless the partnership and other ownership interests and any stock interest amount to 40 percent or more of the equity, or outstanding stock, or outstanding voting stock of a cellular licensee if the ownership interest is held by a small business, a rural telephone company, or a business owned by minorities and/or women, as these terms are defined in § 24.720, or if the ownership interest is held by an entity with a non-controlling equity interest in a broadband PCS licensee or applicant that is a business owned by minorities and/or women. For purposes of broadband PCS licenses for frequency block C, the 40 percent attribution levels shall only apply to interests held by a small business or rural telephone company and interests held by an entity with a non-controlling equity interest in a licensee or applicant that is a small business.

* * * * *

3. Section 24.709 is amended by revising the heading and paragraphs (a), (b)(5)(i)(C), (b)(6, (c)(1) introductory text, (c)(2) introductory text, (c)(2)(ii) and (e) to read as follows:

§ 24.709 Eligibility for licenses for frequency Block C.

(a) *General Rule.*

(1) No application is acceptable for filing and no license shall be granted for frequency block C, unless the applicant, together with its *affiliates* and persons or entities that hold interests in the applicant and their *affiliates*, have *gross revenues* of less than $125 million in each of the last two years and *total assets* of less than $500 million at the time the applicant's short-form application (Form 175) is filed.

(2) The *gross revenues* and *total assets* of the applicant (or licensee), and its *affiliates*, and (except as provided in paragraph (b) of this section) of persons or entities that hold interests in the applicant (or licensee), and their *affiliates*, shall be attributed to the applicant and considered on a cumulative basis and aggregated for purposes of determining whether the applicant (or licensee) is eligible for a license for frequency block C under this section.

(3) Any licensee awarded a license pursuant to this section (or pursuant to § 24.839(d)(2)) shall maintain its eligibility until at least five years from the date of initial license grant, except that a licensee's (or other attributable entity's) increased *gross revenues* or increased *total assets* due to *nonattributable equity* investments (i.e., from sources whose *gross revenues* and *total assets* are not considered under paragraph (b) of this section), debt financing, revenue from operations or other investments, business development or expanded service shall not be considered.

(b) * * *

(5) * * *

(i) * * *

(C) The remaining 10 percent of the applicant's (or licensee's) total equity may be owned, either unconditionally or in the form of stock options, by any of the following entities, which may not comply with § 24.720(n)(1):

(*1*) *Institutional Investors;*

(*2*) Noncontrolling *existing investors* in any *preexisting entity* that is a member of the *control group;*

(*3*) Individuals that are members of the applicant's (or licensee's) management; or

(*4*) *Qualifying investors*, as specified in § 24.720(n)(4).

(6) *Control Group Minimum 50.1 Percent Equity Requirement.* In order to be eligible to exclude *gross revenues* and *total assets* of persons or entities identified in paragraph (b)(4) of this section, an applicant (or licensee) must comply with the following requirements:

(i) Except for an applicant (or licensee) whose sole control group member is a *preexisting entity*, as provided in paragraph (b)(6)(ii) of this section, at the time the applicant's short-form application (Form 175) is filed and until at least three years following the date of initial license grant, the applicant's (or licensee's) *control group* must own at least 50.1 percent of the applicant's (or licensee's) total equity as follows:

(A) at least 30 percent of the applicant's (or licensee's)total equity must be held by *qualifying investors*, either unconditionally or in the form of options, exercisable at the option of the holder, at any time and at any exercise price equal to or less than the market value at the time the applicant files its short-form application (Form 175);

(B) Such *qualifying investors* must hold 50.1 percent of the voting stock and all general partnership interests within the control group and must have *de facto* control of the control group and of the applicant;

(C) The remaining 20.1 percent of the applicant's (or licensee's) total equity may be owned by *qualifying investors*, either unconditionally or in the form of stock options not subject to the restrictions of paragraph (b)(6)(i)(A) of this section, or by any of the following

entities which may not comply with § 24.720(n)(1):

(*1*) *Institutional investors,* either unconditionally or in the form of stock options;

(*2*) Noncontrolling *existing investors* in any *preexisting entity* that is a member of the *control group,* either unconditionally or in the form of stock options;

(*3*) Individuals that are members of the applicant's (or licensee's) management, either unconditionally or in the form of stock options; or

(*4*) *Qualifying investors,* as specified in 24.720(n)(4).

(D) Following termination of the three-year period specified in paragraph (b)(6)(i) of this section, *qualifying investors* must continue to own at least 20 percent of the applicant's (or licensee's) total equity unconditionally or in the form of stock options subject to the restrictions in paragraph (b)(6)(i)(A) of this section. The restrictions specified in paragraph (b)(6)(i)(C)(*1*) through (*4*) of this section no longer apply to the remaining equity after termination of such three-year period.

(ii) At the election of an applicant (or licensee) whose *control group's* sole member is a *preexisting entity,* the 50.1 percent minimum equity requirements set forth in paragraph (b)(6)(i) of this section shall apply, except that only 20 percent of the applicant's (or licensee's) total equity must be held by *qualifying investors,* and that the remaining 30.1 percent of the applicant's (or licensee's) total equity may be held by *qualifying investors,* or noncontrolling *existing investors* in such *control group* member or individuals that are members of the applicant's (or licensee's) management. These restrictions on the identity of the holder(s) of the remaining 30.1 percent of the licensee's total equity no longer apply after termination of the three-year period specified in paragraph (b)(6)(i) of this section.

* * * * *

(c) * * *

(1) *Short-form Application.* In addition to certifications and disclosures required by Part 1, subpart Q of this Chapter and § 24.813, each applicant for a license for frequency Block C shall certify on its short-form application (Form 175) that it is eligible to bid on and obtain such license(s), and (if applicable) that it is eligible for designated entity status pursuant to this section and § 24.720, and shall append the following information as an exhibit to its Form 175:

* * * * *

(2) *Long-form Application.* In addition to the requirements in subpart I of this part and other applicable rules (e.g., §§ 24.204(f), 20.6(e) and 20.9(b) of this chapter), each applicant submitting a long-form application for a license(s) for frequency block C shall, in an exhibit to its long-form application:

* * * * *

(ii) List and summarize all agreements or other instruments (with appropriate references to specific provisions in the text of such agreements and instruments) that support the applicant's eligibility for a license(s) for frequency Block C and its eligibility under §§ 24.711, 24.712, 24.714 and 24.720, including the establishment of *de facto* and *de jure* control; such agreements and instruments include articles of incorporation and bylaws, shareholder agreements, voting or other trust agreements, partnership agreements, management agreements, joint marketing agreements, franchise agreements, and any other relevant agreements (including letters of intent), oral or written; and

* * * * *

(e) *Definitions.* The terms *affiliate, business owned by members of minority groups and women, consortium of small businesses, control group, existing investor, gross revenues, institutional investor, members of minority groups, nonattributable equity, preexisting entity, publicly traded corporation with widely dispersed voting power, qualifying investor, small business* and *total assets* used in this section are defined in § 24.720.

4. Section 24.711 is amended by revising the heading and paragraphs (a)(1), (b) introductory text and (b)(3), and removing paragraphs (b)(4) and (b)(5) to read as follows:

§ 24.711 Upfront payments, down payments and installment payments for licenses for frequency Block C.

(a) * * *

(1) Each eligible bidder for licenses on frequency Block C subject to auction shall pay an upfront payment of $0.015 per MHz per pop for the maximum number of licenses (in terms of MHz-pops) on which it intends to bid pursuant to § 1.2106 of this chapter and procedures specified by Public Notice.

* * * * *

(b) *Installment Payments.* Each eligible licensee of frequency Block C may pay the remaining 90 percent of the net auction price for the license in installment payments pursuant to § 1.2110(e) of this chapter and under the following terms:

* * * * *

(3) For an eligible licensee that qualifies as a small business or as a consortium of small businesses, interest shall be imposed based on the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted; payments shall include interest only for the first six years and payments of interest and principal amortized over the remaining four years of the license term.

* * * * *

5. Section 24.712 is amended by revising the heading and paragraph (a) to read as set forth below, removing paragraphs (b) and (c), and redesignating paragraph (d) as paragraph (b):

§ 24.712 Bidding credits for licenses for frequency Block C.

(a) A winning bidder that qualifies as a small business or a consortium of small businesses may use a bidding credit of twenty-five percent to lower the cost of its winning bid.

* * * * *

6. Section 24.713 is removed and reserved.

7. A new Section 24.715 is added to Subpart H to read as follows:

§ 24.715 Eligibility for licenses for frequency Block F.

(a) *General Rule.*

(1) No application is acceptable for filing and no license shall be granted for frequency block F, unless the applicant, together with its *affiliates* and persons or entities that hold interests in the applicant and their *affiliates,* have *gross revenues* of less than $125 million in each of the last two years and *total assets* of less than $500 million at the time the applicant's short-form application (Form 175) is filed.

(2) The *gross revenues and total assets* of the applicant (or licensee), and its *affiliates,* and (except as provided in paragraph (b) of this section) of persons or entities that hold interests in the applicant (or licensee), and their *affiliates,* shall be attributed to the applicant and considered on a cumulative basis and aggregated for purposes of determining whether the applicant (or licensee) is eligible for a license for frequency block F under this section.

(3) Any licensee awarded a license pursuant to this section (or pursuant to § 24.839(d)(2)) shall maintain its eligibility until at least five years from the date of initial license grant, except that a licensee's (or other attributable entity's) increased *gross revenues* or increased *total assets* due to *nonattributable equity* investments (i.e., from sources whose *gross revenues,* and *total assets* are not considered under paragraph (b) of this section), debt

financing, revenue from operations or other investments, business development or expanded service shall not be considered.

(b) *Exceptions to General Rule.*

(1) *Small Business Consortia.* Where an applicant (or licensee) is a *consortium of small businesses,* the *gross revenues* and *total assets* of each small business shall not be aggregated.

(2) *Publicly-Traded Corporations.* Where an applicant (or licensee) is a *publicly traded corporation with widely dispersed voting power,* the *gross revenues* and *total assets* of a person or entity that holds an interest in the applicant (or licensee), and its *affiliates,* shall not be considered.

(3) *25 Percent Equity Exception.* The *gross revenues* and *total assets* of a person or entity that holds an interest in the applicant (or licensee), and its *affiliates,* shall not be considered so long as:

(i) Such person or entity, together with its *affiliates,* holds only *nonattributable equity* equaling no more than 25 percent of the applicant's (or licensee's) total equity;

(ii) Except as provided in paragraph (b)(5) of this section, such person or entity is not a member of the applicant's (or licensee's) *control group*; and

(iii) The applicant (or licensee) has a *control group* that complies with the minimum equity requirements of paragraph (b)(5) of this section, and, if the applicant (or licensee) is a corporation, owns at least 50.1 percent of the applicant's (or licensee's) voting interests, and, if the applicant (or licensee) is a partnership, holds all of its general partnership interests.

(4) *49.9 Percent Equity Exception.* The *gross revenues* and *total assets* of a person or entity that holds an interest in the applicant (or licensee), and its *affiliates,* shall not be considered so long as:

(i) Such person or entity, together with its *affiliates,* holds only *nonattributable equity* equaling no more than 49.9 percent of the applicant's (or licensee's) total equity;

(ii) Except as provided in paragraph (b)(6) of this section, such person or entity is not a member of the applicant's (or licensee's) *control group*; and

(iii) The applicant (or licensee) has a *control group* that complies with the minimum equity requirements of paragraph (b)(6) of this section and, if the applicant (or licensee) is a corporation, owns at least 50.1 percent of the applicant's (or licensee's) voting interests, and, if the applicant (or licensee) is a partnership, holds all of its general partnership interests.

(5) *Control Group Minimum 25 Percent Equity Requirement.* In order to be eligible to exclude *gross revenues* and *total assets* of persons or entities identified in paragraph (b)(3) of this section, an applicant (or licensee) must comply with the following requirements:

(i) Except for an applicant (or licensee) whose sole control group member is a *preexisting entity,* as provided in paragraph (b)(5)(ii) of this section, at the time the applicant's short-form application (Form 175) is filed and until at least three years following the date of initial license grant, the applicant's (or licensee's) *control group* must own at least 25 percent of the applicant's (or licensee's) total equity as follows:

(A) At least 15 percent of the applicant's (or licensee's) total equity must be held by qualifying investors, either unconditionally or in the form of options exercisable, at the option of the holder, at any time and at any exercise price equal to or less than the market value at the time the applicant files its short-form application (Form 175);

(B) Such *qualifying investors* must hold 50.1 percent of the voting stock and all general partnership interests within the control group, and must have *de facto* control of the control group and of the applicant;

(C) The remaining 10 percent of the applicant's (or licensee's) total equity may be owned by *qualifying investors,* either unconditionally or in the form of stock options not subject to the restrictions of paragraph (b)(5)(i)(A) of this section, or by any of the following entities, which may not comply with section 24.720(n)(1):

(*1*) *Institutional investors,* either unconditionally or in the form of stock options;

(*2*) Noncontrolling *existing investors* in any *preexisting entity* that is a member of the *control group,* either unconditionally or in the form of stock options;

(*3*) Individuals that are members of the applicant's (or licensee's) management, either unconditionally or in the form of stock options; or

(*4*) *Qualifying investors,* as specified in § 24.720(n)(4).

(D) Following termination of the three-year period specified in paragraph (b)(5)(i) of this section, *qualifying investors* must continue to own at least 10 percent of the applicant's (or licensee's) total equity, either unconditionally or in the form of stock options subject to the restrictions in paragraph (b)(5)(i)(A) of this section. The restrictions specified in paragraph (b)(5)(i)(C)(*1*) through (4) of this section no longer apply to the remaining equity after termination of such three-year period.

(ii) At the election of an applicant (or licensee) whose *control group's* sole member is a *preexisting entity,* the 25 percent minimum equity requirements set forth in paragraph (b)(5)(i) of this section shall apply, except that only 10 percent of the applicant's (or licensee's) total equity must be held by *qualifying investors* and that the remaining 15 percent of the applicant's (or licensee's) total equity may be held by *qualifying investors* or noncontrolling *existing investors* in such *control group* member or individuals that are members of the applicant's (or licensee's) management. These restrictions on the identity of the holder(s) of the remaining 15 percent of the licensee's total equity no longer apply after termination of the three-year period specified in paragraph (b)(5)(i) of this section.

(6) *Control Group Minimum 50.1 Percent Equity Requirement.* In order to be eligible to exclude *gross revenues* and *total assets* of persons or entities identified in paragraph (b)(4) of this section, an applicant (or licensee) must comply with the following requirements:

(i) Except for an applicant (or licensee) whose sole control group member is a *preexisting entity,* as provided in paragraph (b)(6)(ii) of this section, at the time the applicant's short-form application (Form 175) is filed and until at least three years following the date of initial license grant, the applicant's (or licensee's) *control group* must own at least 50.1 percent of the applicant's (or licensee's) total equity as follows:

(A) At least 30 percent of the applicant's (or licensee's) total equity must be held by *qualifying minority and/or women investors,* either unconditionally or in the form of options exercisable, at the option of the holder, at any time and at any exercise price equal to or less than the market value at the time the applicant files its short-form application (Form 175);

(B) Such *qualifying minority and/or women investors* must hold 50.1 percent of the voting stock and all general partnership interests within the control group and must have *de facto* control of the control group and of the applicant;

(C) The remaining 20.1 percent of the applicant's (or licensee's) total equity may be owned by *qualifying investors,* either unconditionally or in the form of stock options not subject to the restrictions of paragraph (b)(5)(i)(A) of this section, or by any of the following entities, which may not comply with section 24.720(n)(1):

(*1*) *Institutional investors*, either unconditionally or in the form of stock options;

(*2*) Noncontrolling *existing investors* in any *preexisting entity* that is a member of the *control group*, either unconditionally or in the form of stock options;

(*3*) Individuals that are members of the applicant's (or licensee's) management, either unconditionally or in the form of stock options; or

(*4*) *Qualifying investors*, as specified in § 24.720(n)(4).

(D) Following termination of the three-year period specified in paragraph (b)(6)(i) of this section, *qualifying minority and/or women investors* must continue to own at least 20 percent of the applicant's (or licensee's) total equity, either unconditionally or in the form of stock options subject to the restrictions in paragraph (b)(6)(i)(A) of this section. The restrictions specified in paragraph (b)(6)(i)(C)(*1*) through (*4*) of this section no longer apply to the remaining equity after termination of such three-year period.

(ii) At the election of an applicant (or licensee) whose *control group's* sole member is a *preexisting entity*, the 50.1 percent minimum equity requirements set forth in paragraph (b)(6)(i) of this section shall apply, except that only 20 percent of the applicant's (or licensee's) total equity must be held by *qualifying minority and/or women investors*, and that the remaining 30.1 percent of the applicant's (or licensee's) total equity may be held by *qualifying minority and/or women investors*, or noncontrolling *existing investors* in such *control group* member or individuals that are members of the applicant's (or licensee's) management. These restrictions on the identity of the holder(s) of the remaining 30.1 percent of the licensee's total equity no longer apply after termination of the three-year period specified in paragraph (b)(6)(i) of this section.

(7) *Calculation of Certain Interests.* Except as provided in paragraphs (b)(5) and (b)(6) of this section, 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 such agreements may not be used to appear to terminate or divest ownership interests before they actually do so, in order to comply with the *nonattributable equity* requirements in paragraphs (b)(3)(i) and (b)(4)(i) of this section.

(8) *Aggregation of Affiliate Interests.* Persons or entities that hold interest in an applicant (or licensee) that are *affiliates* of each other or have an identity of interests identified in § 24.720(1), (3) will be treated as though they were one person or entity and their ownership interests aggregated for purposes of determining an applicant's (or licensee's) compliance with the *nonattributable equity* requirements in paragraphs (b)(3)(i) and (b)(4)(i) of this section.

Example 1 for paragraph (b)(8). ABC Corp. is owned by individuals, A, B, and C, each having an equal one-third voting interest in ABC Corp. A and B together, with two-thirds of the stock have the power to control ABC Corp. and have an identity of interest. If A & B invest in DE Corp., a broadband PCS applicant for block C, A and B's separate interests in DE Corp. must be aggregated because A and B are to be treated as one person.

Example 2 for paragraph (b)(8). ABC Corp. has subsidiary BC Corp., of which it holds a controlling 51 percent of the stock. If ABC Corp. and BC Corp., both invest in DE Corp., their separate interests in DE Corp. must be aggregated because ABC Corp. and BC Corp. are affiliates of each other.

(c) *Short-Form and Long-Form Applications: Certifications and Disclosure.*

(1) *Short-form Application. In addition to certifications and disclosures required by Part 1, subpart Q* of this chapter and § 24.813, each applicant for a license for frequency Block F shall certify on its short-form application (Form 175) that it is eligible to bid on and obtain such license(s), and (if applicable) that it is eligible for designated entity status pursuant to this section and § 24.720, and shall append the following information as an exhibit to its Form 175:

(i) For an applicant that is a *publicly traded corporation with widely disbursed voting power:*

(A) A certified statement that such applicant complies with the requirements of the definition of *publicly traded corporation with widely disbursed voting power* set forth in § 24.720(m);

(B) The identity of each *affiliate* of the applicant if not disclosed pursuant to § 24.813; and

(C) The applicant's *gross revenues* and *total assets*, computed in accordance with paragraphs (a) and (b) of this section.

(ii) For all other applicants;

(A) The identity of each member of the applicant's *control group*, regardless of the size of each member's total interest in the applicant, and the percentage and type of interest held;

(B) The citizenship and the gender or minority group classification for each member of the applicant's *control group* if the applicant is claiming status as a *business owned by members of minority groups and/or women;*

(C) The status of each *control group* member that is an *institutional investor*, an *existing investor*, and/or a member of the applicant's management;

(D) The identity of each *affiliate* of the applicant and each *affiliate* of individuals or entities identified pursuant to paragraphs (c)(1)(ii)(A) and (c)(1)(ii)(C) of this section if not disclosed pursuant to § 24.813;

(E) A certification that the applicant's sole *control group* member is a *preexiting entity*, if the applicant makes the election in either paragraph (b)(5)(ii) or (b)(6)(ii) of this section; and

(F) The applicant's *gross revenues* and *total assets*, computed in accordance with paragraphs (a) and (b) of this section.

(iii) for each applicant claiming status as a *small business consortium*, the information specified in paragraph (c)(1)(ii) of this section, for each member of such consortium.

(2) *Long-form Application.* In addition to the requirements in subpart I of this part and other applicable rules (e.g., §§ 24.204(f), 20.6(e) and 20.9(b) of this chapter), each applicant submitting a long-form application for license(s) for frequency Block F shall, in an exhibit to its long-form application:

(i) Disclose separately and in the aggregate the *gross revenues* and *total assets*, computed in accordance with paragraphs (a) and (b) of this section, for each of the following: the applicant; the applicant's *affiliates*, the applicant's *control group* members; the applicant's attributable investors; and affiliates of its attributable investors;

(ii) List and summarize all agreements or other instruments (with appropriate references to specific provisions in the text of such agreements and instruments) that support the applicant's eligibility for a license(s) for frequency Block F and its eligibility under §§ 24.711 through 24.270, including the establishment of *de facto* and *de jure* control; such agreements and instruments include articles of incorporation and bylaws, shareholder agreements, voting or other trust agreements, partnership agreements, management agreements, joint marketing agreements, franchise agreements, and any other relevant agreements (including letters of intent), oral or written; and

(iii) List and summarize any investor protection agreements and identify specifically any such provisions in those agreements identified pursuant to paragraph (c)(2)(ii) of this section, including rights of first refusal,

supermajority clauses, options, veto rights, and rights to hire and fire employees and to appoint members to boards of directors or management committees.

(3) *Records Maintenance.* All applicants, including those that are winning bidders, shall maintain at their principal place of business an updated file of ownership, revenue and asset information, including those documents referenced in paragraphs (c)(2)(ii) and (c)(2)(ii) of this section and any other documents necessary to establish eligibility under this section or under the definitions of *small business and/or business owned by members of minority groups and/or women.* Licensees (and their successors in interest) shall maintain such files for the term of the license. Applicants that do not obtain the license(s) for which they applied shall maintain such files until the grant of such license(s) is final, or one year from the date of the filing of their short-form application (Form 175), whichever is earlier.

(d) *Audits.*

(1) Applicants and licensees claiming eligibility under this section or §§ 24.711 through 24.720 shall be subject to audits by the Commission, using in-house and contract resources. Selection for audit may be random, or information, or on the basis of other factors.

(2) Consent to such audits is part of the certification included in the short-form application (Form 175). Such consent shall include consent to the audit of the applicant's or licensee's books, documents and other material (including accounting procedures and practices) regardless of form or type, sufficient to confirm that such applicant's or licensee's representations are, and remain, accurate. Such consent shall include inspection at all reasonable times of the facilities, or parts thereof, engaged in providing and transacting business, or keeping records regarding licensed broadband PCS service and shall also include consent to interview of principals, employees, customers and suppliers of the applicant or licensee.

(e) *Definitions.* The terms *affiliate, business owned by members of minority groups and women, consortium of small businesses, control group, existing investor, gross revenues, institutional investor, members of minority groups, nonattributable equity, preexisting entity, publicly traded corporation with widely dispersed voting power, qualifying investor, qualifying minority and/or woman investor, small business* and *total assets* used in this section are defined in § 24.720.

8. A new Section 24.716 is added to Subpart H to read as follows:

§ 24.716 Upfront payments, down payments, and installment payments for licenses for frequency Block F.

(a) *Upfront Payments and Down Payments.*

(1) Each eligible bidder for licenses on frequency Block F subject to auction shall pay an upfront payment of $0.015 per MHz per pop for the maximum number of licenses (in terms of MHz-pops) on which it intends to bid pursuant to § 1.2106 of this Chapter and procedures specified by Public Notice.

(2) Each winning bidder shall make a down payment equal to ten percent of its winning bid (less applicable bidding credits); a winning bidder shall bring its total amount on deposit with the Commission (including upfront payment) to five percent of its net winning bid within five business days after the auction closes, and the remainder of the down payment (five percent) shall be paid within five business days after the application required by § 24.809(b) is granted.

(b) *Installment Payments.* Each eligible licensee of frequency Block F may pay the remaining 90 percent of the net auction price for the license in installment payments pursuant to § 1.2110(e) of this Chapter and under the following terms:

(1) For an eligible licensee with *gross revenues* exceeding $75 million (calculated in accordance with § 24.715(a)(2) and (b)) in each of the two preceding years (calculated in accordance with 24.720(f)), interest shall be imposed based on the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted, plus 3.5 percent; payments shall include both principal and interest amortized over the term of the license.

(2) For an eligible licensee with *gross revenues* not exceeding $75 million (calculated in accordance with § 24.715(a)(2) and (b)) in each of the two preceding years, interest shall be imposed based on the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted, plus 2.5 percent; payments shall include interest only for the first year and payments of interest and principal amortized over the remaining nine years of the license term.

(3) For an eligible licensee that qualifies as a Small business or as a consortium of small businesses, interest shall be imposed based on the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted, plus 2.5 percent; payments shall include interest only for the first two years and payments of interest and principal amortized over the remaining eight years of the license term.

(4) For an eligible licensee that qualifies as a business owned by members of minority groups and/or women, interest shall be imposed based on the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted; payments shall include interest only for the first three years and payments of interest and principal amortized over the remaining seven years of the license term.

(5) For an eligible licensee that qualifies as a small business owned by members of minority groups and/or women or as a consortium of small business owned by members of minority groups and/or women, interest shall be imposed based on the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted; payments shall include interest only for the first six years and payments of interest and principal amortized over the remaining four years of the license term.

(c) *Unjust Enrichment.*

(1) If a licensee that utilizes installment financing under this section seeks to assign or transfer control of its license to an entity not meeting the eligibility standards for installment payments, the licensee must make full payment of the remaining unpaid principal and any unpaid interest accrued through the date of assignment or transfer as a condition of approval.

(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 such change as a condition of approval. A licensee's (or other attributable entity's) increased gross revenues or increased total assets due to nonattributable equity investments (i.e., from sources whose gross revenues and total assets are not considered under § 24.715(b)), debt financing, revenue from operations or other investments, business development or expanded service shall not be considered to result in the licensee losing edigility for installment payments.

(3) If a licensee seeks to make any change in ownership that would result in the licensee qualifying for a less favorable installment plan under this section, the licensee shall seek Commission approval and must adjust its payment plan to reflect its new eligibility status. A licensee may not

switch its payment plan to a more favorable plan.

9. A new Section 24.717 is added to Subpart H to read as follows:

§ 24.717 Bidding credits for licenses for frequency Block F.

(a) A winning bidder that qualifies as a small business or a consortium of small businesses may use a bidding credit of ten percent to lower the cost of its winning bid.

(b) A winning bidder that qualifies as a business owned by members of minority groups and/or women may use a bidding credit of fifteen percent to lower the cost of its winning bid.

(c) A winning bidder that qualifies as a small business owned by members of minority groups and/or women or a consortium of small business owned by members of minority groups and/or women may use a bidding credit of twenty-five percent to lower the cost of its winning bid.

(d) *Unjust Enrichment.*

(1) If during the term of the initial license grant (*see* § 24.15), a licensee that utilizes a bidding credit under this section seeks to assign or transfer control of its license to an entity not meeting the eligibility standards for bidding credits or seeks to make any other change in ownership that would result in the licensee no longer qualifying for bidding credits under this section, the licensee must seek Commission approval and reimburse the government for the amount of the bidding credit as a condition of the approval of such assignment, transfer or other ownership change.

(2) If during the term of the initial license grant (*see* § 24.15), a licensee that utilizes a bidding credit under this section seeks to assign or transfer control of its license to an entity meeting the eligibility standards for lower bidding credits or seeks to make any other change in ownership that would result in the licensee qualifying for a lower bidding credit under this section, the licensee must seek Commission approval and reimburse the government for the difference between the amount of the bidding credit obtained by the licensee and the bidding credit for which the assignee, transferee or licensee is eligible under this section as a condition of the approval of such assignment, transfer or other ownership change.

10. Section 24.720 is amended by revising paragraphs (a), (b)(2), (c)(2), (j)(2), (l)(11)(i), (l)(11)(ii), (n)(1), (n)(3) and adding paragraph (n)(4) to read as follows:

§ 24.720 Definitions.

(a) Scope. The definitions in this section apply to §§ 24.709 through 24.717, unless otherwise specified in those sections.

(b) * * *

(2) For purposes of determining whether an entity meets the $40 million average annual gross revenues size standard set forth in paragraph (b)(1) of this section, the gross revenues of the entity, its affiliates, persons or entities holding interests in the entity and their affiliates shall be considered on a cumulative basis and aggregated, subject to the exceptions set forth §§ 24.709(b) or 24.715(b).

* * * * *

(c) * * *

(2) That complies with the requirements of § 24.715 (b)(3) and (b)(5) or § 24.715 (b)(4) and (b)(6).

* * * * *

(j) * * *

(2) For purposes of assessing compliance with the equity limits in § 24.709 (b)(3)(i) and (b)(4)(i) or § 24.715 (b)(3)(i) and (b)(4)(i), where such interests are not held directly in the applicant, the total equity held by a person or entity shall be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain.

(l) * * *

(11) * * *

(i) For purposes of §§ 24.709(a)(2), 24.715(a)(2) and paragraphs (b)(2) and (d) of this section, Indian tribes or Alaska Regional or Village Corporations organized pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.), or entities owned and controlled by such tribes or corporations, are not considered affiliates of an applicant (or licensee) that is owned and controlled by such tribes, corporations or entities, and that otherwise complies with the requirements of § 24.709 (b)(3) and (b)(5) or § 24.709 (b)(4) and (b)(6) or § 24.715 (b)(3) and (b)(5) or § 24.715 (b)(4) and (b)(6), except that gross revenues derived from gaming activities conducted by affiliated entities pursuant to the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.) will be counted in determining such applicant's (or licensee's) compliance with the financial requirements of § 24.709(a) or § 24.715(a) and paragraphs (b) and (d) of this section, unless such applicant establishes that it will not receive a substantial unfair competitive advantage because significant legal constraints restrict the applicant's ability to access such gross revenues.

(ii) For the C block, for purposes of § 24.709(a)(2) and paragraph (b)(2) of this section, an affiliate with gross revenues of less than $125 million in each of the last two years and total assets of less than $500 million at the time the applicant's short-form application (Form 175) is filed will not be considered an affiliate of an applicant (or licensee) that qualifies as a small business under § 24.720(b)(2) (small business definition) provided the gross revenues and total assets of all such affiliates, when considered on a cumulative basis and aggregated with each other do not exceed the amounts specified in section 24.709(a)(1) (entrepreneurs' block caps).

* * * * *

(n) * * *

(1) A qualifying investor is a person who is (or holds an interest in) a member of the applicant's (or licensee's) control group and whose gross revenues and total assets, when aggregated with those of all other attributable investors and affiliates, do not exceed the gross revenues and total assets limits specified in § 24.709(a) or § 24.715(a), or, in the case of an applicant (or licensee) that is a small business, do not exceed the gross revenues limit specified in paragraph (b) of this section.

* * * * *

(3) For purposes of assessing compliance with the minimum equity requirements of § 24.709(b) (5) and (6) or § 24.715(b) (5) and (6), where such equity interests are not held directly in the applicant, interests held by qualifying investors or qualifying minority and/or woman investors shall be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain.

(4) For purposes of § 24.709 (b)(5)(C) and (b)(6)(C) or § 24.715 (b)(5)(C) and (b)(6)(C), a qualifying investor is a person who is (or holds an interest in) a member of the applicant's (or licensee's) control group and whose gross revenues and total assets do not exceed the gross revenues and total assets limits specified in § 24.709(a) or § 24.715(a).

* * * * *

Appendix—Final Regulatory Flexibility Analysis

Note: This appendix will not appear in the Code of Federal Regulations.

Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. 603, the Commission incorporated an Initial Regulatory Flexibility Analysis (IRFA) into the *Further Notice of Proposed Rule Making.* Written public comments on the IRFA were requested. The Commission's final regulatory flexibility

analysis for this Sixth Report and Order in GN Docket No. 93–253 is as follows:

A. Need for and Purpose of Rules

1. This rule making proceeding was initiated to secure comment on proposals to eliminate all race- and gender-based provisions in our competitive bidding rules for our C block auction only. The proposals adopted herein are also designed to implement Congress' goal of giving small businesses, rural telephone companies, and businesses owned by members of minority groups and women the opportunity to participate in the provision of spectrum-based services in accordance with 47 U.S.C. 309(j)(4)(D).

B. Issues Raised by the Public in Response to the Initial Analysis

2. No comments were submitted specifically in response to the Initial Regulatory Flexibility Analysis.

C. Significant Alternatives Considered

3. The *Further Notice of Proposed Rule Making* in this proceeding offered numerous proposals. All significant alternatives have been addressed in the *Sixth Report and Order*. The majority of the commenters supported the major tenets of the proposed changes and some commenters suggested changes to some of the Commission's proposals. The regulatory burdens we have retained for C block applicants, including small entities, are necessary to carry out our duties under the Communications Act of 1934, as amended, and the Omnibus Budget Reconciliation Act of 1993. For example, although we developed race- and gender-neutral rules, we retained the requirement for applicants claiming status as a business owned by members of minority groups and/or women. This requirement will allow the Commission to submit its report to Congress concerning the participation of minorities and women in the provision of spectrum.

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