

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Parts 1 and 27

[GN Docket No. 12–268, WT Docket Nos. 14–170, 05–211, RM–11395; FCC 15–80]

### Updating Competitive Bidding Rules

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** In this document, the Commission modernizes and reforms its competitive bidding rules to provide greater flexibility to small businesses and rural service providers and bring greater choices to consumers.

**DATES:** Effective November 17, 2015, except for §§ 1.2105(a)(2), 1.2105(a)(2)(iii) through (vi), (viii) through (x), and (xii), 1.2105(c)(3) through (4), 1.2110(j), 1.2110(n), 1.2112(b)(1)(iii) through (vi), 1.2112(b)(2)(iii), (v), and (vii) through (viii), 1.2114(a)(1), and 1.9020(e) which contain new or modified information collection requirements that require approval by the Office of Management and Budget (OMB). The Commission will publish a document in the **Federal Register** announcing the effective date of those sections.

#### FOR FURTHER INFORMATION CONTACT:

Wireless Telecommunications Bureau, Auctions and Spectrum Access Division: Leslie Barnes at (202) 418–0660. For further information concerning the Paperwork Reduction Act information collection requirements contained in this document, contact Cathy Williams at (202) 418–2918, or via the Internet at [PRA@fcc.gov](mailto:PRA@fcc.gov).

**SUPPLEMENTARY INFORMATION:** This is a summary of the Report and Order; Order on Reconsideration of the First Report and Order; Third Order on Reconsideration of the Second Report and Order; Third Report and Order (*Part 1 Report & Order*), RM–11395, GN Docket No. 12–268, WT Docket Nos. 05–211 and 14–170, FCC 15–80, adopted on July 16, 2015 and released on July 21, 2015. This summary also reflects the Commission's *Erratum*, DA 15–959, released on August 25, 2015, to correct typographical errors in the text of the decision and make ministerial conforming amendments to the rules attached as APPENDIX A to the *Part 1 Report and Order* that correct typographical errors and update cross-references within the part 1 rules and cross-references to those part 1 rules in other service-specific rule parts. The complete text of this document is available for public inspection and

copying from 8:00 a.m. to 4:30 p.m. Eastern Time (ET) Monday through Thursday or from 8:00 a.m. to 11:30 a.m. ET on Fridays in the FCC Reference Information Center, 445 12th Street SW., Room CY–A257, Washington, DC 20554. The complete text is available on the Commission's Web site at <http://wireless.fcc.gov>, or by using the search function on the ECFS Web page at <http://www.fcc.gov/cgb/ecfs/>. Alternative formats are available to persons with disabilities by sending an email to [FCC504@fcc.gov](mailto:FCC504@fcc.gov) or by calling the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

### Regulatory Flexibility Analysis

As required by the Regulatory Flexibility Act of 1980, the Commission has prepared a Final Regulatory Flexibility Analysis (FRFA) of the possible significant economic impact on small entities of the policies and rules adopted in this document. The FRFA is set forth in Appendix B of the *Part 1 Report and Order*. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, will send a copy of this *Part 1 Report and Order*, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).

### Paperwork Reduction Act

The *Part 1 Report and Order* contains new and modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. They will be submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the PRA. OMB, the general public, and other Federal agencies will be invited to comment on the new and modified information collection requirements contained in this proceeding.

### Congressional Review Act

The Commission will send a copy of this *Part 1 Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act (CRA), *see* 5 U.S.C. 801(a)(1)(A).

### I. Introduction and Background

1. The *Part 1 Report and Order* modernizes and reforms the Commission's part 1 competitive bidding rules to reflect profound changes in the wireless industry over the last decade. In modernizing the part 1 rules, the Commission provides greater flexibility to smaller companies to build wireless businesses that can spur additional investment in

businesses and bring greater choices to consumers. The Commission also provides—for the first time—a bidding credit to eligible rural service providers to help them compete for spectrum licenses more effectively and to provide consumers in rural areas with competitive offerings. Through these changes, and in furtherance of its statutory obligations, the Commission recommitments and refocuses its efforts to providing meaningful opportunities to *bona fide* small businesses and rural service providers, including businesses owned by members of minority groups and women (collectively designated entities, or DEs) to participate in auctions and in the provision of spectrum-based services, and in providing such opportunities, to prevent unjust enrichment.

2. The reforms the Commission adopts reflect that the wireless market is vastly different than when its rules were first adopted nearly two decades ago—and since they were last comprehensively revised in 2006. Consumer demand is exploding, data usage is growing exponentially, and faster 4G networks enable ever more data services. Although this kind of growth should naturally lead to greater opportunities for businesses of all sizes and types, small businesses and rural service providers have faced significant challenges to entering the market and competing against larger carriers. The Commission's rules have not kept pace with the dynamic changes in the market.

3. When the DE rules were first adopted, the wireless industry was in its infancy. The rules governing a nascent industry, and even rules adopted ten years ago, could not have envisioned the changes that have occurred in the industry. The wireless market has matured significantly since that time, and today more than 98 percent of mobile subscribers are served by the top four national providers. In recent years, even new large-scale wireless providers, backed by well-capitalized corporations have struggled to develop successful business models to compete in today's wireless marketplace. If major corporations cannot enter the market as new providers and deploy facilities-based services to consumers, it is wholly unrealistic to expect small businesses to do so.

4. Therefore, the rules the Commission adopts provide greater flexibility for small businesses to gain an on-ramp into the wireless industry by leveraging leasing and other spectrum use agreements to gain access to capital and operational experience. The Commission anticipates that, with

experience in operations and investment, smaller companies may ultimately engage in more robust competition, including as facilities-based providers in certain markets, which has been—and remains—a goal of the Commission. Likewise, the Commission expects that a new bidding credit targeted toward eligible rural service providers will both encourage their greater participation in future auctions, and increase their provision of wireless broadband services to unserved and underserved communities, including persistent poverty areas. Ensuring that multiple rural service providers have the ability to compete effectively to acquire spectrum licenses is crucial to promoting consumer choice and competition throughout rural America, as well as to fostering innovation in the marketplace.

5. The Commission undertakes these rule revisions with an understanding that the opportunity to acquire low-band spectrum licenses in the upcoming Broadcast Television Spectrum Incentive Auction (Incentive Auction) will not be replicated in the foreseeable future. The growth in consumer demand for mobile broadband has led to a growing need for spectrum. But not all spectrum is created equal. Low-band spectrum has distinct propagation advantages for network deployment over long distances and is likely to be necessary for existing providers that wish to expand their coverage in rural areas, as well as for new providers that wish to provide service in a rural market. The rule changes the Commission adopts specifically address the difficulties that small businesses and rural service providers confront in today's marketplace, including raising capital to compete in an auction, securing the far greater financial resources necessary to support the construction and operation of a wireless broadband network, and developing a successful business model based on current market structures and consumer needs. The Commission anticipates that these changes will allow *bona fide* small businesses and eligible rural service providers a greater opportunity to participate in spectrum auctions and in the provision of wireless services.

6. At the same time, the Commission adopts common sense reforms that recognize that with increased flexibility comes additional responsibility. The Commission remains mindful of its obligation to ensure that the benefits it provides through DE bidding credits flow only to those intended by Congress. The *Part 1 Report and Order* establishes a cap on the total value of bidding credits that the Commission

will award to an eligible applicant in a Commission auction. The Commission also adopts targeted measures to ensure that *bona fide* small businesses and eligible rural service providers are “calling the shots,” by limiting the amount of spectrum capacity that a disclosable interest holder in a DE applicant or licensee may use on a license-by-license basis during the unjust enrichment period and by clarifying the types of agreements that will require particularly close scrutiny during its evaluation of DE eligibility. Taken together, and based on experience gained by administering the Commission's auctions program, the Commission believes these measures will ensure that benefits are provided only to eligible DEs. This rulemaking therefore marks another chapter in the Commission's more than twenty-year effort to achieve a proper balance between the parallel goals of affording DEs reasonable flexibility to obtain the necessary resources to participate in auctions and in the wireless industry while also effectively preventing the unjust enrichment of entities that would be ineligible to receive DE benefits in their own right.

7. In the *Part 1 Report and Order*, the Commission also modifies its competitive bidding processes and compliance rules to increase transparency and efficiency, as well as to protect the integrity of the Commission auction process. Chief among these modifications is its prohibition of joint bidding, with limited exceptions, and related changes the Commission makes to its rules regarding multiple applications by commonly controlled entities and prohibited communications. These changes will still afford opportunities for non-nationwide providers and DEs to pool their resources but will update the Commission's rules to promote more robust competition in future auctions and in today's evolving mobile wireless marketplace, especially when anonymous bidding is utilized. The Commission also amends its rules governing former defaulters to simplify the auction process and minimize administrative and implementation costs for bidders. Taken together, the Commission expects that these rule changes will improve the competitive bidding process for all participants.

8. Accordingly, in the *Part 1 Report and Order*, the Commission: (1) modifies its eligibility requirements for small business benefits, and updates the standardized schedule of small business sizes, including the gross revenues thresholds used to determine eligibility; (2) establishes a new bidding credit for

eligible rural service providers; (3) implements a cap on the overall amount of bidding credits available for eligible entities in any one auction; (4) strengthens and targets attribution rules to prevent the unjust enrichment of ineligible entities; (5) retains and clarifies DE reporting requirements; (6) revises the former defaulter rule, consistent with the waiver the Commission granted in Auction 97; (7) adopts rules prohibiting joint bidding arrangements with limited exceptions, and makes related updates to its rules on prohibited communications; and (8) adopts rules prohibiting the same individual or entity as well as entities that have controlling interests in common from becoming qualified to bid on the basis of more than one short-form application in a specific auction, with a limited exception for certain rural wireless partnerships and individual members of such partnerships.

## II. Eligibility for Bidding Credits

### A. Attribution Rules and Small Business Policies

9. *Background.* The Commission revisits its DE eligibility rules in an effort to address the difficulties that small businesses and rural service providers confront in a dynamic, rapidly evolving wireless marketplace. In establishing the Commission's auction authority, Congress vested the Commission with broad discretion to balance a number of competing objectives. Among these are special provisions to ensure that DEs, including small businesses and rural service providers, have the opportunity to participate in competitive bidding and in the provision of spectrum-based services. 47 U.S.C. 309(j)(3)(B), 309(j)(4)(D). For such purposes, Congress granted the Commission the ability to consider the use of bidding preferences. 47 U.S.C. 309(j)(3)–(4). At the same time, the Congress directed the Commission to prevent unjust enrichment as a result of the methods it employs to issue licenses. 47 U.S.C. 309(j)(3)(C), (4)(E). Congress also directed the Commission, through its auction design, to seek to promote several other objectives, including the following: The development and rapid deployment of new technologies, products, and services without administrative delays; economic opportunity and competition through the dissemination of licenses among a wide variety of applicants, including DEs; recovery for the public of a portion of the value of the public spectrum resource made available for commercial use; and efficient and intensive use of

the electromagnetic spectrum. 47 U.S.C. 309(j)(3)(A)–(D). Over the course of the auctions program, the Commission has periodically re-evaluated its rules to strike the right balance among these competing statutory objectives.

10. As the Commission's principal means of fulfilling its statutory objectives for DEs, it offers auction bidding credits to eligible small businesses whose gross revenues, in combination with those of its "attributable" interest holders, fall below applicable service-specific size limits. 47 CFR 1.2110. (A bidding credit operates as a percentage discount on the winning bid amount of a qualifying small business. See 47 CFR 1.2110(f)(1)). Since 2000, the Commission has applied a "controlling interest" standard in all services when making these attribution determinations for small business eligibility. Under this standard, the Commission measures an applicant's size by attributing to it the gross revenues of the applicant, its controlling interests, its affiliates, and the affiliates of the applicant's controlling interests. In 2006, the Commission added a bright-line test to require a small business applicant or licensee to automatically attribute to itself the gross revenues of any entity with which it has an "attributable material relationship" (AMR). An applicant or licensee has an AMR when it has one or more agreements with any individual entity for the lease (under either spectrum manager or *de facto* transfer leasing arrangements) or resale (including wholesale arrangements) of, on a cumulative basis, more than 25 percent of the spectrum capacity of any individual license held by the applicant or licensee. 47 CFR 1.2110(b)(3)(iv)(A).

11. Since the adoption of the AMR rule, small businesses have asserted that it impedes their ability to compete successfully in the wireless industry. In the *Part 1 Notice of Proposed Rulemaking* (Part 1 NPRM or NPRM), 79 FR 68172, November 14, 2014, the Commission discussed the significant industry changes that have occurred over the past two decades and in particular during the ten years since it last undertook a major update of the DE eligibility requirements. During this time, the marketplace for mobile wireless services has evolved significantly, both in terms of consumer demand for services and in market structure. According to UBS Investment Research, the total estimated number of wireless customer connections in the United States reached 376.2 million at the end of 1Q 2015, up from 352.5 million at the end of 2014, an increase of 23.7 million connections. The

deployment of next generation networks has contributed to an increase of more than 200,000 percent in the number of long-term evolution (LTE) subscribers alone, from approximately 70,000 in 2010 to over 140 million in 2014. Consumers today expect to be able to use mobile wireless services—especially mobile broadband—at home, at work, and while on the go. The marketplace has seen the rapid and widespread adoption of smartphones and tablet computers and an increase in the use of mobile applications, as well as in the deployment of high-speed 3G and 4G technologies, the combination of which has led to more intensive use of mobile networks. For instance, according to providers responding to the most recent CTIA survey, active smartphones topped 208 million in 2014, up 19 percent from 175 million in 2013, and 35.4 million active wireless-enabled tablets and laptops were reported (up 40.5 percent year-over-year) in the same time period. Consequently, mobile data traffic has grown dramatically, increasing from 388 billion MB in 2010 to 4.06 trillion megabytes (MB) at the end of 2014, which represents a greater than ten times increase in the volume of data that was reported just four years ago. Despite technological improvements that have led to more efficient use of existing spectrum and increased investment in infrastructure, this skyrocketing consumer demand for high-speed data has increased providers' need for spectrum at an unprecedented rate.

12. Additionally, the wireless market structure continues to evolve. While the mobile wireless marketplace once consisted of six near-nationwide providers and a substantial number of regional and small providers, over the last ten years there has been consolidation, leaving four nationwide providers and fewer small and regional mobile wireless service providers. More than 98 percent of mobile subscribers are served by the top four providers, which combined serve more than 375 million consumers. This concentration of mobile service providers contributes to the difficulties experienced by small businesses in the wireless marketplace. Moreover, the costs of spectrum and network deployment—especially for small businesses—have increased in the last 20 years. These market realities require DEs to have increased flexibility to gain access to capital in order to acquire licenses and benefit from the different opportunities available to participate in the provision of spectrum-based services. Interested parties therefore urged the Commission to re-

examine its rules and policies to provide small businesses with more operational flexibility to enable them to grow their operations and to develop new and innovative products and services. As noted in the *NPRM*, the SBA's Office of Advocacy raised similar concerns.

13. To address these concerns and changing conditions, the Commission sought comment in the *Part 1 NPRM* on whether to eliminate the AMR rule and revisit the policy that has required that small businesses seeking bidding credits to directly provide facilities-based service for the benefit of the public with each of their licenses. The Commission also sought comment on standards for evaluating small business eligibility, and on revising the rules for spectrum manager leasing by DE licensees. During the initial comment cycle, several parties suggested alternate approaches to its proposals, others offered additional suggestions, and some raised questions beyond those covered in the *NPRM*. Accordingly, to assure a more complete record, the Commission released a public notice in April 2015 seeking additional comment on these proposals, suggestions, and questions, as well as on other associated issues.

14. In the *Part 1 Public Notice* (Part 1 PN), 80 FR 22690, April 23, 2015, the Commission acknowledged that it had received comments both in favor of and against the Commission's proposed repeal of the AMR rule, and it sought further comment on various methods of modifying its DE eligibility rules. The Commission asked, for example, whether, instead of repealing the AMR rule, the Commission should retain it, in either its existing or a modified form. The Commission sought additional comment on whether it should continue to require DE lessors to provide primarily facilities-based service. The Commission asked whether it should distinguish between types of secondary market arrangements (such as wholesale and resale agreements) entered into by DEs. The Commission sought comment on whether the rules that it applies to secondary market arrangements between DEs and nationwide wireless providers should be different from the ones that it applies to arrangements between DEs and other lessees. The Commission solicited input on whether to have any limit on the amount of spectrum that a DE would be permitted to lease to another DE or a rural carrier. And, among other possibilities, the Commission sought comment on whether it should reconsider a bright-line test for determining who is considered a controlling investor in a DE.

15. Based on the entirety of the record, including the comments filed both in the initial comment cycle and in response to the *Part 1 PN*, the Commission believes that the revised rules it adopts will increase the ability of small businesses to become spectrum licensees. Together, these changes update its eligibility rules to take into account current market realities, namely that DEs need increased flexibility to gain access to capital and, in turn, have greater opportunities to participate in the provision of spectrum-based services. The *Part 1 Report and Order* addresses the specific obstacles these participants face, including raising the capital necessary to compete in an auction; finding sufficient financial resources to support network construction and business operations; and developing a business model based on market needs. It responds to concerns voiced by licensees and potential licensees that the Commission's DE rules have not kept pace with today's environment. And, of equal importance, it updates its rules to ensure that only *bona fide* small businesses qualify for and benefit from the designated entity program. With these rules, the Commission allows small businesses to take advantage of opportunities available under its rules to utilize their spectrum capacity and gain access to capital similar to those afforded to larger licensees.

16. The record demonstrates that, while commenters are divided on the best approach to implement its DE program, they are nonetheless in agreement that it is time for the Commission to recalibrate its rules to achieve an improved statutory balance. The fundamental changes in the market coupled with the evolution of DE participation in the Commission's auctions since 2006, have led it to conclude that it is time to revise its rules and revisit their statutory underpinnings. First, the Commission eliminates the AMR rule. Second, the Commission adopts a two-pronged test to determine eligibility for the award and retention of small business benefits, largely as proposed in the *NPRM*. This test retains the foundation of the controlling interest standard, including the attribution and affiliation requirements of 47 CFR 1.2110, but applies these requirements in a more precise manner, based upon a careful review of all of a DE's relevant relationships and agreements. Under this test, the Commission will apply existing rules requiring attribution of the controlling interests in, and the affiliates of, a small business venture to

determine whether the applicant: (1) Meets the applicable small business size standard, and (2) retains control over the spectrum associated with the individual licenses for which it seeks benefits. Pursuant to this more tailored review, eligibility for small business benefits will be determined, as the Commission proposed in the *NPRM*, on a license-by-license basis to ensure that the small business makes independent decisions about its business operations.

17. To better ensure that only eligible entities enjoy the valuable bidding credits that the Commission awards DEs, it adopts an additional attribution requirement under which during the five-year unjust enrichment period, the gross revenues (or the subscribers, in the case of a rural service provider) of a disclosable interest holder in a DE applicant or licensee will become attributable, on a license-by-license basis, for any license acquired with a bidding credit and still subject to unjust enrichment requirements of which the disclosable interest holder uses (or has an agreement to use) more than 25 percent of the spectrum capacity. Lastly, the Commission relies on the language of section 309(j), as opposed to the Commission's prior interpretation of its legislative history, to conclude that there is no statutory requirement for DEs to provide facilities-based service directly to the public with each license they hold. Together, these changes will permit DEs the same flexibility as other licensees under its rules to avail themselves of a wider range of the opportunities to participate in the provision of spectrum-based services. For these same reasons, the Commission modifies the language of 47 CFR 1.9020 as it proposed doing to make clear that DE lessors may fully engage in spectrum manager leasing under the same *de facto* control standard as non-DE lessors.

#### i. AMR Rule

18. The Commission eliminates the AMR rule, which required a *per se* bright-line attribution of revenues to a DE applicant, even in circumstances where there may have been no control of the DE's overall operations or the DE's spectrum by the spectrum user. Instead, the Commission employs a totality-of-the-circumstances analysis to evaluate an entity's eligibility for, and retention of, small business benefits. Further, the Commission adds a more targeted, license-by-license rule, to ensure that DE benefits do not flow to ineligible entities.

19. Throughout the course of this proceeding, the Commission has received comments that variously advocate keeping, eliminating, or

modifying the AMR rule. Many commenters, however, agree with the Commission's proposal to repeal the AMR rule, stating that repeal of the rule will afford small businesses the flexibility needed to obtain the capital necessary to participate in the provision of spectrum-based services. These commenters note that the proposal to adopt a two-pronged standard for evaluating the eligibility for small business benefits relies on well-established Commission standards for evaluating *de jure* and *de facto* control and can be coupled with stronger unjust enrichment provisions to better prevent the abuse of small business benefits. In asking the Commission to eliminate the AMR rule, ARC, for example, indicates that a return to a case-by-case analysis of eligibility using the Commission's control and affiliation standards will align the Commission's policy with marketplace realities. ARC notes that by allowing relationships between DEs and "large, successful entities, including mobile wireless incumbents," DEs will be able to acquire the capital needed to win licenses and "participate in the provision of spectrum-based services." According to ARC, DEs can have such relationships without relinquishing control of their businesses. Similarly, Tristar maintains that the Commission should "allow DEs to engage in any activities with its licenses that are available to non-DEs, without limit," suggesting that a limitation is contrary to the "plain language" of section 309(j). CCA also supports eliminating the AMR rule in favor of *de jure* and *de facto* control standards but cautions that repeal of the rule must be accompanied by safeguards to protect against abuse. In addition, USCC argues that setting any absolute limit on the amount of spectrum that a DE may lease or resell will continue to have negative consequences.

20. Other parties oppose the repeal of the AMR rule. T-Mobile argues that doing so will increase the likelihood that DE benefits could flow to ineligible entities or spectrum "speculators" in contravention of Congressional intent, and others express similar concerns. Further, some commenters argue that the AMR rule should not only be retained but strengthened. For example, T-Mobile and C Spire advocate that the Commission prohibit a DE from leasing more than 25 percent of its spectrum in the aggregate across one or more licenses. C Spire also argues that, if the AMR rule is retained, a DE should not be allowed to lease more than 25 percent of its total spectrum to any one wireless operator.

21. Although the Commission acknowledges the concerns of parties who urge the Commission to retain or strengthen the AMR rule, the Commission concludes that its collective rule revisions, including the adoption of a more targeted attribution rule that limits the ability of a disclosable interest holder in a DE to use spectrum awarded with a bidding credit decreases the likelihood that DE benefits will flow to ineligible entities in contravention of Congress's intent. Moreover, because the Commission's revised approach utilizes its existing controlling interest and affiliation standards to determine what revenues are attributable to an applicant based upon a rigorous review of all relevant relationships and agreements on a license-by-license basis, the Commission concludes that it no longer needs a bright-line, across-the-board, attribution rule to ensure that a small business makes independent decisions about its business operations. Based on the Commission's auction experience, and in light of the totality of the record in this proceeding, it is persuaded that the AMR rule is overbroad.

22. Eliminating the AMR rule, and replacing it with a more targeted license-by-license attribution rule, will allow small businesses greater flexibility to engage in business ventures that include increased forms of leasing and other spectrum use arrangements, while still having the ability to attract capital investment, even from large providers. DEs, like other licensees, will enjoy greater flexibility to adopt more individualized business models for each license they hold—some that include DE benefits and potentially some that do not. The Commission anticipates that small businesses will, as a result, gain greater access to capital, and in turn, increase their likelihood of participating in auctions and in the provision of spectrum-based services. Under the license-by-license approach for a DE's acquisition and retention of bidding credits that the Commission adopts, a DE will not necessarily lose its eligibility for all current and future small business benefits solely because of a decision associated with any particular license.

23. Although the Commission agrees that its rules must prevent ineligible entities from thwarting the spirit of the DE program and benefitting from bidding credits intended for small businesses, it disagrees that the continuation of the AMR rule achieves that goal. Rather than employing the overly broad attribution standard that has been applied since the adoption of the AMR rule, the Commission

concludes that it can balance its competing statutory objectives more effectively and at the same time better empower small businesses to acquire spectrum and operate in today's wireless marketplace. The Commission adopted the AMR rule in 2006 with the goal of preventing unjust enrichment to ineligible entities and ensuring that DEs had opportunities to become independent, facilities-based service providers with each of their licenses. Thus, the AMR rule, in contrast with the other provisions of the Commission's DE eligibility rules, established a bright-line test for triggering the attribution of revenues where a lease was for more than 25 percent of the spectrum capacity of any individual license, regardless of whether the DE retained control of its overall operations or its spectrum. The Commission was concerned about a lessee's "potential to significantly influence" the DE applicant. It also noted "the potential" for the relationship to impede a DE's "ability to become a facilities-based provider," and sought to avoid a relationship that was "ripe for abuse." The bright-line application of the AMR rule was therefore a tool that the Commission chose to implement in its effort to balance its statutory objectives. Yet commenters in this proceeding have argued that, based on experience, the Commission's current rules, which include the AMR rule, may not be effective in limiting the award of bidding credits to *bona fide* small businesses.

24. The Commission further notes that the adoption of the AMR rule was a departure from its earlier, more comprehensive analysis of how a DE's relationships might lead to attribution of gross revenues, as well as its initial approach to evaluating how much leasing was permissible for DEs at the outset of its secondary market policies. Over the last ten years, industry developments have demonstrated that this regulatory adjustment to prevent unjust enrichment, may have operated to the detriment of the Commission's other equally important statutory objectives, and may not be achieving the goals for which it was adopted. By re-examining the statutory underpinnings of its rules and policies and refining its eligibility rules to reflect current market realities, including the niche roles DEs may play in a mature wireless industry, the Commission can better promote the statutory goal of disseminating licenses among a wide variety of applicants, including small businesses, while also following its competing statutory obligations. Moreover, the revised rules

the Commission adopts here refocuses its efforts to thwart speculation by narrowly tailoring the attribution of revenues of those that control the DE's business, control the DE's spectrum, or have an interest in the DE and an agreement to use a spectrum license.

25. Based on the Commission's most recent auction experience, the changes in the wireless marketplace, and the comments and other submissions filed in the record, the Commission agrees with those commenters that contend that the Commission cannot realistically continue to expect DEs to compete successfully at auction or in the marketplace against their larger counterparts while, unlike those competitors, being subject to an across the board, all or nothing rule that limits their ability to make rational, business-based decisions on how best to utilize their licensed spectrum capacity. Absent additional flexibility to gain access to capital through increased secondary market opportunities, on terms similar to their better-financed and more-experienced competitors, it is the Commission's predictive judgment that DEs will not be able to build viable, competitive wireless businesses. The decisions the Commission reaches collectively recognize that permitting DEs to make independent business judgments on how to best provide service—either on their own, directly or indirectly, or in connection with others—will better ensure that DEs themselves are the driving forces of their business operations. Thus, provided that a DE remains fully in control of its primary business and complies with all of the provisions of 47 CFR 1.2110, as amended, the Commission concludes that the degree to which a small business engages in a spectrum use agreement on any particular license need not, without more, presumptively require the bright-line attribution of revenues of the user to the DE in all circumstances.

26. In addition, the Commission relies on the express language of section 309(j) to conclude that there is no statutory requirement for DEs to directly provide facilities-based service to the public with each license they hold. As the Commission noted in the *NPRM*, that policy arose from the Commission's analysis of a part of the legislative history of section 309(j) that explained that anti-trafficking restrictions and unjust enrichment payment obligations were needed to deter "participation in the licensing process by those who have no intention of offering service to the public." As the Commission recognized in the *NPRM*, there are other more narrowly tailored methods that it can

adopt, and do in fact implement, to prevent unjust enrichment and accomplish that same goal. More important, as the Commission also noted in the *NPRM*, “[i]n interpreting statutes, “[a]nalysis of the statutory text, aided by established principles of interpretation, controls.” Section 309(j) does not refer to any requirement of “offering service to the public,” much less the provision of facilities-based telecommunications services directly to the public. Nor does it specify what measures the Commission must implement to address unjust enrichment concerns. Rather, it leaves to the Commission the design of auction rules to include those “as may be necessary.” Pursuant to the specific language of section 309(j), the Commission has broad discretion to balance many factors.

27. In this regard, the Commission disagrees with the concerns of CAGW and others regarding the retention of the prior policy of direct facilities-based service to the public by licensees that were awarded bidding credits. Specifically, CAGW argues that by “allowing non-facilities-based entities to qualify for the DE discounts, smaller facilities-based carriers will find it more difficult to obtain the necessary spectrum required to expand their coverage and service.” To the contrary, the Commission finds that in light of the combined rule modifications it adopted, a singular focus on requiring DEs to provide primarily facilities-based service directly to the public with each and every license they hold is not necessary to prevent unjust enrichment, operates as an impediment to the competing statutory goals, and hinders the ability of small businesses to participate effectively in the provision of spectrum-based services.

28. As the Commission explains, although it eliminates the AMR rule, it emphasizes that it fully preserves its ability to assess whether the terms of any particular spectrum use agreement with a DE, or any other aspect of a relationship between a DE and another party, requires the attribution of that party’s gross revenues to the DE generally or on a license-by-license basis under 47 CFR 1.2110, as amended. Contrary to a bright-line application of the AMR rule, this approach should better reflect the nature of the relationship between DEs and the parties with which they are securing financing and/or engaging in spectrum use agreements. The AMR rule was overly broad insofar as it foreclosed DEs from the business flexibility afforded to other licensees and yet was also overly narrow insofar as it did not foreclose

other possible misuses of the bidding credits awarded DEs. Accordingly, the Commission revises its rules to determine more precisely what entities have the ability to dictate the DE’s business and spectrum use decisions such that their gross revenues should be attributed to the DE applicant for purposes of determining its eligibility for and retention of small business benefits.

29. *Two-Pronged Standard for Evaluating Eligibility for Small Business Benefits.* To assess more accurately an applicant’s size for determining eligibility for DE benefits, the Commission adopts a two-pronged standard. Under this test, the Commission will use its existing controlling interest and affiliation rules to determine whether an applicant (or licensee): (1) Meets the applicable small business size standard, and (2) retains control over the spectrum associated with the licenses for which it seeks small business benefits.

30. Under the first prong of the standard, the Commission will apply its existing controlling interest and affiliation rules to determine the gross revenues attributable to a DE. This analysis must determine those that have *de jure* or *de facto* control of, or are affiliated with, the applicant’s overall business venture. 47 CFR 1.2110. *De jure* control is typically evidenced by the holding of greater than 50 percent of the voting stock of a corporation or, in the case of a partnership, general partnership interests. 47 CFR 1.2110(c). *De facto* control is assessed on a case-by-case basis to determine whether the licensee has actual control over its business. 47 CFR 1.2110(c). Pursuant to 47 CFR 1.2110, control and affiliation may also arise through, among other things, ownership interests, voting interests, management and other operating agreements, or the terms of any other types of agreements—including spectrum lease agreements—that independently or together create a controlling, or potentially controlling, interest in the DE’s business as a whole. *See, e.g.*, 47 CFR 1.2110(c)(5)(vii) through (x). (As discussed below, except under the limited provisions provided for spectrum manager lessors, the decision to discontinue the Commission’s policy requiring DE licensees to operate as primarily facilities-based providers of service directly to the public does not alter the rules that require the Commission to consider whether facilities sharing and other agreements confer control of or create affiliation with the applicant). By separating the issue of who controls, or has the potential to control, the DE in

regard to its overall business from the inquiry into who uses or controls the license(s) acquired with DE benefits for any particular license, the Commission can more accurately determine the extent to which these benefits are unjustly enriching an ineligible entity. In this way, the Commission can continue to fulfill its statutory objectives by facilitating the ability of small businesses to acquire licenses and participate in the provision of spectrum-based services to the public, while also promoting its competing statutory objectives.

31. This reformed approach received the endorsement of most commenters specifically addressing the two-pronged standard. Under this approach, the Commission will rely on its existing controlling interest and affiliation standards to determine which revenues are attributable to an applicant based upon a careful review of all of its relevant relationships and agreements to ensure that small businesses make independent decisions about their business operations. *See, e.g.*, 47 CFR 1.2110(c)(5)(vii) through (x). (The Commission notes, for example, that standard passive investor protections generally do not give cause for concern but that provisions that limit the DE’s use, deployment, operation, or transfer of its spectrum license(s) or business may warrant closer scrutiny). The Commission’s existing attribution rules examine the extent to which a small business may combine its efforts, property, money, skill, and knowledge with another party. Further, where there is an agreement to share profits and losses in proportion to each party’s contribution to the business operation, the existing rules allow it to consider this in determining whether to attribute the revenues of parties to that agreement to the applicant. The rules the Commission adopts, taken together, will continue to apply a totality-of-the-circumstances approach to allow it to evaluate where an agreement or relationship warrants the attribution of revenues for the purposes of evaluating eligibility. This approach will better enable the Commission to evaluate the various investors in a DE, both controlling and non-controlling, to ensure that a DE remains in command of its business. The Commission emphasizes that this review process will therefore provide it the ability to determine, pursuant to its existing rules, whether an entity with a non-controlling interest in more than one DE has created a relationship of affiliation between applicants for bidding credits such that the revenues of one need to be

attributable to the other. The Commission will also evaluate whether participation of a non-controlling interest holder in more than one applicant renders it an affiliate of both (or multiple) applicants such that the revenues of the non-controlling interest holder (as well as those of its controlling interests, its affiliates, and the affiliates of its controlling interests) should be considered attributable, with respect to either, both, or multiple applicants for purposes of determining eligibility for bidding credits on any particular license or as a general matter. *See, e.g.*, 47 CFR 1.2110(c)(5)(vii)–(x). For instance, where a party has a non-controlling interest in more than one DE applicant or licensee, the Commission will carefully review its investments in, and agreements with, the applicants to evaluate overlapping interests with respect to issues like the use of licensed spectrum capacity, jointly used facilities, shared office space, managerial authority, operational contracts, as well as how the parties may generally be combining their efforts, capital, skill and knowledge. Thus, whether DEs are affiliated with each other or with a common investor, for example, could be informed by the nature of their relationships with that common investor.

32. As in the past, the Commission will carefully review an applicant's claim of eligibility for bidding credits on a case-by-case basis. In so doing, the Commission will examine the facts in the context of both the specific eligibility standards set forth in its rules, and the totality of the circumstances and facts presented by the applicant. While no two cases are the same and each case must be judged on its own facts, the Commission emphasizes that some management, loan, and organizational documents, such as limited liability company agreements, and other types of operational agreements could raise concerns that warrant particular scrutiny as part of its application review. These include agreements and arrangements in which a disclosable interest holder, lender, spectrum lessee, or other interest holder has a role in the day-to-day operations and business of a DE applicant or licensee, as well as provisions that would, taken together or separately, limit the DE's use, deployment, operation, or transfer of its license(s) or business, extending the role of these entities beyond the standard and typical role of a passive investor. While the Commission will look at the totality of the circumstances in each particular case, the Commission also continues to

“emphasize that its concerns are greatly increased when a single entity provides most of the capital and management services and is the beneficiary of the investor protections.”

33. If an entity qualifies as a DE under the first prong, the Commission will evaluate whether it is eligible for benefits on a license-by-license basis under the second prong. Under the second prong, the Commission will evaluate whether a small business is entitled to benefits based on whether it will maintain *de jure* and *de facto* control of the particular license at issue under the terms of any use agreements for each license. For instance, if a DE has a network sharing agreement on a particular license that calls into question whether, under affiliation rules, the user's revenues should be attributed to the DE for that particular license, rather than for its overall business operations, the Commission may conclude that the DE is ineligible to acquire or retain benefits with respect to that particular license. Under this more targeted review, an entity will not necessarily lose its eligibility for all current and future small business benefits, as it did under the application of the AMR rule, solely because of a decision associated with any particular license. Instead, while a small business will lose DE eligibility (and possibly incur unjust enrichment obligations) if it relinquishes *de jure* or *de facto* control of any particular license for which it claimed benefits, the DE could maintain its eligibility for benefits on its other existing and future licenses so long as the DE continues to meet the relevant small business size standard. Thus, an applicant need not be eligible for small business benefits on each of the spectrum licenses it holds in order to demonstrate its overall eligibility for such benefits.

34. As the Commission emphasized in the *NPRM*, under the new standard, small businesses, like all Commission licensees, will remain subject to section 310(d) of the Communications Act, as well as its rules prohibiting unauthorized transfers of control of license authorizations. Accordingly, if a DE executes a spectrum use agreement that does not comply with the Commission's relevant standard of *de facto* control, it will be subject to unjust enrichment obligations for the benefits associated with that particular license, as well as the penalties associated with any violation of section 310(d) of the Communications Act and related regulations. *See* 47 CFR 1.9010 (*de facto* control for spectrum leasing arrangements); *see also Intermountain Microwave*, 12 FCC 2d 559, 559–60

(1963) (*Intermountain Microwave*) (*de facto* control for non-leasing situations); 47 CFR 1.2110(c) (*de facto* control for DEs); *Part 1 Fifth Report and Order*, 65 FR 52323, August 29, 2000 (incorporating the *Intermountain Microwave* principles of control into 47 CFR 1.2110 of the Commission's rules. If that spectrum use agreement (either alone or in combination with the DE controlling interest and attribution rules), goes so far as to confer control of the DE's overall business, the gross revenues of the additional interest holders will be attributed to the DE, which could render the DE ineligible for all current and future small business benefits on all licenses. Except where the leasing standard of *de facto* control applies under 47 CFR 1.9010 and 1.9020 of the secondary market rules, the criteria of *Intermountain Microwave* and *Ellis Thompson* continue to apply to every Commission licensee for purposes of assessing whether it can demonstrate that it retains *de facto* control of its business venture and spectrum license.

35. *Standard for Evaluating DE Leasing*. For the same policy reasons the Commission also adopts its proposal to apply to DE spectrum manager lessors the same *de facto* control standard that it applies to non-DE spectrum manager lessors, and modifies 47 CFR 1.9020 of its rules accordingly.

36. The limited comment the Commission received on this issue was generally supportive of adopting the rule modifications proposed in the *NPRM*. The DE Coalition, USCC, and WISPA all support the proposed modifications of the rules to clarify that DE lessors may fully engage in spectrum leasing under the same *de facto* control standard and to the same extent as non-DE lessors under a spectrum manager lease. WISPA further states that a uniform standard makes the application process for spectrum leases more predictable, eliminates the need for special filings, and reduces administrative burdens. WISPA also maintains that the proposal will enable small businesses to enter into leasing arrangements that are well understood and utilized within the marketplace, and will ensure that small business licensees retain control over certain obligations, preventing any sham arrangements or unjust enrichment for non-small business entities. Blooston Rural, however, argues that, while some relaxation of the leasing restrictions is in order, its *NPRM* proposals will invite abuse of the bidding credit program by allowing the largest carriers to invest in a DE, and then use spectrum leases to gain full access to spectrum obtained with the small business benefits.



37. In order to allow DEs the ability to make independent business judgments about how to best utilize the spectrum capacity of each of their licenses, the Commission revises 47 CFR 1.9020(d)(4) of its rules to remove the conflicting reference to the control standard of 47 CFR 1.2110, as it proposed to do in the *NPRM*. The Commission agrees with WISPA that this modification will enable small businesses to enter into leasing arrangements that are well understood and utilized within the marketplace, and ensure that small business licensees retain sufficient control of their overall operations and regulatory obligations to safeguard the award of bidding credits.

38. Pursuant to this modification, a DE will, like any other spectrum manager lessor, be considered to have *de facto* control over the portion of a spectrum license for which it, as lessor, has a spectrum manager lease provided that it: (1) Maintains an active, ongoing oversight role in ensuring that the lessee complies with Commission rules and policies; (2) retains responsibility for all interactions with the Commission required under the license related to the use of the leased spectrum; and (3) remains primarily and directly accountable to the Commission for any lessee violation of these policies and rules. (A DE's ongoing control over any non-leased portion of a license for which it has benefits is evaluated according to 47 CFR 1.2110 and the criteria set forth in *Intermountain Microwave* and *Ellis Thompson*). The Commission stresses however, that it will not allow spectrum manager leases of licenses subject to DE benefits to automatically go into effect under the Commission's 21-day processing period. Instead, staff will carefully review DEs' requests to engage in spectrum manager leasing, and review such requests as necessary to determine whether the terms of the spectrum management lease agreement include provisions that confer *de jure* or *de facto* control of the DE lessor's business venture. These rule modifications will allow a DE to participate in the secondary market under the same control standard as other wireless licensees.

39. The Commission nonetheless recognizes Blooston Rural's concerns and agrees that in relaxing its rules with respect to leasing generally, the Commission must counterbalance such modifications to ensure that ineligible entities cannot invest in a DE and then use spectrum leases to gain full access to spectrum obtained with the small business benefits. Accordingly, to address the scenario raised by Blooston Rural, the Commission adopts a specific

attribution rule that will serve to limit the amount of spectrum capacity a disclosable interest holder in a DE applicant or licensee will be able to utilize during the five-year unjust enrichment period under any use agreement.

#### ii. Attribution Rules

40. In the *Part 1 PN*, the Commission sought comment on various recommendations from commenters for modifying its attribution rules to better ensure that only *bona fide* small businesses qualify for bidding credits. These recommendations include, among other things, modifications to the applicable attribution, controlling interest or affiliation rule to alter the types of equity arrangements available to a DE applicant by (a) attributing to a DE the revenues and spectrum of any entity holding certain interests of more than ten percent, (b) restricting certain large carriers or companies from providing a certain amount of capital or otherwise exercising control over a DE, and (c) adopting a rebuttable presumption that equity interest of 50 percent or more represents *de facto* control of the DE. The Commission also invited comment on other suggestions by commenters regarding DE eligibility for benefits, such as: (1) Adopting a 25 percent minimum equity requirement for DEs; (2) limiting the total dollar amount of DE benefits that any DE (or group of affiliated DEs) may claim during any given auction, based on particular criteria; (3) limiting the overall amount that a small business can bid based on a revenues or population-based metric; (4) narrowing the scope of the affiliation rules to exclude individuals and entities whose revenues are currently attributable to a DE, such as directors and certain family members; and (5) clarifying the affiliation rules to prevent rural telephone companies from losing DE status because they hold a fractional interest in a cellular partnership if the rural telephone company has no ability to control the partnership's day-to-day operations and/or strategy.

41. After review of the comments submitted in response to its inquiry, the Commission adopts a new attribution rule to establish a limit on how much spectrum capacity a disclosable interest holder in a DE applicant or licensee (which for the purposes of this rule the Commission defines as any party holding ten percent or greater interest of any kind in the DE, including but not limited to, a ten percent or greater interest in any class of stock, warrants, options or debt securities in the applicant or licensee) can use in any

particular license awarded with DE benefits, and reject the remaining suggestions.

42. *Limitation on Spectrum Use by a Disclosable Interest Holder in a DE*. To ensure that DE benefits are awarded to only eligible, *bona fide* small businesses, the Commission adopts a new attribution rule that will serve as an additional safeguard to prevent the circumvention of the Commission's rules during the unjust enrichment period for any license awarded with bidding credits. Specifically, the Commission adopts an additional attribution requirement under which, during the five-year unjust enrichment period, the gross revenues (or the subscribers in the case of a rural service provider) of a disclosable interest holder in a DE applicant or licensee will become attributable, on a license-by-license basis, for any license in which the disclosable interest holder uses, in any manner, more than 25 percent of the spectrum capacity of a DE's license awarded with bidding credits.

43. A number of commenters suggested that the Commission restrict larger nationwide and regional carriers, entities with a certain number of end-user customers, and/or other large companies from providing a material portion of the total capitalization of DE applicants or otherwise exercising control over such applicants as part of the definition of material relationship. In responding to its inquiry on this matter, several commenters offer various suggestions on whether and to what extent the Commission should implement such a restriction. Blooston Rural, for instance, supports a restriction on leasing spectrum to nationwide carriers that have invested in the applicant/licensee, along with large regional carriers and other large companies. Tristar argues that some restriction on DE financing arrangements involving other participants and incumbent service providers is merited. In support of a new restriction, AT&T reasons that, given the capital costs for deploying a service, the cost of the licenses should be a small fraction of a DE's operational fund; thus, if a DE has the financial wherewithal to compete in urban markets and fulfill the Commission's performance benchmarks, "it seems unlikely that the [DE] is the type of business that any rational small business program is meant to assist." At the same time, AT&T/Rural Carriers caution that any new restrictions should include an exception for arms-length commercial loans to bidding entities.

44. Other commenters also opine that a restriction should also be imposed on



entities utilizing the rural service provider bidding credit. Among these commenters, Blooston Rural supports the adoption of some restriction that would limit the ability of a DE to lease spectrum that is acquired with the rural service provider bidding credit to an investor, provided that the Commission carve out an exception for an investor that is “a rural telephone company or rural telco subsidiary/affiliate with wireless or wireline presence in the original license area (as established by its existing ETC designation), or to an independent wireless ETC that is certified in the original license area and that has fewer than 100,000 subscribers.” RWA/NTCA agrees with Blooston Rural’s restriction, including the exception, but would also apply the restriction to nationwide wireless carriers who are not investors of the DE and impose the restriction for the initial license term.

45. Based on the common theme in commenters’ proposals, the Commission incorporates into 47 CFR 1.2110 a new attribution rule under which, during the five-year unjust enrichment period, the gross revenues (or the subscribers in the case of a rural service provider) of a disclosable interest holder in a DE applicant or licensee will become attributable, on a license-by-license basis, for any license in which the disclosable interest holder uses, in any manner, more than 25 percent of the spectrum capacity of a DE’s license awarded with bidding credits. For the purposes of this rule, the Commission defines a disclosable interest holder as any party holding a ten percent or greater interest of any kind in the DE, including, but not limited to, a ten percent or greater interest in any class of stock, warrants, options, or debt securities in the applicant or licensee. Despite receiving a number of the alternative proposals from commenters, the Commission declines to specifically restrict financing or agreements with large or regional carriers, because doing so may impede a DE’s ability to raise capital and gain operational experience. Instead, the rule the Commission adopts should safeguard the award of valuable bidding credits by carefully targeting the concerns of commenters, which generally seek to ensure ineligible entities don’t improperly benefit from DE bidding credits by gaining full unrestricted access to use the spectrum license.

46. For DEs that acquire licenses with the new rural service provider bidding credit, however, the Commission will include an exception to this new attribution rule, similar to that suggested by Blooston Rural, to apply to

any disclosable interest holder that would independently qualify for a rural service provider bidding credit.

Pursuant to this exception, a rural service provider may have spectrum license use agreements with a disclosable interest holder, without having to attribute the disclosable interest holder’s subscribers, so long as (a) the disclosable interest holder is independently eligible for a rural service provider credit and (b) the use agreement is otherwise permissible under its existing rules. This exception should ensure that rural service providers can work in concert to provide service to rural areas.

47. In adopting this new attribution rule, the Commission disagrees with commenters who oppose the adoption of limitations on the ability for an investor to engage in certain transactions with a designated entity concerning licenses acquired with bidding credits. Specifically, Council Tree argues that such restrictions would contravene Congressional intent and impede the ability of DEs to acquire the necessary capital to compete with incumbents who already have a distinct operational advantage in the wireless marketplace. Council Tree also maintains that “the adoption of any of these [Part 1 PN] proposals to restrict the size and impact of DEs in spectrum auctions [serves] the *private* financial interests of the largest, most entrenched incumbents.” CCA voices concern that the limitations would be too restrictive and create significant disincentives to investment. USCC asserts generally that most of the proposals violate the principles of simplicity and avoiding different classes of licenses—and begs the question of why the Commission does not use *Intermountain Microwave*—as the ultimate test. Moreover, USCC opines that “when individual, properly constituted DEs win auctions, that is not an abuse of the rules; [r]ather, it carries their intent.”

48. While the Commission recognizes the concerns echoed by various commenters that investor use limitations could restrict the ability for DEs raise capital, the Commission concludes that this carefully targeted rule, applied on a license-by-license basis during the five-year unjust enrichment period, is necessary to fulfill its responsibility of ensuring that DE benefits flow only to those intended by Congress. The Commission therefore adopts this rule to balance the increased flexibility the Commission has granted to DEs to raise capital against its obligation to prevent investors from benefitting from bidding credits indirectly through their use of a DE’s

discounted license. The rule is also consistent with its two-pronged analysis of small business eligibility, allowing a DE to monetize individual licenses without losing its overall eligibility, while ensuring that the DE remains independent and in control of its business as a whole. Moreover, the Commission disagrees with USCC that such a rule is unnecessary because the application of the criteria in *Intermountain Microwave* sufficiently mitigates the additional risks of unjust enrichment and undue influence that may arise after the elimination of the AMR rule and relaxation of the Commission’s facilities-based service requirements. Rather, by establishing this targeted rule to focus only on the intersection of a disclosable interest in a DE and the disclosable interest holder’s use of 25 percent or more of the spectrum capacity of a license awarded with DE benefits, the Commission can alleviate commenters’ concerns regarding unjust enrichment and, at the same time, provide DEs with more transparency and predictability in the auctions and licensing process.

49. Because the Commission is implementing this 25 percent use limit for disclosable interest holders in a DE, the Commission will not incorporate into its rules any of the alternative attribution restrictions for which it sought comment. For instance, the Commission will not modify its rules to require a DE to attribute the revenues and spectrum of any entity that holds more than a ten percent interest in any type of DE and will instead adopt the more targeted rule, evaluating on a license-by-license basis. Most commenters generally oppose the proposal that would attribute to a DE the revenues and spectrum of any spectrum holding entity that holds an interest, direct or indirect, equity or non-equity of more than ten percent. Some of these commenters assert that the proposal is too restrictive and impedes the ability of a DE to raise capital to compete successfully in spectrum auctions. NTCH further opposes the notion that non-equity debt financing should be considered for determining DE eligibility because it would disadvantage small businesses who must often rely on non-institutional sources of debt financing. The Commission agrees with these commenters, and declines to accept the positions of those like C Spire that support a more restrictive proposal. The Commission also agrees with T-Mobile, which suggests that the ten-percent proposal, while a “step in the right direction, may be too restrictive.”

Accordingly, the Commission concludes that its more targeted attribution rule achieves the proper balance of its numerous policy goals.

50. Nor will the Commission adopt a rebuttable presumption that equity interests of 50 percent or more represent *de facto* control of a DE, which would run counter to its overall policy goal of providing additional sources of access to capital. The Commission notes that commenters are divided in response to the establishment of a rebuttable presumption that equity interests of 50 percent or more represent *de facto* control of a DE. Some commenters, including Blooston Rural and Tristar, support this proposal, with some changes. Blooston Rural would support the rebuttable presumption, provided that “properly insulated passive investors” are not “lumped together to determine a 50% or greater interest.” Tristar would also establish a rebuttable presumption that any provider of financial support of 25 percent or more, direct or indirect, should be considered a controlling interest of the DE. T-Mobile argues that this proposal is a compromise position and is consistent with the Commission’s existing standards for evaluating *de jure* control. Opponents of the rebuttable presumption argue that such a provision may not withstand judicial scrutiny and would create a “logistical nightmare” for small businesses and Commission staff. Additionally, USCC argues that, like the minimum equity requirement, this policy would limit DEs’ flexibility to attract financing and undercut the underlying policies of the DE program. The Commission agrees with commenters that this type of restriction would impede a DE’s access to capital without any counter-balancing benefits that cannot otherwise be achieved by its new targeted rule. Moreover, for similar reasons the Commission believes that the attribution rule it adopted will address the concerns underpinning this type of proposal in a directed, practical, and effective way.

51. The Commission also rejects the suggestion to adopt a rule that would require a DE to provide, without outside investment, a minimum of 25 percent of the equity of its business, as such a requirement could be unachievable for many small businesses and rural service providers, particularly in capital intensive auctions. For instance, in opposing this suggestion, KSW contends that “very few entities have 25 percent or more held by a single entity,” and that “the result would be less DE funding, and far fewer and much smaller DEs.” Also rejecting this suggestion, USCC notes that the

Commission previously declined to adopt a minimum equity requirement because “it would subject DEs to unnecessary competitive harms and conflict with the Commission’s goal of providing DEs with ‘maximum flexibility’ in attracting financing.” CCA, however, reasons that a minimum equity requirement could be reasonable but that the suggested 25 percent requirement is too high. The Commission has historically declined to adopt a minimum equity requirement for the controlling interests of a DE applicant, and it continues to do so here because it concluded it would be counter-productive to its efforts to afford DE applicants greater flexibility to gain access to capital.

52. The Commission notes that each of the proposals it declines to adopt attempts to limit the ability of ineligible entities to circumvent its rules and reap the benefits of DE discounts through their investments in, and business involvements with, DEs. After reviewing the record in this proceeding, and taking into account the Commission’s experience in administering the bidding credits program, it concludes that the rule it adopts will best achieve the ends these commenters seek without the associated drawbacks in furtherance of its statutory obligation to balance dual directives.

53. *Implementation of the New Eligibility Test and Attribution Rule.* The Commission will implement its new eligibility test and attribution rule on a prospective basis, including for licenses in the 600 MHz band. Additionally, the Commission will apply this rule prospectively, so as to apply to all determinations of eligibility for designated entity benefits with respect to: Any application filed to participate in auctions in which bidding begins after the effective date of the rules; all applications for a license authorization, assignment, or transfer of control; and any spectrum leases or reports of events affecting a designated entity’s ongoing eligibility filed on or after the release date of the *Part 1 Report and Order*. In light of the changes that the Commission is making to its eligibility and attribution rules, it will require additional information from applicants and licensees in order to ensure compliance with the policies and adopted rules. The Commission will therefore modify its FCC forms and the Universal Licensing System (ULS) to implement these new rule changes.

54. *Attribution of Revenues Where the Applicant Holds an Interest in a Cellular General Partnership.* In the *Part 1 PN*, the Commission invited comment on whether it should modify its

affiliation rules to prevent an applicant from losing eligibility for small business bidding credits because it holds an interest in a cellular partnership that was established as part of the cellular B Block settlement process that applied to wireline companies in the mid to late 1980s. Commenters have noted that despite being a partner, a rural telephone company typically holds only a fractional ownership interest in these partnerships and thus has no ability to control the partnership’s day-to-day operations. Commenters therefore request that the Commission not attribute the revenues of the partnership to such an applicant when it is seeking eligibility for a small business bidding credit.

55. While the Commission understands that some rural telephone companies may not be eligible for a small business bidding credit because they hold an attributable interest in a cellular general partnership, the Commission must make every effort to ensure that its DE benefits inure only *bona fide* eligible entities. Accordingly, the Commission declines to adopt a rule that would exempt an applicant that is a controlling interest, or an affiliate of a cellular partnership, from attributing the revenues of the partnership for the purposes of complying with the size standards for eligibility for small business bidding credits. However, the Commission has adopted a bidding credit for eligible rural service providers based upon the number of subscribers of the applicant (as well as its controlling interests, affiliates and the affiliates of its controlling interest), and for that bidding credit the Commission has created an exception to its attribution rules for existing rural partnerships.

56. *Attribution of Immediate Family Members and of Officers and Directors.* The Commission also declines to adopt changes to two of its other attribution rules. In the *Part 1 PN*, the Commission sought comment on whether it should narrow the scope of two of its attribution requirements where an immediate family member or a particular officer or director is unlikely to exercise control over the applicant. Under the kinship affiliation requirement, immediate family members are rebuttably presumed to “own or control or have the power to control interests owned or controlled by other immediate family members.” 47 CFR 1.2110(c)(5)(iii)(B). Under the officer/director attribution requirement, officers and directors of an applicant (or of an entity that controls an applicant or licensee) are considered to have a controlling interest in the applicant (or licensee). 47 CFR 1.2110(c)(2)(ii)(F).

57. Both NTCH and Tristar propose relaxing the kinship affiliation requirement, arguing that the existing rule is too broad and requires attribution of the revenues of family members who are unlikely to have involvement with the applicant. NTCH also contends that the Commission must narrow the officer/director attribution requirement, claiming that it encompasses officers “who have no executive authority whatsoever.” Blooston Rural, on the other hand, advises caution before the Commission narrows either rule, noting that officers and directors of privately held companies often have significant control and pointing out that the kinship affiliation presumption is, by its terms, rebuttable.

58. The Commission finds its current rules help ensure that only *bona fide* small businesses receive small business bidding credits. Accordingly, the Commission will leave both rules intact. There is minimal record support for eliminating or modifying these rules, particularly the officer/director attribution requirement. Moreover, the Commission has found the kinship affiliation rule to be effective in forcing the attribution of revenues of close relatives who are likely to exercise control over an applicant. Thus, the rule continues to serve the purpose for which the Commission first adopted it in 1994 for broadband PCS. The Commission explained then that the reason for the rule is twofold, to ensure that entities receiving DE benefits are actually in need of special financial assistance and to prevent otherwise ineligible entities from circumventing the rules by funding family members who purport to be eligible applicants. The Commission further explained that it was adopting bright-line tests for determining when the financial interests of spouses and other family members should be attributed, because, as a practical matter, it would not be able to resolve all questions pertaining to the individual circumstances of particular applicants for an auction before bidding began.

59. At the same time, the Commission acknowledged that a non-spousal family relationship may not carry the same potential for abuse that a relationship between spouses does. Accordingly, while the Commission adopted spousal attribution of revenues as a non-rebuttable standard (unless the spouses are legally separated) (*see* 47 CFR 1.2110(c)(5)(iii)(A)), it implemented the kinship rule as a rebuttable presumption. Now, as then, a winning bidder may rebut the presumption by showing that close family members cannot exercise control over the

business, *i.e.*, that “the family members are estranged, the family ties are remote, or the family members are not closely involved with each other in business matters.” The Commission therefore concludes that the rule is not overly broad and continues to serve a specific necessary purpose.

60. Likewise, the Commission believes that defining officers and directors as controlling interests of a DE applicant or licensee similarly helps ensure that “only those entities truly meriting small business status qualify for its small business provisions.” NTCH argues that the attribution rule discourages individuals from taking seats on an applicant’s board of directors, because their “private revenue information” would have to be disclosed. Contrary to NTCH’s concerns, personal net worth, including personal income, of the officers and directors need not be disclosed. 47 CFR 1.2110(c)(2)(ii)(F). More important, the revenue information of officers and directors need be disclosed only if their company is seeking a substantial public benefit by applying for a bidding credit. Finally, NTCH has provided no specific examples of instances where it thinks that the rule should not have been applied and has therefore not convinced the Commission that changing the rule is in the public interest. The Commission reminds NTCH and all interested parties that if an applicant considers a waiver of the rule to be warranted in its case, it may seek one under 47 CFR 1.925.

61. *Tribal Exclusion from affiliation coverage.* In the *Part 1 PN*, the Commission sought comment on a request that it “eliminate the preferential treatment for [Alaska Native Corporations (“ANCs”)] that do not meet the standard definition of small business under its attribution rules.” Under the Commission’s small business attribution rules, applicants or licensees affiliated with Indian tribes or ANCs are not required to include revenues of those tribes or ANCs, other than gaming revenues, in their gross revenues for purposes of determining their eligibility for bidding credits. When the Commission adopted this exclusion from the affiliation requirements in 1994, it sought to ensure that its rules remained consistent with other federal laws, policies, and regulations, most notably the affiliation rules of the Small Business Administration (SBA). The Commission asked in the *Part 1 PN* whether it should now eliminate the exclusion, whether the rules concerning Indian tribes or ANCs remain consistent with other federal policies, and whether these rules increase the risk of unjust

enrichment. The Commission also asked commenters to tell it whether and how it should amend the rules.

62. The Commission has received no record support for this proposal. Fourteen commenters, all tribes or tribal organizations, oppose elimination of the affiliation exclusion. NCAI emphasizes “the unique legal relationship that exists between the federal government and Indian Tribal governments, as reflected in the Constitution of the United States, treaties, federal statutes, Executive orders, and numerous court decisions,” amounting to a fiduciary trust relationship. NCAI also explains that the Commission’s preservation of the tribal attribution exclusion is essential because of the economic disparities that exist on tribal lands and the well-documented challenges of deploying communications infrastructure there. Several of the tribal entities explain that they still lack high-speed and dependable telecommunications services and face daunting barriers to obtaining spectrum licenses for the provision of commercial mobile wireless services on tribal lands. Under these circumstances, the commenters tell the Commission, access to capital is crucial. As one commenter asserts, any adverse modification of the affiliation exclusion will effectively nullify the Commission goal that telecommunications services be deployed to tribal communities.

63. Native Public observes that “[t]he Commission has repeatedly found that Native Americans have had less access to telecommunications services than any other segment of the population[.]” adding that the Commission’s DE tribal policies “advance the interests of an underserved minority population group, those of the Tribal governments which have a sovereign right to set their own communications policies and goals for the welfare of their members.” And Nez Perce encourages the Commission to retain its “well established and rooted policies to bolster a tribe’s resources to deploy wireless services on their land to serve the communication needs of their population.” Other commenters all express similar views.

64. When the Commission decided to include this exclusion under its definition of the term “affiliate,” it concluded that the exclusion would ensure that Indian tribes and Alaska Regional or Village Corporations have a meaningful opportunity to participate in spectrum-based services from which they would otherwise be precluded, and that such an exclusion for these specified entities would not entitle them to an unfair advantage over entities that are otherwise eligible for small business

status. The affiliation exclusion for ANCs is based on their “unique legal constraints” imposed by statute that are inapplicable to other businesses. These constraints preclude ANCs 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.” In addition, land holdings held by Indian tribes cannot be used as collateral for purposes of raising capital, “because the land holdings are owned in trust by the federal government or are subject to a restraint on alienation in the government’s favor.” The exception was carefully tailored so as not to extend it to gaming revenues, which are not subject to the same constraints. The Commission has also not been presented with any evidence that its rule is no longer consistent with other federal laws, policies, and regulations, most notably the affiliation rules of the SBA such that the Commission should revisit the exclusion. In light of commenters’ significant opposition and the absence of a record supporting the elimination or modification of this attribution exclusion, the Commission retains the exclusion in its current form.

#### B. Bidding Credits

65. In the *NPRM*, the Commission took a fresh look at its bidding credit program to ensure that it remains a viable avenue for DEs to meaningfully participate in auctions and thereby create additional competition and investment in the wireless marketplace. The Commission’s bidding credit program was adopted in 1994 and is the primary way it facilitates participation by designated entities in auctions. Section 309(j)(4)(D) of the Act states that the Commission must consider using bidding preferences when prescribing regulations for acquiring service-specific licenses through competitive bidding. A bidding credit provides a percentage discount on winning bids for eligible DEs. The Commission defines bidding credit eligibility requirements for DEs on a service-specific basis, taking into account the capital requirements and other characteristics of each particular service.

66. After reviewing the record, the Commission revises its rules for its bidding credit program. Specifically, the Commission updates its small business eligibility requirements to better reflect the capital-intensive nature of the wireless industry, while retaining its overall three-tiered approach that links the percentage of the small business bidding credit to the size of the business. The Commission also adopts a

new bidding credit for eligible rural service providers to increase their participation in auctions and provide greater opportunities for bringing crucial wireless voice and broadband services to rural areas, including underserved and unserved areas and areas of persistent poverty. By adopting this new bidding credit, the Commission facilitates greater access by multiple entities to valuable, low-band spectrum, thereby fulfilling its statutory goals of promoting competition and ensuring the efficient use of spectrum. As a further step to ensure these benefits continue to flow only those intended beneficiaries, the Commission also adopts a reasonable limitation or cap on the total amount of benefits that a small business or rural service provider can receive in any particular auction.

67. The Commission adopts these rule changes specifically for the 600 MHz service, for which licenses will be offered in the Incentive Auction, to provide eligible small businesses and rural service providers with additional tools to compete meaningfully for low-band spectrum and to promote overall competition in auctions and in the wireless marketplace. On a prospective basis, the Commission will determine the award of bidding credits for small businesses and rural service providers on a service-specific basis taking into account the capital requirements and other characteristics of each particular service, as the Commission currently does.

68. The Commission declines to adopt at this time specific bidding preferences for other types of entities, including those that serve unserved/underserved areas or areas with persistent poverty, as well as those that have overcome disadvantages. The Commission expects, however, that such parties should benefit from the changes it makes to its bidding credit program for small businesses and rural service providers. Finally, the Commission declines to consider any modification of the tribal lands bidding credit because the record does not support revisions to its current policies for the award of this benefit.

#### i. Small Business Bidding Credit

69. *Background.* The Commission’s small business bidding credit program consists of a three-tiered schedule of bidding credits corresponding to small business size definitions that are based on an applicant’s average annual gross revenues for the preceding three years. Applicants with average gross revenues not exceeding \$3 million are potentially eligible for a 35 percent bidding credit; applicants with average gross revenues

not exceeding \$15 million are potentially eligible for a 25 percent bidding credit; and applicants with average gross revenues not exceeding \$40 million are potentially eligible for a 15 percent bidding credit. In order to qualify for a small business bidding credit, an applicant must demonstrate that its average annual gross revenues, in combination with those of its “attributable” interest holders, fall below the applicable financial thresholds. The Commission takes into account the capital requirements and other characteristics of a particular service in establishing which small business definitions to apply to a specific service.

70. In the *Part 1 NPRM*, the Commission sought comment on whether its small business bidding credit program continues to align with the operational demands of small businesses that acquire spectrum and build out services in a formidable wireless marketplace. The Commission invited comment on whether to increase the gross revenue thresholds for defining the small business sizes for bidding credits, using the price index for the U.S. Gross Domestic Product (GDP price index) as the standard for measuring the increase of the thresholds. Specifically, the Commission proposed to increase the average annual gross revenues thresholds from \$3 million to \$4 million for applicants potentially eligible for a 35 percent bidding credit; from \$15 million to \$20 million for applicants potentially eligible for a 25 percent bidding credit; and from \$40 million to \$55 million for applicants potentially eligible for a 15 percent bidding credit. The Commission also sought comment on alternative indices, criteria, or methods that may better reflect the development and relevant range of economic activity in the wireless industry.

71. The Commission invited comment on whether to modify the current bidding credit percentages and whether to add additional tiers of bidding credits. The Commission also asked whether the Commission should continue to evaluate the definition of a small business on a service-by-service basis. Moreover, the Commission sought comment on whether any adopted changes to its part 1 rules should be incorporated into the 600 MHz service rules. In addition, the Commission asked whether it should apply its revised Part 1 rules to re-auctioned licenses for existing services. Based on comments received in response to the *Part 1 NPRM*, the Commission sought additional comment in the *Part 1 PN* on

alternative proposals that would increase the gross revenue thresholds based on other standards, increase the small business bidding credit percentages for all or some of the tiers, and decline to make any changes to the small business bidding credit program until the Commission addressed perceived DE eligibility issues stemming from Auction 97.

72. *Discussion.* The Commission adopts its proposal in the *Part 1 NPRM* to increase the gross revenues thresholds that define the three tiers of small business bidding credits and to retain the existing percentage levels of the small business bidding credits. See *Part 1 NPRM*, 79 FR at 68181–82. Consistent with past practice, the Commission will select, on a service-by-service basis, the small business bidding credits and corresponding definitions that will be available for the applicable auction based on the capital requirements of a particular service. For the Incentive Auction, the Commission will continue to utilize the 25 percent and 15 percent bidding credits, but the Commission will apply the increased gross revenue thresholds that it adopts to the small business size definitions for those bidding credits. The Commission expects that these measures will advance its statutory goals by providing small businesses with an opportunity to remain competitive in an evolving wireless marketplace by facilitating participation in auctions and in the provision of spectrum-based services.

73. *Updating the Standardized Schedule of Small Business Sizes.* The Commission retains its existing three-tiered schedule for determining eligibility for bidding credits, but updates the gross revenues thresholds to reflect the capital challenges small business face in the current wireless industry. The Commission has previously found that robust competition depends critically upon the availability of spectrum for provisioning services. Given the ever-increasing competitive nature of the wireless marketplace, several commenters advocate for modifications to its bidding credit program in order to facilitate a higher rate of participation in auctions by small businesses that might otherwise find it difficult to acquire sufficient capital to compete in spectrum auctions. In this regard, many commenters favor increasing the gross revenue thresholds, with some advocating for higher increases than those proposed in the *Part 1 NPRM*. RWA, for instance, supports the Commission's proposal but also urges it to increase the threshold for the lowest tier from \$40 million to \$100 million.

Council Tree and Blooston Rural also favor using annual gross revenues as the basis for defining the small business sizes for bidding credits.

74. The Commission finds that its three-tiered system for providing small business bidding credits, when properly tailored and implemented, serves the underlying policy interests of its bidding credit program. Therefore, the Commission modifies 47 CFR 1.2110(f) to increase the three tiers of gross revenue thresholds defining eligibility for each small business bidding credit to the following: (1) Businesses with average annual gross revenues for the preceding three years not exceeding \$4 million would be eligible for a 35 percent bidding credit; (2) Businesses with average annual gross revenues for the preceding three years not exceeding \$20 million would be eligible for a 25 percent bidding credit; and (3) Businesses with average annual gross revenues for the preceding three years not exceeding \$55 million would be eligible for a 15 percent bidding credit.

75. In considering how much to adjust the gross revenues thresholds in the small business definitions, the Commission proposed to use as a guide the price index for the U.S. Gross Domestic Product (“GDP price index”) published by the U.S. Department of Commerce on a quarterly basis as part of its National Income and Product Accounts. See generally BEA, Interactive Data, <http://www.bea.gov/itable>. The Commission adjusted the current gross revenues thresholds with the percentage change in the GDP price index between 1997 and 2013. The Commission determined that the GDP price index increased by 36.4 percent from 1997 to 2013. Based on this 36.4 percent increase, the Commission proposed new gross revenues thresholds that were obtained by multiplying the current thresholds by 1.364 and rounding to the nearest million.

76. Consistent with the Commission's statutory objectives, it finds that increasing the gross revenue thresholds will enhance the ability of small businesses to acquire and retain capital thereby facilitating their ability to compete meaningfully in today's auctions. At the same time, the Commission avoids setting the small business size thresholds at a level that may be over inclusive and result in DE benefits flowing to entities for which such credits are not necessary. In so doing, the Commission agrees with commenters in favor of using the GDP price index as the basis for calculating the increase for each tier defining the small business size for purposes of the bidding credit. As noted in the *Part 1*

*NPRM*, the currently available wireless industry price indices do not reflect the dramatic shift from a voice-centric to a data-centric wireless industry, along with the tremendous growth of mobile broadband data services. Moreover, the SBA recently used the GDP price index to adjust its receipts-based industry size standards as part of its size standards review.

77. In adopting this methodology for increasing the gross revenue thresholds for defining small business eligibility for bidding credits, the Commission declines to adopt alternative proposals for adjusting the small business size definitions. For example, ARC would adjust the small business size definition to the cost of auctioned spectrum on a MHz per pop basis. CCA opposes ARC's proposal, noting that it would create uncertainty for DEs as the value of spectrum varies by band and market conditions. The Commission agrees with CCA's assessment and further finds that ARC's proposal would be administratively burdensome to implement without providing a meaningful corresponding benefit. Rather, by using the GDP price index, the Commission establishes a simple bright-line standard to improve the efficiency of the auction process, serve the public interest, and avoid additional implementation costs for small businesses.

78. Additionally, the Commission will not disturb its earlier decision declining to adopt SBA's employee-based business size standard for adjusting its small business size definitions. Council Tree states that the SBA's standard is too inclusive for purposes of establishing DE eligibility. However, CCA promotes the use of SBA's employee-based standard because “expanding eligibility, rather than shrinking it, may be warranted given the increasing disparity between the largest carriers . . . and all other carriers.” As noted in the *Part 1 NPRM*, the Commission previously concluded that by adopting the SBA's standard, the Commission would allow many large carriers to take advantage of DE benefits not intended for them. See *Part 1 NPRM*, 71 FR at 68182. Additionally, the Commission notes that there is no data in the record to support reconsideration of its previous conclusion. The Commission will therefore rely on the GDP price index for establishing the small business size definitions to reflect the increased operational costs for small businesses and the need to foster competition in spectrum auctions and in the wireless marketplace.

79. The Commission also declines to adopt proposals favoring a single bidding credit in lieu of the current three-tiered system. AT&T/Rural Carriers, for instance, advocate for the creation of a new 25 percent single bidding credit for small businesses with average gross revenues of less than \$55 million. AT&T also notes that this proposal would fulfill the DE program's original vision and safeguard against gamesmanship. Opponents of the single bidding credit argue that the proposal is too limiting and is inconsistent with the Commission's statutory mandates. The Commission finds that AT&T/Rural Carriers' proposal ignores the various sizes and types of small businesses that participate in Commission auctions. Because not all small businesses are alike in the wireless marketplace, the Commission adopted its three-tiered bidding credit system in 1997 so that as a small business grew, it would receive reduced benefits from its DE program. In doing so, its graduated approach allows for other new small businesses to gain a foothold in the marketplace using additional DE benefits. The Commission finds that this approach continues to be relevant and complements its policy for defining bidding credits on a service-by-service basis in order to tailor small business bidding preferences to the capital requirements of a particular service. Thus, the Commission refrains from disturbing its long-standing policy.

80. With respect to the percentage levels of the small business bidding credits, the Commission declines to increase any of the current percentages as proposed by some commenters. These commenters, including ARC, WISPA, KSW, and the DE Coalition, assert that it should increase the bidding credit percentages across all or specific tiers. ARC, for instance, would increase the percentages of all three bidding credit tiers, from the largest to the smallest tier, to 25 percent, 35 percent, and 40 percent respectively. WISPA recommends adjusting the maximum bidding credit up to 45 percent and increasing the other tiers proportionately. Moreover, KSW seeks to change the bidding credit percentages to 40 percent for applicants below the \$15 million threshold and 25 percent for applicants below the \$40 million threshold.

81. The Commission believes that its decision to eliminate the AMR rule and to increase the gross revenues thresholds for its small business size definitions will sufficiently enhance the benefits of the DE program by helping small businesses obtain access to capital and thereby increase participation and competition in auctions. The

Commission is, however, concerned about expanding the scope of DE benefits to a level that may incentivize gamesmanship of the program in the current wireless marketplace. Rather, in light of all the other changes the Commission is making to its rules, it will proceed with care, so that it may assess the impact of its changes to the rules. In this regard, the Commission will revisit these rules as may be necessary in light of its future auction experience. In declining to adopt those proposals to increase the bidding credit percentages, the Commission concludes that the use of the small business size standards and credits set forth in its updated part 1 schedule, when coupled with its other changes, align with its statutory objectives. They also provide a simple, consistent, and predictable avenue for facilitating small business participation in auctions and in today's wireless marketplace.

82. The Commission also declines to adopt PK's proposal for a new entrant bidding credit. Under PK's suggested policy, a new entrant bidding credit would be explicitly designed to attract "new and innovative technologies," noting that "nothing in the [Act] precludes the use of bidding credits to large businesses to achieve [the Commission's] statutory goals." Thus, PK's proposal could provide a bidding preference to well-financed entities that would not otherwise qualify for a bidding credit under its adopted small business size definitions. Tristar submits that well-financed new entrants, among others, should be entitled to some benefits in the upcoming Incentive Auction, but not the same benefits that are available to DEs. CCA opposes this proposal, arguing that "[it] would be complicated to administer and could lead to unintended consequences and possible gaming." The Rural-26 Coalition submits that large, well-financed companies, like an Apple or a Google, "do not need a helping hand from the American taxpayer" to be competitive in spectrum auctions. The Commission agrees with commenters that the proposal would conflict with its principles against the unjust enrichment of ineligible entities. Deciding the eligibility criteria for a new entrant would also be difficult to administer and may undercut the underlying policies of the DE program by exacerbating the challenges current DEs face to compete meaningfully in spectrum auctions. The Commission also notes that PK did not offer any details regarding how such a proposal could be implemented. Although the

Commission declines to adopt PK's proposal it expects that its new rules for the small business bidding credit program will also help new entrants face the capital challenges of entering the wireless marketplace, provided that they meet the eligibility standards for the bidding credit.

83. Finally, the revisions the Commission has made to modernize and improve its part 1 competitive bidding rules generally respond to the calls by commenters urging it to avoid implementing any bidding credit increases until there is surety that ineligible entities will not benefit from its bidding credit program. The Commission anticipates that the collective rule changes it has made will provide such safeguards. The Commission therefore concludes that the time is ripe to update its standardized Part 1 bidding credit schedule prior to the Incentive Auction. The Commission's actions reflect the current nature of the wireless marketplace and renews its commitment to providing DEs with the opportunity to participate meaningfully in Commission auctions. Further, the Commission adopts targeted measures to ensure that valuable bidding credits are available only to those Congress intended.

84. *Implementation of the Revised Standardized Schedule of Small Business Sizes.* The Commission's rule changes to the Part 1 schedule for small business bidding credits will be available to any particular auction prospectively, including for 600 MHz licenses in the Incentive Auction. See *Incentive Auction Report and Order (Incentive Auction R&O)*, 79 FR 48441, 48504–06, August 15, 2014. Specifically, these rules changes will apply to all Commission auctions in which the short-form deadline falls on or after the release date of the *Part 1 Report and Order*. Moreover, applicants claiming any small business bidding credits will continue to be subject to the Commission's DE rules under 47 CFR 1.2110, as amended herein.

85. NTCH supports the incorporation of its rule changes to the Incentive Auction, with Council Tree and WISPA arguing for the adoption of a 35 percent bidding credit (the lowest tier) for the Incentive Auction as well. The Commission declines to reconsider its previous decision in the *Incentive Auction R&O* not to adopt a 35 percent bidding credit for the Incentive Auction. Because of the similarities between the 600 MHz and 700 MHz bands, in the Incentive Auction proceeding, the Commission determined that licensees utilizing the 600 MHz band may face

challenges similar to licensees utilizing the 700 MHz, including issues and costs related to developing markets, technologies, and services. In light of the similar characteristics and capital requirements for both services, the Commission affirms its prior conclusion that it is appropriate to offer the same two bidding credit percentages in the Incentive Auction proceeding as in the 700 MHz auction. Additionally, by increasing the gross revenue thresholds for this schedule, entities that previously exceeded the legacy thresholds may now fall within the new thresholds, and thus become eligible for small business bidding credits. Similarly, the Commission notes that bidders that previously exceeded the legacy thresholds as a result of the AMR rule may now be eligible for a bidding credit under the current thresholds. By adopting its revised three-tiered schedule, the Commission aims to better reflect the potential capitalization costs for new entrants and small businesses in the wireless marketplace and encourage a greater level of participation and competition by small businesses in an auction that offers a significant opportunity for interested applicants to acquire licenses for below-1-GHz spectrum.

86. Consistent with the Commission's current practices it will continue evaluating the definition of small business on a service-by-service basis, determined by the associated characteristics and capital requirements of each service. See 47 CFR 1.2110(c)(1). Thus, the Commission will resolve, on a service-by-service basis, the DEs eligible for bidding credits, the licenses for which bidding credits are available, the amount of the bidding credits, and other procedures. Moreover, the Commission will apply the small business size definitions and associated bidding credits to any spectrum licenses in that service assigned through subsequent auctions, absent further action by the Commission. The Commission did not receive any comments squarely addressing these matters, except that WISPA would apply all three tiers of bidding credits to every spectrum auction, including the Incentive Auction. However, WISPA fails to provide data detailing the benefit of a blanket application of the rule in comparison to using a tailored, service-by-service approach. The Commission concludes that a service-specific proceeding is the appropriate avenue for evaluating the capital costs and technical challenges associated with the deployment of a service which will, in turn, drive the selection of the

appropriate small business size definition and bidding credit. In taking a service-by-service approach, the Commission will better serve the public interest by promoting the rapid deployment of wireless services. The Commission also intends to review its small business definitions on a more regular basis in the future to ensure that the DE program continues to align with the strategic and operational demands of small businesses in the wireless marketplace.

#### ii. Rural Service Provider Bidding Credit

87. Background. Under section 309(j), Congress mandated that the Commission design auctions to "include safeguards to protect the public interest in the use of the spectrum," including the objectives to disseminate licenses "among a wide variety of applicants," including rural telephone companies, and to promote the deployment of new technologies, products, and services to "those residing in rural areas." Section 309(j)(4) also directs the Commission to "ensure" that various entities—again, specifically including rural telephone companies—"are given the opportunity to participate in the provision of spectrum-based services." To this end, it requires the Commission to "consider the use of . . . bidding preferences" and other procedures. Historically, the Commission has concluded that section 309(j)(4)(D) does not warrant adoption of an independent bidding credit for rural telephone companies because such entities had not demonstrated that they had experienced significant barriers to raising capital, particularly when compared to other DEs, like small businesses. In the *Incentive Auction R&O*, the Commission found that the record in that proceeding did not provide a sufficient basis to revisit those prior determinations nor sufficient support for adoption of a rural bidding credit.

88. The Commission recognized in the *Part 1 NPRM* that the marketplace for wireless services has evolved significantly since it last comprehensively updated its DE eligibility rules in 2006. Based on this industry-wide evolution, the *Part 1 NPRM* asked commenters to provide data demonstrating whether rural telephone companies lack access to capital or face barriers to formation similar to those faced by other DEs. In response to the *Part 1 NPRM*, several commenters highlighted the fact that rural service providers had difficulty obtaining licenses in Auction 97 and urged the Commission to adopt a bidding credit for rural telephone companies for future auctions. The *Part*

1 *PN* then sought comment on a number of issues related to whether it should establish a bidding credit for rural telephone companies, including whether a bidding credit would better enable rural telephone companies to compete more successfully at auction. Subsequently, in response to the *Part 1 PN*, AT&T/Rural Carriers submitted a joint proposal that urged adoption of a rural service provider bidding credit. Other stakeholders also offered alternative suggestions for structuring the credit.

89. *Discussion.* The Commission adopts a 15 percent bidding credit for eligible rural service providers that provide commercial communications services to a customer base of fewer than 250,000 combined wireless, wireline, broadband, and cable subscribers and serve primarily rural areas. The Commission agrees with commenters that a targeted bidding credit will better enable rural service providers to compete for spectrum licenses at auction, thereby speeding the availability of wireless voice and broadband services in rural areas. Based on the record established in this proceeding, the Commission anticipates that providing eligible rural service providers with a meaningful opportunity to compete for spectrum licenses will be particularly important in the upcoming Incentive Auction, which will offer multiple blocks of licenses for low-band spectrum. The Commission's action is thereby consistent with other efforts it took in the *Incentive Auction R&O* to facilitate competition in rural areas. The Commission will only permit an eligible small and rural entity to claim one bidding credit though, rather than benefit from both a small business and a rural service provider bidding credit. The Commission believes that the rural service provider bidding credit it adopts will allow a diversity of service providers to compete more effectively for spectrum licenses in rural areas, in furtherance of statutory objectives, while also preventing unjust enrichment of ineligible entities.

90. The Commission's decision today incorporates many of the suggestions offered by commenters, though it declines to adopt in full any single proposal offered by stakeholders for establishing a rural service provider bidding credit. For instance, the AT&T/Rural Carriers Joint Proposal recommended that in order to be eligible for the credit, an applicant must be in the business of providing commercial communications services to a customer base of fewer than 250,000 combined wireless and wireline



customers. Under their particular proposal, however, eligible auction applicants would be permitted to claim a credit of 25 percent, but the credit would be capped at \$10 million per bidding entity. Other commenters support the adoption of a rural bidding credit, but under different terms. For example, RWA/NTCA jointly propose a "Rural Telco Bidding Credit" of 25 percent that is capped at \$10 million and is "available only to rural telephone companies (or their affiliates/subsidiaries) that seek spectrum in an area in which they are designated as an eligible telecommunications carrier." Under the RWA/NTCA proposal, the bidding credit would be separate from, and in addition to, any small business bidding credit for which an applicant would qualify. The Commission notes that this proposal is also supported by other rural stakeholders, such as the Blooston Rural Carriers and the Rural Carrier Coalition. Cerberus proposes a 35 percent bidding credit for rural telephone companies, in addition to any small business bidding credit for which an applicant would qualify.

91. Council Tree, however, claims that rural telephone companies do not have "the same access to capital issues as other DEs, especially New Entrant DEs." Accordingly, Council Tree urges that the Commission not "elevate" rural providers "to a special class of DEs superior to any other DE class." CCA "does not support proposals for the establishment of a separate rural telephone company bidding credit," because of "administrative complexity." Accordingly, it urges the Commission to keep a "simple and straightforward approach of maintaining small business as the touchstone of any bidding credit mechanism."

92. *The Need for a Rural Service Provider Bidding Credit.* Based upon the record established in this proceeding and its experience garnered over the history of the auctions program, including Auction 97, the Commission now concludes that creating a 15 percent rural service provider bidding credit will better enable eligible rural service providers to compete for spectrum licenses at auction and speed the availability of wireless voice and broadband services to rural areas, consistent with its statutory objectives. See 47 U.S.C. 309(j)(3)(A)–(B). In the past, the Commission has noted that due to certain traditional financing programs, rural providers "may have greater ability than other designated entities to attract capital." While the Commission does not believe that rural service providers warrant as great a bidding credit as other DEs, several

factors demonstrate that they face obstacles to wireless deployment that are more challenging in their service areas. First, the evidence confirms these difficulties, which are reflected in their inability to provide service that competes with larger providers in rural areas. See 17th Mobile Wireless Competition Report, 29 FCC Rcd at 15334 para. 48, 15335 para. 51. Second, the Commission observes that the wireless industry has undergone significant consolidation during the past decade and that concentration in the market share of the major providers has also increased during that time period. Additionally, many rural service providers, although relatively small, are not eligible for small business bidding credits under its size standards to assist them in competing against larger carriers at auction. The record also demonstrates that rural service providers have encountered challenges in their efforts to obtain financing because the rural areas they seek to serve are not as profitable as more densely-populated markets. In a recent NTCA survey, for example, sixty-two percent of survey respondents characterize the process of obtaining financing for wireless projects as "somewhat difficult" or "very difficult," and roughly half reported that their ability to obtain spectrum at auction was a concern.

93. Furthermore, commenters have argued that the challenges that rural service providers face in competing for spectrum were reflected in the results of Auction 97, which postdated the Commission's review of this question in the *Incentive Auction R&O*. In Auction 97, 38 qualified bidders were rural telephone companies, or rural telephone company affiliates, and only 28.9 percent of those entities won licenses. Contrary to Council Tree's assertion that the reason many rural telephone companies were unsuccessful in Auction 97 was due to their reduced interest in spectrum and unwillingness to bid competitively in the auction, rural service providers have asserted that they did not bid more aggressively in the auction because many were unable to qualify as DEs under its rules and thus competed against DEs and well-funded national carriers without the benefit of bidding credits.

94. Based on the Commission's review of the record, along with the results of Auction 97, it concludes that a rural service provider bidding credit may have assisted such entities to acquire spectrum suitable for mobile broadband services had a bidding credit been available. Rural service provider commenters have provided evidence

illustrating recent increased challenges in securing traditional financing which has resulted in difficulties in competing successfully in auctions. In view of the record and the Commission's experience in running its competitive bidding program, it is convinced that a bidding credit for eligible rural service providers is warranted to ensure that designated entities of all types have the opportunity to acquire spectrum and participate in spectrum based services. The Commission therefore adopts a rural service provider credit for the first time.

95. Under the rules the Commission adopts today, rural service providers will be able to demonstrate eligibility for a 15 percent bidding credit if they serve fewer than 250,000 subscribers and serve predominantly rural areas. The Commission declines to adopt a specific threshold for the proportion of an applicant's customers who are located in rural areas, but puts prospective applicants on notice that it is the Commission's intent that in order for an applicant to be eligible for a rural service provider bidding credit, the primary focus of its business activity must be the provision of services to rural areas. Accordingly, this rule change will provide an incentive for rural service providers to participate more vigorously in upcoming spectrum auctions, including the Incentive Auction. Further, as the Rural-26 Coalition notes, the Commission anticipates that "more rural companies, including Rural-26 members, likely will participate in the upcoming Incentive Auction than participated in Auction 97, given the favorable propagation characteristics of the 600 MHz spectrum and the opportunity for rural providers to use this spectrum to provide mobile and fixed wireless broadband services in rural markets."

96. This bidding credit is particularly important in advance of the Incentive Auction, a once-in-a-generation opportunity for small and rural providers to gain access to below-1-GHz spectrum. Spectrum below 1 GHz, referred to as "low-band" spectrum, has distinct propagation advantages for network deployment over long distances and is therefore particularly well-suited for deployment in rural areas. Today, two nationwide carriers control the vast majority of this low-band spectrum. Given the limited supply of this spectrum, the continued concentration of low-band spectrum will have a pronounced effect on competition and consumers in rural areas. Indeed, currently, 92 percent of non-rural consumers, but only 37 percent of rural consumers, are covered by at least four

3G or 4G mobile wireless providers' networks.

97. The Commission's adoption of the rural service provider bidding credit is consistent with many of the actions the Commission took in the *Incentive Auction R&O* that were designed to facilitate competition in rural areas. For example, the *Incentive Auction R&O* reserved a modest amount of low-band spectrum in each market for providers that lack low-band capacity. It also adopted Partial Economic Areas (PEAs) to encourage entry by providers that contemplate offering wireless broadband service on a more localized basis. The Commission concluded in the *Incentive Auction R&O* that licensing on a PEA basis is consistent with the requirements of section 309(j) because it will promote spectrum opportunities for carriers of different sizes, including small businesses and rural telephone companies. Finally, the Commission required handset interoperability to "promote rapid deployment of the 600 MHz band, particularly in rural areas." These policy decisions reflect its commitment to address the challenges that rural providers face in competing for spectrum and ensure that consumers in rural areas have access to wireless voice and broadband services. The bidding credit the Commission adopts will build on these policies and support its statutory objectives to disseminate licenses among a wide variety of applicants, ensure that rural telephone companies have an opportunity to participate in the provision of spectrum-based services, and promote the availability of innovative services to rural America.

98. The Commission does not adopt Blooston Rural's proposal to permit a winning bidder to deduct from its auction purchase price the pro rata value of any area partitioned to a rural telephone company, where the area includes all or a portion of the rural telephone company's service area. Under this proposal, the larger carrier "would be compensated twice for making spectrum available in rural areas—a discount on its final auction payment, plus whatever payment it negotiates with the rural carrier." ARC supports this proposal and argues that the rule would "benefit DEs by providing incentives for partitioning and promote secondary market transactions, which further the prospect of rural telcos obtaining licenses for rural and other underserved/unserved areas where they have an excellent service record." The Commission finds that the Blooston Rural proposal would be overly burdensome and challenging to implement. Not only would it require

the Commission to review post-auction transactions to determine how much of a discount to apply, but it would also require it to modify its short-form applications to accommodate larger carriers' that intend to receive bidding credits for areas that they partition to rural service providers. Moreover, the Commission notes that it would provide a benefit to carriers for choosing *not* to serve rural areas, which is inconsistent with its goals. Notably, the Commission did not receive any feedback from larger carriers on Blooston Rural's proposal, thus it appears that larger carriers lack interest in participating in such a complex undertaking. While CCA was generally supportive of this proposal in its response to the *Part 1 NPRM*, it reverses course in its response to the *Part 1 PN* and states that "the nuances of determining which areas should qualify for such credits would introduce undue complexity into already-complex auction processes."

99. *Eligibility for a Rural Service Provider Bidding Credit.* For purposes of the Commission's rules, as amended, it defines designated entities to include eligible rural service providers. To be eligible for a rural service provider bidding credit, an applicant must be in the business of providing commercial communications services to a customer base of fewer than 250,000 combined wireless, wireline, broadband, and cable subscribers and must also serve predominantly rural areas. A provider may count any subscriber as a single subscriber even if that subscriber receives more than once service. That is, a subscriber receiving both wireline telephone service and broadband would be counted only as a single subscriber. The Commission notes that there is broad consensus in the record to support a benchmark of fewer than 250,000 combined subscribers, which should encompass carriers that provide a variety of services to rural areas, while excluding larger entities that do not have the same demonstrated need for a bidding credit. Moreover, by establishing the eligibility threshold for a rural service provider bidding credit as those with fewer than 250,000 subscribers, rather than 100,000 access lines or less, the Commission selected a criterion that is large enough to permit rural service providers to seek spectrum licenses at auction, expand their coverage areas, grow their subscriber base, and continue to be eligible for bidding credits in future spectrum auctions. Based on the record in this proceeding, the Commission finds that a benchmark of fewer than 250,000 combined subscribers will best ensure

that only smaller rural service providers that serve predominantly rural areas receive the bidding credit.

100. To determine whether a provider has fewer than 250,000 subscribers, the Commission will follow an approach similar to how it attributes revenues in the small business bidding credit context, and will determine eligibility by attributing the subscribers of the applicant, its controlling interests, its affiliates, and the affiliates of its controlling interests. See 47 CFR 1.2110(f)(2)(i)(4)(C), as adopted herein. As with the Commission's existing small business bidding credits, it anticipates that this approach for establishing eligibility will ensure that applicants are *bona fide* in nature and that a rural service provider credit is only awarded to a designated entity, as Congress intended. Thus, like small businesses, affiliates of rural service provider applicants include entities or individuals that directly or indirectly control or have the power to control the applicant, directly or indirectly are controlled by a third party that also controls the applicant, or have an "identity of interest" with the applicant." Likewise, controlling interests include those that have *de jure* or *de facto* control of the applicant.

101. Blooston Rural, RWA, and NTCA argue that the Commission should not aggregate the subscribers attributed to an applicant seeking a rural service provider bidding credit in the same manner as it aggregates the gross revenues of a small business seeking a sized-based bidding credit. Instead, they contend that it should award a rural service provider bidding credit when the applicant, and its controlling interests and affiliates each independently demonstrate eligibility for the credit. The Commission disagrees, and concludes that rather than creating greater parity among designated entities, adopting such a method to determine eligibility for a rural service provider bidding credit would undercut its existing small business bidding credit program. In sum, the approach recommended by commenters would permit an applicant that far exceeds the size standard the Commission has established to be an eligible rural service provider, potentially in exponential amounts, to obtain and control spectrum licenses awarded with a bidding credit. Such an applicant would also likely have access to the financial resources of its controlling interests and affiliates and thus granting it a 15 percent bidding credit would be inequitable and contrary to its policy of providing a bidding credit to those designated

entities that have difficulty in obtaining access to capital. Accordingly, the Commission denies this request.

102. The Commission's rules provide options for several parties to combine resources and participate in an auction. Like small businesses seeking eligibility for bidding credits, the Commission will allow rural service providers to form a consortium for this purpose. Under the rules for a rural service provider consortium, the Commission will not aggregate the subscribers of each of the members of the consortium, but will instead determine the eligibility of each individual member for the bidding credit. If the consortium wins a license at auction, either an individual member of the consortium or a new legal entity comprising of two or more individual consortium members may apply for the license(s). Moreover, contrary to the concerns of commenters the Commission is not limiting rural service providers to bidding through a consortium model and stresses that applicants seeking a rural service provider bidding credit have many options to structure their businesses in a manner that complies with its eligibility rules.

103. The Commission also recognizes the concerns of commenters that attributing subscribers of rural service providers in the same manner as it does for the revenues of small businesses will unfairly disadvantage existing rural partnerships, including those that were structured under cellular settlements with numerous controlling interests, yet as a policy matter, still warrant a bidding credit to create greater parity among designated entities. Accordingly, in order not to penalize rural partnerships that were formed for purposes having nothing to do with participation in competitive bidding and to promote more fully the increased participation of rural service providers generally in upcoming auctions, the Commission adopts an exception to its attribution rules for existing rural partnerships. Specifically, for rural partnerships providing service as of the date of the adoption of this decision, the Commission will determine eligibility for the 15 percent rural service provider bidding credit by evaluating whether the members of the rural wireless partnership each individually have fewer than 250,000 subscribers, and for those types of rural partnerships, the subscribers will not be aggregated. Thus we would essentially evaluate eligibility for an existing rural wireless partnership on the same basis as we would for an applicant applying for a bidding credit as a rural service provider consortium. See 47 CFR

1.2110(b)(3)(i). This exception will permit eligible rural service providers to receive the benefit of a bidding credit without having to interrupt their existing business relationships or the provision of service to consumers.

104. Notably, because each member of the rural partnership must individually qualify for the bidding credit, by definition a partnership that includes a nationwide provider as a member will not be eligible for the benefit. Similar to attribution in the small business revenue context, the Commission stresses that applicants, including rural wireless partnerships, that do not have an identifiable controlling interest will have all of the subscribers of all of their interest holders evaluated for the purposes of determining eligibility for the bidding credit. The Commission does clarify, as commenters request, that members of such partnerships may also apply as individual applicants or as members of a consortium to the extent it is otherwise permissible to do so under the rules as amended in this decision, and seek eligibility for a rural service provider bidding credit.

105. In regard to the definition of "rural area," while the Communications Act does not include a statutory definition of what constitutes a rural area, the Commission has used a "baseline" definition of rural as a county with a population density of 100 persons or fewer per square mile. Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies To Provide Spectrum-Based Services, *Report and Order*, 69 FR 75144, 75146, December 15, 2004. The Commission will use this same definition for purposes of determining whether a carrier serves predominantly rural areas. To qualify for a rural service provider bidding credit, an applicant must certify in its short-form application that it serves predominantly rural areas.

106. Several commenters argue that the Commission should limit the rural service provider bidding credit's eligibility to geographic licenses where the applicant, or one of its members, or affiliates, has Eligible Telecommunications Carrier (ETC) status to provide wireline service. Blooston Rural argues that "ETC status is an objective and easily-verifiable criterion for determining those geographic markets where the bidder or one of its members has 'presence,' while at the same time preventing the credit from being used to reduce bid price for large urban PEAs." The Commission finds that limiting a rural service provider bidding credit to an area where

the provider has been certified for ETC status would be overly restrictive and challenging to implement. While the Commission envisions rural service providers will bid primarily on geographic licenses that overlap with their service area, the Commission does not want to restrict small rural service providers from being able to expand their service area by bidding on licenses that are outside of their service area.

107. The Commission recognizes the consumer benefits that stem from multiple providers being able to utilize the unique and highly valuable characteristics of low-band spectrum. It is therefore the Commission's goal to encourage significant competition in the Incentive Auction for licenses in rural areas. The Commission finds that the bidding credit cap will protect against a provider using a rural service provider bidding credit to win a license in a major metropolitan area. As Council Tree notes, "[i]n Auction 97, 87 percent of the licenses sold were valued at more than \$40 [million]" and "[s]uch caps effectively preclude DEs from acquiring medium- and large-sized urban markets." Moreover, the Commission finds that it would be overly cumbersome to implement a bidding credit that would vary on a provider-by-provider and market-by-market basis. Consistent with the Commission's overall goals in this proceeding, it sought to streamline and simplify the implementation of its rural service provider bidding credit where possible. For these reasons, the Commission does not limit a rural service provider bidding credit to an area where the service provider has been certified for ETC status.

108. *Rural Service Provider Bidding Credit*. The Commission's current rules provide a schedule of small business definitions and corresponding bidding credits. 47 CFR 1.2110(f). The bidding credits range from a 15 percent bidding credit to a 35 percent bidding credit. These bidding credits are based on the businesses' average annual gross revenues, and not the number of subscribers, or the number or percentage of rural counties served. AT&T, the Rural-26 Coalition, and several other rural entities propose a rural service provider bidding credit of 25 percent. Some commenters argue that the Commission should adopt a rural service provider bidding credit equal to the average credit available to small businesses—currently 25 percent—and argue that "the funds saved by a 25% bid credit would enable rural carriers to use more of their scarce resources on build out and upgrading of their existing networks, rather than spectrum

acquisition, thereby ensuring better and faster service to rural consumers.” The Commission notes, however, that rural service providers are already eligible to receive funding for network build-out through various Commission and Federal government programs, such as the Universal Service Fund. Moreover, rural service providers generally have greater access to capital and infrastructure than other small businesses or new entrants. Accordingly, the Commission establishes a rural service provider bidding credit of 15 percent. The Commission believes that a bidding credit of 15 percent will strike the right balance between its existing DE system where rural service providers are often unable to receive a bidding credit at all and the requested 25 percent bidding credit that may provide an existing rural service provider with an unnecessary advantage in certain markets.

109. *Small Business and Rural Service Provider Bidding Credits Will Not Be Cumulative.* An applicant is permitted to claim a rural service provider bidding credit or a small business bidding credit, but not both. While several rural stakeholders argue that the rural service provider bidding credit should be cumulative with a small business credit, the Commission does not believe that a cumulative rural bidding credit is necessary or appropriate at this time. Both of these credits are designed to be tailored to the circumstances appropriate for eligible bidders. While the Commission finds that the adoption of a rural service provider bidding credit will serve the public interest by fostering competition in rural areas, it does not believe that a provider should be permitted to “double-dip” and benefit from both a small business bidding credit and a rural service provider bidding credit. Indeed, many of the service providers that are now eligible for the rural service provider bidding credit have well over \$55 million in annual revenues and thus have far greater access to capital than most small businesses. The Commission therefore declines to adopt a bidding credit higher than 15 percent because it is mindful of concerns of small businesses that granting higher credits could serve to undercut the effectiveness of its existing small business bidding credit program. For similar reasons, the Commission also declines to adopt a tiered approach for rural service providers. There is no evidence in the record to support a tiered credit, or that smaller rural service providers face significantly unique or different challenges than

larger ones. Moreover, to the extent a smaller rural service provider would qualify as a small business, the Commission anticipates that it would elect to claim a small business bidding credit, rather than a rural service provider bidding credit. Accordingly, the Commission agrees with the AT&T and Rural-26 Joint Proposal that the rural service provider bidding credit should not be cumulative with the small business bidding credit. Therefore, an applicant must choose between one bidding credit and the other.

### iii. Small Business and Rural Service Provider Bidding Credit Caps

110. *Background.* In the *Part 1 NPRM*, the Commission sought comment on various proposed changes to its DE program designed to realize more effectively the goals of providing meaningful opportunities for *bona fide* small businesses and eligible rural service providers to participate at auction, without compromising its responsibility to prevent unjust enrichment. The Commission asked whether, in an effort to achieve that balance, it should consider reducing the level of bidding credits it awards in light of its proposals to increase a DE's flexibility in other respects, including eliminating the AMR rule and increasing small business size standards. Several parties submitted additional proposals that expand the criteria for, or offer alternatives to, how the Commission evaluates DE eligibility, including proposals to limit the total dollar amount of DE bidding credits that any DE (or DE consortium) can claim in an auction through a cap on the total benefits awarded, or through another limiting metric that would tie bidding credits more closely to a typical business plan of a *bona fide* small business or eligible rural service provider. Based on the comments and proposals received in response to the *NPRM*, the Commission sought additional comment in the *Part 1 PN* on various options, including a bidding credit cap that would limit the amount of bidding credits that a DE could receive in an auction.

111. *Discussion.* The Commission received a range of comments on this issue in response to the *NPRM* and the *Part 1 PN*. Although some commenters oppose the imposition of any sort of limit on the amount of DE bidding credits that a DE may be awarded in an auction, several parties support adopting a cap or limit on the overall amount that may be awarded to any applicant or group of applicants. Moreover, some of the commenters opposing the imposition of a cap on the

award of bidding credits appear to be more concerned by the appropriate level of any such cap than a cap as a general matter. The Commission adopts a cap on the monetary amount of DE bidding credits it will award in future auctions.

112. The Commission agrees with commenters that contend that the imposition of a cap, if properly designed, will help the very entities that it sought to benefit, as well as provide some level of assurance that bidding activity by small businesses and rural service providers is consistent with their relative business size and plans. AT&T notes, for example, that a cap “could help to ensure that the amounts DEs are bidding are consistent with the smaller size and revenues of a small business.” This approach is also consistent with the approach that other federal agencies have taken. The SBA, for example, limits the total dollar value of sole-source contracts that an individual participant in its 8(a) business development program may receive.

113. Commenters also argue that the implementation of a bidding credit cap may discourage entities that seek to game the Commission's rules at taxpayer expense. As Blooston Rural notes, a cap “would serve as a substantial disincentive to truly large entities that may be tempted to configure an applicant that is designed to qualify for a small business status.” The Rural-26 Coalition agrees, stating that a cap will “deter large entities backed with Wall Street capital from gaming the rules and denying the U.S. taxpayers billions in revenues.” The Commission notes that, as the cost of spectrum continues to grow, the incentives for structuring transactions to obtain bidding discounts increases significantly. Thus, while the Commission remains committed to strict enforcement of its DE rules, it believes that by imposing a bright-line cap on the overall amount of bidding credits it will award to a *bona fide* small business or eligible rural service provider, it will provide an important additional safeguard—or backstop—that will prevent misconduct in a manner that is simple and straightforward to implement, if set appropriately will not impose an artificial restriction on the amount DEs are likely to bid. The Commission therefore concurs with Tristar that “[a]n aggregate limitation . . . does not frustrate the purposes of section 309(j), but instead assists in protecting the integrity of the DE program and the auction itself.”

114. In adopting an overall limit on the amount of bidding credits the Commission will award to any DE

applicant, it acknowledges that the effectiveness of a cap will depend, in significant measure, on how high—or low—it is set for any particular auction. To establish an appropriate amount generally, it is guided by its statutory directives to promote the “development and rapid deployment of new . . . services for the benefit of the public, including those residing in rural areas;” “disseminat[e] licenses among a wide variety of applicants;” and ensure the “efficient and intensive use of the electromagnetic spectrum.” 47 U.S.C. 309(j)(3)(A)–(B) and (D). Finally, the Commission notes that small businesses and rural service providers generally have different business plans and associated capital requirements that must also be considered in setting its cap amounts. In balancing these objectives and concerns, the Commission concludes that it can establish a cap on an auction specific basis in a manner that will allow *bona fide* small businesses and eligible rural service providers to participate in spectrum auctions and in the provision of service in a meaningful and measured way.

115. After carefully considering the record on this issue, and taking into account the changes the Commission makes to increase a DE’s flexibility in other respects, it adopts a process for establishing a reasonable monetary limit or cap on the total amount of bidding credits that an eligible small business or rural service provider may be awarded in any particular auction. As a general matter, the Commission establishes the parameters to implement a bidding credit cap for all future auctions on an auction-by-auction basis, based on an evaluation of the expected capital requirements presented by the particular service being auctioned, and the inventory of licenses to be auctioned. The Commission resolves that the amount of the bidding credit cap for a small business in any particular auction will not be less than \$25 million, and the bidding credit cap for the total amount of bidding credits that a rural service provider may be awarded will not be less than \$10 million. Given the potential number of licenses and their expected value in the Incentive Auction, the Commission does not foresee it likely that any subsequent auction would include a bidding cap that exceeds the one established for previous auctions.

116. In establishing the aggregate bidding credit cap floor for any particular auction at \$25 million for each eligible small business, and \$10 million for each eligible rural service provider, the Commission uses data

from Auctions 66, 73, and 97 as a starting point. The Commission observes that a \$25 million cap would have allowed the vast majority of small businesses to take full advantage of the Commission’s bidding credit program. The Commission also notes that there is support in the record that a \$25 million cap for a small business would still provide “a significant benefit to the vast majority of small businesses and entrepreneurs participating in a spectrum auction, since it would represent a 25% discount on bids of up to \$100 million.”

117. Likewise, the Commission notes that rural service providers have collectively advocated for a \$10 million cap on the newly-established rural service provider bidding credit, which they claim will assist in their ability to participate successfully in competitive bidding and ensure that DE benefits are used for spectrum acquisition in rural markets. Additionally, based on past auction data for Auctions 66, 73, and 97, the Commission finds that if a 15 percent bidding credit had been offered in each of those auctions, each winning bidder self-identifying as a rural telephone company would not have been affected by the \$10 million cap as applied to their respective gross winning bids. Indeed, RWA/NTCA also conclude that a “[bidding] credit up to \$10 million as proposed is sufficient and appropriate,” based on its own review of past auction data. As such, the Commission finds that the smaller cap requested by the rural service providers reflects their more targeted approach to bidding generally, which is usually focused on competing for a few select license areas that align with their existing service territories or adjacent areas.

118. Given the different nature of their business plans and financial resources, the Commission concludes that different bidding credit caps, and the methodology for implementing them in the Incentive Auction, are warranted for small businesses and rural service providers. Rural service providers generally have targeted business plans focused primarily on a smaller number of license areas within their established service areas. Moreover, the Commission observes that some rural service providers may have greater access to capital than small businesses, including access to universal service funds and other forms of federal support. At the same time, the Commission notes that a cap would limit the benefits that a rural service provider could obtain in a service area that is predominantly urban, particularly if it seeks multiple licenses

in the auction (and thereby has its bidding credits apportioned over those licenses). This point is largely offset by the fact that the substantial majority of the licenses available in the Incentive Auction include significant amounts of spectrum in rural areas.

119. The Commission disagrees with entities that believe that adoption of a cap “would essentially end the DE program” and could significantly limit a DE’s ability to obtain spectrum in more than one market. USCC, for instance, explained that a bidding credit cap “could prevent DEs from operating with sufficient scale to sustain itself in the industry.” As a general matter, the Commission finds that taking an auction-by-auction approach for establishing bidding credit caps will enable it to look carefully at, among other challenges, the capitalization costs for a particular service that DEs may face in order to compete in that auction and provide service to the public. Using this process will also provide commenters with the flexibility to provide specific, data-driven arguments in support of the bidding credit caps for that particular service. The Commission also notes that its rule changes will not foreclose the ability for designated entities to participate in auctions when their auction bids fall above the cap; rather, such entities may still receive a bidding credit discount of up to designated cap for that auction and then pay the excess above that amount. Nor has USCC provided any basis for the scenario in which non-DEs will outbid the cap simply to deprive DEs of the licenses. First, because the cap is an aggregate one, rather than a per-license one, such a strategy would appear to be impracticable, particularly in auctions where anonymous bidding is utilized. More important, there is no basis for concluding that non-DEs would exceed an aggregate cap (on whatever licenses they may seek) unless they believe the licenses’ value exceeds the cap—in which case doing so would promote section 309(j)’s goal of efficient and intensive use of the spectrum.

120. The Commission also disagrees with various comments that, in sum, argue that the implementation of bidding credit caps is inconsistent with the Commission’s statutory mandates. The Commission finds no merit in these arguments. The Commission is vested with broad discretion when balancing various statutory objectives. Additionally, the Commission has consistently determined that section 309(j) does not charge the Commission with providing entities with generalized economic assistance or a path to success, but rather with the

responsibility and the discretion to provide opportunities for small businesses while preventing the unjust enrichment of ineligible entities. *See* Order on Reconsideration of the DE Second Report and Order, 71 FR 34272, 34276–77, June 14, 2006; Secondary Markets Second Report and Order, 69 FR 77522, 77529, December 27, 2004. The Commission further notes that the statutory goal cited by commenters requiring it to promote economic opportunity and competition by a wide dissemination of licenses is “subject to a variety of reasonable interpretations,” and must be balanced against a number of other competing statutory objectives. In striking that balance, “only the Commission may decide how much precedence particular policies will be granted when several are implicated in a single decision.” The Commission finds that appropriate bidding credit caps will protect the integrity of the DE program by providing opportunities for qualified designated entities, while mitigating the incentives for abuse, consistent with its statutory mandates.

121. Finally, the Commission declines to adopt other proposals that would restrict the amount a small business can bid at auction, or that would base a bidding credit cap on another metric such as population. The Commission believes that such proposals would be unduly burdensome on DEs to implement and might negatively affect competition, unlike those the Commission adopts. Indeed, as Blooston Rural notes, placing a limit on bid amounts is arbitrary and establishing standards based on population contravenes the long-standing economic principle that “a license available for auction should go to the entity that values it the most.”

122. The bidding credit caps the Commission adopts will enable small businesses and rural service providers to attract capital and participate in the Incentive Auction, as well as future Commission auctions, in a meaningful way, consistent with their business plans. The Commission adopts these bidding credit caps based on its experience in administering its auctions program, and based on data regarding bidding credits DEs have utilized to date. By establishing parameters significant enough to assist eligible entities to have the opportunity to compete at auction, but reasonable enough to ensure that ineligible entities are not encouraged to undercut its rules, the Commission concludes that it achieves its dual statutory goals of benefitting DEs and at the same time preventing unjust enrichment.

123. *Adoption of DE Bidding Credit Caps for the Incentive Auction.* Given the significant advantages of the low-band spectrum licenses being auctioned, and the associated capital requirements, the Commission establishes a higher cap on the total amount of bidding credits that a small business may receive for the Incentive Auction than what it anticipates in other future auctions. Specifically, the Commission establishes a \$150 million cap for small businesses and maintains a \$10 million cap for rural service providers on the total amount of bidding credits that a winning bidder may receive. The Commission finds that these cap amounts are appropriate given the unique characteristics of the 600 MHz spectrum being auctioned, its analysis of past auction data, and record evidence. Further, for the purposes of the upcoming Incentive Auction, the Commission also employs a market-based differential for how the cap will be imposed on a winning DE bidder in both larger and smaller markets. Taken together, the Commission believes that these cap amounts will allow small businesses and rural service providers to attract capital and compete in the Incentive Auction in an equitable and meaningful way, consistent with their respective business plans.

124. The Commission finds that a significant upwards adjustment from the \$25 million baseline for small businesses is warranted in light of the significant value of the 600 MHz spectrum to be auctioned and associated capital requirements. As the Commission indicated in the *Mobile Spectrum Holdings Report and Order*, 79 FR 39977, July 11, 2014, low-band spectrum is known to have superior propagation characteristics to mid- or high-band spectrum. Low-band spectrum is also less costly to deploy and provides higher coverage quality. As noted by T-Mobile, “[t]he 600 MHz spectrum is particularly valuable because it penetrates buildings more readily and covers a much wider geographic area with fewer transmitters than higher-band spectrum.” According to CostQuest, the cost of deploying networks using mid-band spectrum (1900 MHz) would require nearly 300 percent more in total investment than a comparable network deployed using low-band spectrum (700 MHz). The Commission therefore finds that a \$150 million cap is warranted given the significant difference in value between low-band and higher-band spectrum. This will ensure that smaller businesses are not disadvantaged vis-à-vis larger

bidders and have the opportunity to compete in a meaningful way.

125. Based on past auction data, the Commission also finds that a \$150 million cap would accommodate the bidding thresholds of a higher percentage of small business participants than the \$25 million baseline would. The Commission observes, for example, that in Auctions 66, 73, and 97, nearly all of the small businesses that claimed bidding credits—for licenses in both large and small markets—would have fallen under a \$150 million cap amount. In addition, the Commission notes that when applying Auction 97 prices to 10-megahertz PEA licenses (the same configuration as in the Incentive Auction), a \$150 million cap would not affect a 15 percent or 25 percent bidding credit discount for any individual license bid except in the top two markets (NY and LA). The Commission therefore expects that a \$150 million cap would give small businesses a meaningful opportunity to compete for a wide variety of licenses in both large and small market areas, consistent with their overall business plans.

126. While USCC suggests that the use of past auction data for determining the bidding credit cap is not an accurate reflection of the ever-increasing cost of spectrum, the Commission does not find this argument to be persuasive. Commenters, such as AT&T and RWA/NTCA, have used past auction data to support their proposed caps for the Incentive Auction. In addition, Council Tree has used past auction data to support their advocacy for certain policy positions. Moreover, as part of determining what DE benefits to adopt for a particular service, the Commission traditionally reviews the service rules for spectrum bands that have similar propagation characteristics. In the Incentive Auction for instance, the Commission determined the appropriate small business size definitions and associated bidding credits based in part on its service rules for the licenses in the 700 MHz band. Therefore, consistent with its past practices and the approach taken by several commenters in this proceeding, past auction data will be a factor, among others, in establishing a reasonable cap for DE benefits in the Incentive Auction.

127. Capping the rural service provider bidding credit at \$10 million for the Incentive Auction is also appropriate based on a similar examination of past auction data and is supported by the majority of rural service providers. Assuming that these same entities will participate in the Incentive Auction, the Commission

expects that its bidding credit limits will capture nearly all of the gross winning bids of these entities thereby minimizing any negative impact on DEs in general. By establishing these caps, the Commission intends to provide *bona fide* small businesses and eligible rural service providers with sufficient flexibility to obtain the necessary capital to compete in spectrum auctions and achieve the appropriate size and scale to operate in the wireless marketplace and serve the public interest.

128. *Implementation of the DE Bidding Credit Caps, Based on Market Population, for the Incentive Auction.* To create parity in the Incentive Auction among small businesses and eligible rural service providers competing against each other in smaller markets, the Commission establishes a ceiling on the overall amount of bidding credits that any winning DE bidder may receive in connection with winning licenses in markets with a population of 500,000 or less, *i.e.*, PEAs 118 through 416. See Wireless Telecommunications Bureau Provides Details about Partial Economic Areas, *PEAs PN*, 79 FR 52653, September 4, 2014. Specifically, no winning DE bidder will be able to obtain more than \$10 million in bidding credits for licenses won in PEAs 118–416, with the exception of PEA 412 (Puerto Rico), which exceeds the 500,000 pop threshold. To the extent a small business does not claim the full \$10 million in bidding credits in the smaller markets, it may apply the remaining balance to its winning bids on larger licenses, up to the aggregate \$150 million cap for small businesses.

129. The Commission expects that this approach will provide small businesses the flexibility to pursue a variety of business models that may include bidding in both large and small markets, while ensuring they compete on equal footing with rural service providers in smaller markets. The Commission also notes that this flexible approach is generally consistent with alternative proposals put forth by commenters and agree that it strikes a measured and reasonable balance to help protect against potential abuse of the DE program while also allowing larger DEs a higher cap in larger service areas.

130. The Commission determines that a market threshold based on a license area with 500,000 or less pops is consistent with record evidence, an analysis of past auction data, and its experience in auctions and licensing matters. The Commission also finds that the 500,000 population threshold provides an objective and easily

administrable delineation between larger urban and smaller rural markets.

131. Several commenters strongly advocated for placing a ceiling on the amount of bidding credits that could be applied in those areas with a population of 500,000 or less. These commenters note that, in light of record support for a larger cap in urban markets, it may be advantageous to vary the cap levels for larger urban and smaller rural markets. The RWA/NTCA/Blooston Rural and Rural-26 Coalition, for example, propose using a 500,000 threshold to differentiate between such markets. The Commission concurs that a 500,000 threshold is a reasonable benchmark to distinguish between larger and smaller license areas. The Commission notes, for example, that the population density of PEAs with population of 500,000 or less correlates more closely with that of rural areas, as well as the average population of a Cellular Market Area (CMA), a smaller geographic license area favored by small and rural carriers. Specifically, the average population density of PEAs with a population greater than 500,000 (PEAs 1–117 and 412) is 333 pops/mile, whereas the average population density for the smaller PEAs (PEAs 118–416), except for 412—Puerto Rico) is 76 pops/mile. Additionally, the Commission observes that 76 pops/mile roughly corresponds with the 100 pops/mile approach it takes in defining rural areas. Given these characteristics, the Commission notes that these smaller markets are ones where rural service providers are most likely to offer service and where an opportunity to compete on equal footing is of particular importance. In addition, based on the results of Auction 97, the Commission estimates that the cap for any entity eligible with a 15 percent bidding credit or larger would not be exhausted in any these areas. In light of these considerations, the Commission finds that 500,000 is a reasonable threshold and provides DEs with sufficient flexibility to adjust their strategic and capitalization demands in order to compete meaningfully in the Incentive Auction. The Commission therefore declines to implement the proposal recommended by ARC in its late-filed *ex parte* to divide the markets into thirds and to implement a \$10 million cap for PEAs in the bottom third tier (*i.e.*, PEA 278 and below) or alternatively to implement a \$10 million cap for PEAs with populations below 100,000. The Commission notes that ARC makes no showing as to why this alternative approach is superior or better serves the Commission's goal of establishing parity for small and rural

providers competing in the smallest markets.

#### iv. Other Bidding Preferences/Types of Credit

132. The *Part 1 NPRM* sought comment on whether to extend bidding preferences to entities based on criteria other than business size. Specifically, the Commission sought comment on the possibility of offering credits to members of the groups named in the statute besides small businesses—*i.e.*, rural telephone companies and businesses owned by minority groups and women. The Commission also sought comment on whether to extend bidding preferences based on the provision of service to unserved/underserved areas and areas of persistent poverty, as well as to entities owned by persons who have overcome substantial disadvantages. The Commission noted that its ability to implement other types of bidding credits is constrained by both its statutory authority and standards of judicial review, and sought specific comment on how any alternative proposals could overcome such limitations. In response to suggestions submitted in response to the *Part 1 NPRM*, the Commission sought comment in the *Part 1 PN* on whether it should offer other bidding preferences or types of credits such as those “based on criteria other than business size.”

133. With the exception of the rural service provider bidding credit, the Commission declines to adopt bidding preferences or credits based on criteria other than business size at this time. The limited record support for any of the proposals beyond the rural service provider bidding credit is insufficient to justify departure from its existing DE program. The Commission believes that repeal of the AMR rule, the expanded size standards for eligibility for the DE program, and new rural service provider bidding credit will help to address the challenges that such groups face today, including: raising capital to compete in an auction; finding a revenue stream to support network construction and business expansion; and developing a business model based on market needs.

#### a. Minority- and Women-Owned Businesses

134. *Background.* The Commission's ability to target bidding credits to certain types of entities is constrained by its statutory authority and constitutional standards of judicial review. Following the Supreme Court's decisions establishing judicial standards for government programs based upon gender and race, it has been the



Commission's policy to employ gender- and race-neutral provisions, offering credits instead to businesses based on the size of the business. The Commission has long recognized that many minority- and women-owned businesses are eligible for a small business bidding credit. However, the Commission has never foreclosed on the possibility of finding additional ways to directly or indirectly support opportunities for participation by minorities and women in auctions and the wireless marketplace within the bounds of its authority. In the *Part 1 NPRM*, the Commission sought comment on whether its current small business provisions are sufficient to promote participation by businesses owned by minorities and women and, if not, how additional provisions to ensure participation by minority- or women-owned businesses could be crafted to meet the relevant standards of judicial review. While commenters did not advocate for preferences targeted specifically toward minority- and women-owned businesses, several urged the Commission to adopt race- and gender-neutral updates to the DE rules that would aid all eligible entities, including minorities and women.

135. *Discussion.* The Commission declines to adopt a bidding credit for minority- and women-owned businesses. The Commission notes that no party advocated for such a preference, nor provided evidence to demonstrate that such a credit could meet the constitutional standards for review. Instead, the Commission agrees with commenters that updating its DE rules should provide small businesses—including enterprises owned by minorities and women—a better on-ramp into the wireless business.

**b. Unserved/Underserved Areas and Persistent Poverty Preferences**

136. *Background.* The Commission sought comment in the *Part 1 NPRM* on whether the Commission should extend bidding credits to winning bidders that deploy facilities and provide service to unserved or underserved areas, or to those that provide service to persistent poverty counties. The Commission also sought comment on its tentative conclusion that section 309(j) of the Act authorizes it to offer bidding credits using these criteria. Further, the Commission encouraged commenters to offer data-driven suggestions and address any potential implementation issues.

137. *Discussion.* The Commission declines to adopt specific additional bidding credits on the basis of whether the license area correlates with

unserved/underserved areas or persistent poverty counties at this time. Some commenters support a bidding credit for persistent poverty areas. Others argue for a bidding credit in conjunction with addressing unserved/underserved areas, or that the Commission should focus on strengthening its current DE program, rather than considering the adoption of new bidding credits. It remains a goal of the Commission, through its various universal service and other programs and policies, to promote the deployment of broadband facilities and services to unserved and underserved areas and persistent poverty counties. The Commission furthers those goals by adopting a rural service provider bidding credit and repealing the AMR rule. According to the Department of Agriculture's Economic Research Service (ERS), a large portion of unserved or underserved areas and persistent poverty counties are located in rural areas. Thus, the rural service provider bidding credit the Commission adopts is intended to better ensure that consumers in unserved/underserved areas and persistent poverty counties have access to more competition and improved services. Nevertheless, the Commission will continue to monitor the effectiveness of the proposals it adopts in advancing the deployment of spectrum-based services in unserved/underserved and persistent poverty areas. To the extent the policies the Commission adopts is not sufficient, it encourages parties to provide it with contrary evidence so that it may reexamine these policies based on a more complete record.

**c. Overcoming Disadvantages Preference**

138. *Background.* In response to renewed interest raised in the Incentive Auction proceeding, the *Part 1 NPRM* sought further comment on a recommendation by the Commission's Advisory Committee on Diversity for Communications in the Digital Age (Advisory Committee) to implement a bidding preference for persons or entities who have overcome substantial disadvantage (referred to as an overcoming disadvantages preference or ODP). The Commission sought detailed and specific comment on its statutory authority to adopt such a preference and the benefits of doing so, as well as eligibility for, and administration of, the preference. The Commission also noted that the Advisory Committee's proposal raised a number of challenges to be resolved before any ODP could be designed and implemented. The Commission received only two comments on this issue, which are

divided on the desirability and feasibility of an ODP.

139. *Discussion.* The Commission declines to adopt the Advisory Committee's ODP proposal. The *Part 1 NPRM* reflects the Commission's uncertainties about how eligibility for such a preference could be defined and/or administered in the auction context. The comments the Commission received in response to the *Part 1 NPRM* did not alleviate any of its concerns about the complexity in implementing such a preference. In addition, the policy decisions adopted—including the repeal of the AMR rule, the expansion of the small business bidding credit thresholds, and the new rural service provider bidding credit—will benefit those persons or entities who have overcome substantial disadvantage. These decisions are intended to promote the provision of spectrum-based services by all *bona fide* small businesses and eligible rural service providers, including those that have overcome a substantial disadvantage. The Commission also believes that this approach is simpler than adoption of the Advisory Committee's ODP proposal. While the ODP Recommendation provided a non-exhaustive list of disadvantages, it is not clear what proof should be required from those individuals or entities seeking to receive such a preference and how to apply the ODP on a neutral basis. The Commission is also concerned that its review of such a claim would involve a costly and lengthy process. Accordingly, the Commission declines to adopt the Advisory Committee's ODP proposal.

**d. Tribal Lands Bidding Credit**

140. *Background.* NTCH urges the Commission to consider ending its tribal lands bidding credit, and the Commission sought additional comment on this topic in the *Part 1 PN*. The tribal lands bidding credit program awards a discount to a winning bidder for serving qualifying tribal land that has a wireline telephone subscription rate equal to or less than 85 percent based on Census data. NTCH argues that tribal lands may not merit *per se* qualification as a disadvantaged category because some tribes have multiple business enterprises and some receive subsidies from grant programs to target telecommunications deficits. NTCH provides no citation or reference to empirical data to substantiate its position. NTCH suggests instead that the Commission determines the need for a tribal lands bidding credit on a case-by-case basis to avoid granting bidding credits that may be "unnecessary and

actually unfair to others,” but does not explain specifically how such an individualized qualification process might be administered. Several tribal entities involved in the telecommunications industry detail the chronic lack of wireless services on tribal lands, explain that tribal entities may encounter unique challenges in participating in spectrum auctions, and oppose any changes to the tribal lands bidding credit program.

141. *Discussion.* The Commission declines to adopt any modifications to its tribal lands bidding credit in this proceeding. A substantial number of comments and reply comments from various tribes and tribal entities uniformly oppose NTCH’s suggestion. Several tribal entities involved in the telecommunications industry detail the chronic lack of wireless services on tribal lands, explain that tribal entities may encounter unique challenges in participating in spectrum auctions, and oppose any changes to the tribal lands bidding credit program. Numerous reply comments voice support for these comments and asked that NTCH’s suggestion be rejected. The Commission has been presented with no evidence or information suggesting that its policy of providing tribal lands bidding credits has been rendered unnecessary or does not further its objective in promoting further deployment and use of spectrum over tribal lands. Thus, the Commission declines to make any alterations to the established tribal lands bidding credits here.

### C. Unjust Enrichment

142. *Background.* Under the Commission’s rules, a DE seeking approval of a transfer of control or an assignment of a license acquired with a bidding credit to a non-DE within five years after its initial issuance must reimburse the government a portion of the bidding credit. This reimbursement obligation is governed by a five-year unjust enrichment schedule, with the amount of repayment decreasing over time.

143. As part of its effort to balance the policy objectives for the DE program, the Commission sought comment in the *Part 1 NPRM* on whether any changes are needed to strengthen its unjust enrichment rules. The Commission invited comment on whether the existing five-year unjust enrichment period and repayment schedule continue to provide sufficient safeguards against potential misuse, or whether there is a need to extend the schedule to ten years or some other time period. In addition, the Commission sought comment on the ability of a

small business to raise capital and participate at auction, and to provide service, if the Commission were to repeal the AMR rule, as proposed in the *NPRM*, and also tighten the unjust enrichment rules—particularly when compared to the existing unjust enrichment rule. The Commission also asked whether there are other unjust enrichment provisions it should consider, such as requiring full repayment of benefits if a small business loses eligibility prior to meeting the applicable construction requirement, and whether a different reimbursement percentage (*i.e.*, less than 100 percent) is preferable.

144. In the *Part 1 PN*, the Commission sought comment on some of the alternative viewpoints expressed by parties in response to the *Part 1 NPRM*. The Commission asked for additional comment on whether the unjust enrichment period should be extended to apply for a specified number of years (*e.g.*, ten years), to the entire license term, or linked to an interim construction milestone. The Commission also asked if there are other alternatives it should consider, such as revisiting the percentage amounts associated with the unjust enrichment schedule. In addition, the Commission requested comment on whether it should, as T-Mobile suggests, require the repayment of any profit or some multiple of the bidding credit received, and invited commenters to discuss whether the DE benefits associated with any and all of a DE’s licenses should be forfeited if a DE loses its eligibility. The Commission invited comment on whether it should consider T-Mobile’s proposal to impose additional build-out and reporting obligations specific to DEs that would require them to determine “tangible steps toward development” and, if so, what the appropriate timeframe(s) for such a requirement would be. The Commission also asked whether there are any other options it should consider to prevent spectrum warehousing and encourage expeditious spectrum build-out, such as requiring repayment of some percentage of a bidding credit if a DE fails to meet a construction benchmark. Finally, the Commission asked commenters to address any tradeoffs related to these proposals, including the extent to which they would restrict a DE’s ability to access capital, prevent abuse of the designated entity program, and avoid unjust enrichment.

145. The Commission received a range of comments in response to its proposals in both the *Part 1 NPRM* and *Part 1 PN*. Most parties oppose any extension of the unjust enrichment

period, with many maintaining that the existing five-year period sufficiently protects against unjust enrichment while at the same time providing small businesses with the flexibility to obtain access to capital. Several of these parties also highlight the potentially adverse impact that extending the unjust enrichment period could have on their ability to retain capital to operate their businesses. RWA and WISPA, for example, warn that an extended unjust enrichment period locks DEs into business plans and hinders new entrants. Council Tree maintains that extending the period to ten years “would be debilitating for investors and effectively end DE bidding at higher levels.” M/C Partners submits that “[t]he practical effect of extending the unjust enrichment period beyond five years and removing the payback tiers would be to discourage venture capital investments in DEs,” while Columbia Capital notes that “limiting a DE’s flexibility to transfer or assign licenses during the entire term likely would rule out investments in DEs by such funds.” MMTC similarly states that “in a rapidly changing industry, no one will invest in a company from which exit is impossible . . . for a decade.” MMTC further notes that an extension of the unjust enrichment period to ten years would further hamper or eliminate a DE’s ability to raise and retain capital and operate its business with the same level of flexibility afforded to other businesses in the wireless industry. M/C Partners and Columbia Capital maintain that extending the unjust enrichment period to ten years would effectively foreclose private equity investments in DEs because most venture capital and private equity funds have a ten-year investment horizon, with investments typically occurring in the first few years, average realization periods of three to seven years from the time of initial investment, and the last few years devoted to planning an exit. The DE Coalition, RWA, WISPA, KSW, and Atelum likewise express concern that an extension of the unjust enrichment period could limit a small business’ access to capital. As KSW states in opposing a ten-year unjust enrichment period, “ten years is a lifetime in wireless, and financial institutions are far less willing to provide money for a ten-year period.” CCA recognizes the need for strong unjust enrichment protections, but opposes proposals to extend the unjust enrichment penalties to apply throughout the entire license term because it could cause DEs to experience difficulties in attracting and

obtaining outside investment which would constrain small business participation in auctions. CCA submits that “adopting a rigorous two-pronged eligibility combined with the current five-year unjust enrichment restriction and payment schedule represents a sensible calibration of policy objectives that strikes a balance between increasing participation of small businesses in auctions and promoting the deployment of spectrum-based services.” RWA similarly states that a five-year period “nicely balances the competing goals of preventing unjust enrichment to ineligible entities with small and rural carriers’ need for flexibility and access to capital.”

146. A few parties, however, support making certain adjustments to strengthen its unjust enrichment rules. T-Mobile and Native Public support extending the unjust enrichment period to the full license term. T-Mobile also advocates requiring licensees to repay the windfall profit, plus interest, from the sale of a license obtained with a bidding credit, while Taxpayer Advocates supports requiring a DE that leases or sells a significant portion of spectrum acquired with a bidding credit within the first five years to pay back all or part of the discount it received. Native Public supports allowing a license acquired with a bidding credit to be sold during the license term only by repaying the bidding credit used to obtain the license or selling the licenses to the tribe or ANC whose DE eligibility was used to obtain the credit. T-Mobile also supports adopting a build-out requirement that is uniquely applicable to DEs or tethered to service-specific performance requirements to prevent spectrum warehousing and to promote facilities-based service. Specifically, T-Mobile asks that the Commission require DEs to show some evidence of build-out activity within one year after acquiring a license or clearing incumbent users.

147. Most commenters, however, strongly oppose any build-out requirements that are uniquely applicable to DEs. Council Tree argues that if a unique build-out restriction is imposed on DEs, the associated licenses would be less valuable and investor capital would be more difficult to obtain, while KSW maintains that it would be “counter-productive to require enhanced build-out showings from those who are least equipped to do so” and that there is no reason to apply a heightened standard to DEs in this regard. Rural Telcos maintain that the Commission’s rules should prevent DE program abuse before licenses are granted, rather than imposing additional

regulatory burdens on *bona fide* DEs (i.e., rural telephone companies) that can least afford them. Although CCA supports the concept of requiring DEs to ensure they are utilizing their spectrum in order to deter speculators from using bidding credits to acquire and warehouse spectrum, it cautions against adopting any requirements that would hamstring small carriers’ ability to compete or raise capital for the auction, or create undue burdens for DEs that are legitimately using spectrum. CCA therefore urges the Commission to avoid impairing smaller competitors through accelerated build-out schedules or expansive coverage requirements that are disproportionately onerous for smaller entities. USCC states that, in addition to imposing burdensome obligations exclusively on those that are least equipped to deal with them, treating DEs differently in this manner could also lead to other harms. USCC notes, for example, that based on the currently anticipated schedule for the Incentive Auction, the 600 MHz band will be cleared about one to two years before the expected rollout of 5G; a non-DE licensee could delay construction until 5G becomes available, however, if a DE is required to demonstrate some level of build-out within a year after clearing, it would be forced to begin building out prior to the rollout of 5G even though, without the participation of the rest of the industry, 4G equipment for the band would not be available. USCC submits that as a result, DE licensees would not be able to comply with an accelerated build-out despite their best efforts. Tristar, on the other hand, maintains that DEs that are not rural telephone companies should not be held to the same build-out standards as non-DEs and should instead be given a much longer build-out timeframe and the ability to “save” all licenses through build-outs over some portion of the aggregate population of their licenses.

148. Proponents of a rural service provider bidding credit support applying the same unjust enrichment rules adopted for small business bidding credits to any adopted rural service provider bidding credit with some modest changes. Specifically, Blooston Rural, Rural Coalition, and RWA/NTCA support requiring an unjust enrichment payment if a rural service provider licensee assigns or transfers a license acquired with a bidding credit to a non-eligible entity within the unjust enrichment period. These parties maintain, however, that neither an unjust enrichment payment nor the prohibition should apply to a license recipient that is (1) another rural

telephone company or rural telco subsidiary/affiliate with a wireless or wireline presence in the applicable license area, or (2) an independent wireless ETC certified in the original license area with fewer than 100,000 subscribers.

149. *Discussion.* After a careful review of the record, the Commission concludes that its existing rules provide a sufficient safeguard to ensure that designated entity benefits are provided only to *bona fide* small businesses and eligible rural service providers. The Commission therefore declines to make any adjustments to the unjust enrichment period and repayment schedule. The Commission agrees with commenters that increasing the unjust enrichment period will impede the ability of DEs to both access capital and participate in auctions. As WISPA notes, investors in the telecommunications industry typically want to recover their investments within five years. RWA also notes that a five-year unjust enrichment period allows small businesses and rural carriers to quickly respond to rapid industry changes, changing business models, and capital demands, thereby providing them with the necessary flexibility to compete against larger carriers. Overall, the record does not provide the Commission with sufficient evidence to demonstrate that an extension of the current unjust enrichment period will yield greater protections without causing undue harm to *bona fide* small businesses and eligible rural service providers. To the contrary, the record is replete with evidence from the numerous parties that oppose extending the unjust enrichment period that it will impede DEs’ ability to raise and retain capital and successfully participate in auctions.

150. The Commission’s current unjust enrichment rules—in combination with the other actions it takes—balances commenters’ concerns regarding the unjust enrichment of ineligible entities with the need to provide increased operational flexibility to DEs given the evolving wireless marketplace. Specifically, its adoption of a totality-of-the-circumstances approach in evaluating the eligibility of DEs will allow the Commission to consider all the agreements and relationships that a DE maintains with its investors. In addition, its decision to limit the ability of a DE’s disclosable interest holders to use the spectrum in any way during the five-year unjust enrichment period where the nexus of use is more than 25 percent and the interest in the DE is ten percent or greater will prevent the benefits of the program from flowing to

the financial investors in a DE. As its revised rules demonstrate, the Commission will remain vigilant in undertaking a careful review of all applications by entities seeking to acquire or retain bidding credits. In so doing, the Commission expects to properly execute its statutory responsibility to continue to prevent unjust enrichment of ineligible entities.

151. The Commission also declines to adopt T-Mobile's proposal that impose additional build-out and reporting obligations specific to DEs. There is very limited support for such a requirement in the record, and the few parties that support it offer no evidence of the benefit it would provide or the harm that will result in the absence of any such requirement. Conversely, the record contains ample evidence from the numerous parties that oppose such a requirement that it is likely to be burdensome, both administratively and in terms of their ability to raise capital. After weighing how the proposal may affect a small business's ability to access capital, prevent abuse of the designated entity program, and avoid unjust enrichment, the Commission is persuaded that any potential benefit that might be gained from adopting such a requirement would be outweighed by the harms it would cause. The Commission agrees with commenters opposing such a requirement that a construction requirement specifically targeted to DEs would likely impose unnecessary administrative and operational burdens with no demonstrated benefit. This requirement could also have the effect of hindering initiatives to spur additional marketplace competition by *bona fide* small businesses and eligible rural service providers. Accordingly, the Commission does not adopt any DE-specific construction requirements.

152. *Application of Unjust Enrichment Rules to Recipients of Rural Service Provider Bidding Credit.* The Commission will apply its existing unjust enrichment rules to licensees that take advantage of the new rural service provider bidding credit. Therefore, a licensee that assigns or transfers a license acquired with a rural service provider bidding credit to an entity that meets the eligibility requirements for such credit will not be required to make an unjust enrichment payment. But if the licensee assigns or transfers a license acquired with a rural service provider bidding credit to an entity that is not eligible for such a credit within the unjust enrichment period, an unjust enrichment payment will be required.

#### *D. Alternatives To Promote Small Business Participation in the Wireless Sector*

153. In the *Part 1 NPRM*, the Commission sought comment on suggestions that would enable the DE program to remain a viable mechanism for small businesses to gain flexibility to access capital, compete in auctions, and participate in new and innovative ways to provision services in a mature wireless industry. Several commenters offered alternatives they contend the Commission could pursue to facilitate small business access to benefits in both the auction and secondary market contexts. AT&T suggests that providing incentives for secondary market transactions or virtual networks may offer a more direct path to including more valuable small businesses in the telecommunications industry and may be a more effective mechanism for DE participation in wireless markets than facilitating participation in auctions due to the cost of licenses and capital needed to build networks. Blooston Rural advocates allowing a winning bidder to deduct from the auction purchase price the *pro rata* portion of its winning bid payment for any area that is partitioned to a rural telephone company or cooperative to provide another avenue for rural service providers to obtain licenses for smaller areas that correspond to their existing service areas. CCA and ARC agree that Blooston Rural's proposal would benefit DEs by providing incentives for partitioning and promoting secondary market transactions, but ARC states that the incentives would be even greater if the winning bidder received a 125 percent credit for partitioning to any DE, not just a rural telco. NTCH states that diverse ownership has been shown to enhance competition, spur innovation in services, permit local-based service to customers, and spread the benefits of spectrum to a broader segment of the population, and proposes giving a 50 percent "diversity credit" to bidders who can deliver this important diversity benefit by acquiring licenses. ARC agrees that such a credit would promote wide dissemination of licenses as required by the Communications Act.

154. Based on the comments received in response to the *NPRM*, the Commission sought comment in the *Part 1 PN* on these alternatives. The Commission also asked whether strengthening its build-out requirements and improving processes to reclaim licenses provide opportunities for small businesses to gain access to spectrum and increase diversity of license holders, and whether there are

alternative frameworks that it should consider to promote a diverse telecommunications ecosystem, including incentives for secondary market transactions or virtual networks that could provide a more direct path into the industry for all entities, including DEs. RWA/NTCA support Blooston Rural's rural partitioning bidding credit proposal, submitting that it would encourage larger carriers to facilitate rural carrier participation in the provision of wireless services. MMTC proposes that the Commission consider a variety of options that would add to a reformed DE program, among them, consideration of secondary market transactions as a factor in evaluating market competition and in reviewing waiver requests relating to ownership (including in the mergers and acquisitions and IP transition contexts), restoration of its former tax certificate policy, and establishment of a new bidding credit or installment payment program for entities that engage in secondary market transactions. The National Urban League suggests that any carrier that participates in secondary market transactions with designated entities could be provided a bidding credit for future auctions. NTCH suggests that the concentration of spectrum in a handful of companies can be reduced by offering significant discounts to entities that hold less than 20 megahertz of spectrum in a given market and that are not also counted as nationwide providers as defined by the Commission in the *Part 1 NPRM*, and reiterates its earlier proposal to provide a 50 percent "diversity credit" to such entities. CCA asks the Commission to consider supplemental measures to small business bidding credits that address the challenges smaller carriers face in the secondary market for spectrum, and proposes that it provide incentives in the secondary market by offering carriers a license term extension in exchange for partitioning or disaggregating unused portions of their spectrum to small carriers or to serve rural areas.

155. Based on the record, the Commission declines at this time to adopt any of the alternatives recommended by interested parties.

156. *Rural Partitioning Bidding Credit.* The Commission declines to adopt a rural partitioning bidding credit for entities that partition their licenses area to a rural telephone company or cooperative. The Commission notes that none of the commenters supporting this approach provided any details about how such a proposal could be implemented, and it is concerned that

the proposal would be complicated to implement without providing any meaningful benefit. Moreover, the Commission concludes that the policy concern the proposal seeks to address, which relates to facilitating access to spectrum by rural service providers, is sufficiently addressed by its adoption of a rural service provider bidding credit.

157. *Diversity Bidding Credit.* To avoid having an excessive concentration of licenses held by a small number of providers, NTCH proposes a 50 percent “diversity credit” for entities that hold less than 20 megahertz of spectrum in the market at issue and who are not also counted as nationwide providers. The Commission notes that in the *Mobile Spectrum Holdings Report and Order*, it considered and rejected requests to offer bidding credits based on the level of spectrum holdings. The Commission finds that the very limited record in this proceeding offers no new evidence to support disturbing its prior conclusion.

158. *Enhanced Build-Out Rules.* Based on the record, the Commission declines to adopt any enhanced build-out rules to give smaller providers an opportunity to obtain spectrum that has not been built out by a licensee. The Commission acknowledges the importance of its build-out rules; however, it did not receive any specific comments on this question in response to its inquiry and, therefore, concludes that the record is not sufficiently developed to warrant any the adoption of any enhanced build-out rules at this time.

159. *Incentives for Secondary Market Transactions or Virtual Networks.* AT&T suggested in its comments on the *NPRM* that providing incentives for secondary market transactions or virtual networks may offer a more direct path for more valuable small businesses in the telecommunications industry and may be more effective than facilitating participation in auctions due to the cost of licenses and capital needed to build networks. However AT&T did not offer any specific proposals in connection with this suggestion, and did not further comment on this topic in response to the *Part 1 PN*. MMTC suggested in response to the *Part 1 PN* that the Commission consider a variety of options to augment a reformed DE program. The Commission declines to adopt MMTC’s recommendation that it consider secondary market transactions as a factor in deciding whether to grant a carrier rule waivers relating to ownership. In its *Mobile Spectrum Holdings* proceeding, the Commission addressed commenters’ recommendations that it adopt a similar consideration in the spectrum holdings

context, namely, that elements of a proposed transaction that facilitate diversity be considered in balancing the benefits and harms of the transaction. The Commission declined in the *Mobile Spectrum Holdings Report and Order* to adopt a formal set of guidelines, noting that it retains the authority to consider all factors that could affect the likely competitive impact of a proposed transaction. The Commission finds that the limited record in this proceeding does not provide sufficient justification to support adopting such a requirement, and therefore declines to adopt MMTC’s recommendation. The Commission notes again that it retains the right to consider such factors in evaluating specific future transactions, as it has “encouraged the use of secondary market transactions . . . to transition unused spectrum to more efficient use and allow network providers to obtain access to needed spectrum for broadband deployment.” The Commission also declines to adopt MMTC’s recommendation that it consider secondary market transactions as a factor in determining whether to report to Congress that the wireless marketplace is competitive. The Commission notes that the Wireless Telecommunications Bureau recently sought comment on the role of secondary market transactions in a public notice in connection with the annual report on the state of competition in mobile wireless. Accordingly, the Commission will address the issue of secondary market transactions as a factor in determining whether access to sufficient spectrum exists for multiple service providers to be able to provide robust competition in the context of that proceeding. With regard to MMTC’s other recommendations, MMTC did not offer any specific details about how they might be implemented, nor did the Commission receive any comment from other commenters on this topic or on MMTC’s recommendations. Moreover, the Commission observes that MMTC’s recommendation that it restore its previous tax certificate policy appears to be outside the scope of its authority. The Commission therefore concludes that the record is not sufficiently developed to allow it to act on this suggestion.

160. *License Term Extension in Exchange for Partitioning.* The Commission declines to adopt CCA’s proposal that it provide licensees with a license term extension in exchange for partitioning or disaggregating unused portions of their spectrum to small carriers or to serve rural areas. The

Commission notes that CCA did not offer any details about how such a proposal could be implemented. Moreover, the Commission did not receive comments from other any party on this proposal. The Commission therefore concludes that the record is not sufficiently developed to allow it to act on CCA’s proposal.

#### *E. DE Reporting Requirements*

161. *Background.* Pursuant to 47 CFR 1.2110(n), the Commission requires DE licensees to file an annual report with the Commission that includes, at a minimum, a list and summaries of all agreements and arrangements, extant or proposed, that relate to eligibility for DE benefits. The list must include the parties (including affiliates, controlling interests, and affiliates of controlling interests) to each agreement or arrangement, as well as the dates on which the parties entered into each agreement or arrangement. DEs are required to file a report for each of their licenses no later than, and up to five business days before, the anniversary of the date of license grant.

162. In the *Part 1 NPRM*, the Commission proposed to repeal the annual DE reporting requirement, stating that the information that DEs are required to include in their annual reports is duplicative of information that DEs provide in their auction and license applications. The Commission also observed that for licensees with multiple auction licenses, each having a different grant date, the burden of the annual reporting requirement is exacerbated by the obligation to file multiple reports each year.

163. *Discussion.* In light of the increased flexibility the Commission grants to DEs in this proceeding, it concludes that its ability to oversee the award of DE benefits, and its responsibility to prevent unjust enrichment, will be better served by retaining the annual reporting requirement, as modified and clarified. While the reporting requirement of 47 CFR 1.2110(n) is similar to other requirements in its competitive bidding rules, it is not identical to any of them. See 47 CFR 1.2110(j), 1.2112(b), 1.2114. Moreover, the changes the Commission adopts will eliminate the reporting redundancies that two commenters mentioned. The Commission is also cognizant of the comments filed by the DE Coalition and MMTC, urging it to rely on its reporting requirements as part of an effective system of checks and balances on waste, fraud, and abuse in the DE program.

164. In deciding to retain the annual reporting requirement, the Commission

has carefully evaluated the concerns of Blooston Rural and RWA, both of which support repeal of the annual DE reporting requirement. The objections of Blooston Rural and RWA are twofold—that licensees with multiple auction licenses, each having a different grant date, must file multiple annual reports numerous times per year, and that the information provided under the annual reporting requirement is duplicative of information required to be reported by other Commission rules. To resolve these concerns, the Commission amends the annual DE reporting requirement and provides four clarifications.

165. To eliminate the burden for some DEs of having to file more than one annual report at various times of the year, the Commission will modify its annual reporting requirement to require that all annual reports be filed no later than September 30 of each calendar year. This annual report will reflect the status of each individual license subject to unjust enrichment requirements that is held by a particular licensee as of August 31 of that same calendar year including all proposed or executed agreements or arrangements affecting DE benefit eligibility. This September 30 deadline will apply regardless of the grant date of an individual license. This rule modification will reduce the administrative and related burdens that the annual reporting requirement might pose for certain small businesses or rural service providers without undermining its ability to obtain the information contained in the DE reports.

166. The Commission also specifies the following transition from its current annual report filing process to the newly-adopted modified requirement. Any designated entity licensee that would have had a report due between the release date of this order and the applicable effective date of the amended rule may defer filing its annual report until September 30, 2016. This transition will enable the Commission to balance the goal of minimizing the administrative burden on DEs with its objective of having current DE information on file.

167. In addition, the Commission modifies its rules to reduce the administrative burden on DEs and address questions that the Commission has received in the past from DEs. First, the 47 CFR 1.2110(n) annual reporting requirement applies only to licenses acquired with a DE bidding credit and still held subject to unjust enrichment obligations. *See* 47 CFR 1.2111. Second, when a DE assigns or transfers a license to another DE, the DE that holds the license on September 30 of the year in which the application for the

transaction is filed is responsible for complying with 47 CFR 1.2110(n). Finally, filers need not list agreements and arrangements otherwise required to be reported under 47 CFR 1.2110(n) so long as they have already filed that information with the Commission and the information on file remains current. In such a situation, the filer must include in its annual report both the ULS file number of the report or application containing the current information and the date on which that information was filed. The Commission also clarifies that the annual DE reporting requirement, and all DE reporting requirements, will, on the effective date of the rules it adopts apply to rural service providers as well as to other DEs.

168. Finally, the Commission stresses that, in light of the increased flexibility and benefits available to DEs under the rules it adopts, it will continue to rely on the information produced pursuant to the DE reporting requirement to help it monitor the eligibility of those awarded DE bidding credits. Accordingly, the Commission reminds DEs that it expects them to comply fully with the annual reporting requirement, as modified and clarified herein. DEs also remain obligated to provide the Commission with all of the information relevant to their initial and ongoing eligibility to acquire and retain DE benefits under its other reporting requirements, in a timely and accurate manner, which will be particularly important given the flexibility it has afforded them to determine eligibility for designated entity benefits on a license-by-license basis. Toward that end, the Commission reminds DEs that they have an ongoing obligation to provide information regarding any agreements entered into after the license grant(s) that, had they been in existence, would have had to be disclosed at the long-form application stage to demonstrate DE eligibility, including, for example, agreements between a DE and its investors that are relevant for evaluating control or spectrum use agreements that are relevant for compliance with its newly-adopted attribution rules. *See* 47 CFR 1.2110(j), 1.2112(b), 1.2114.

#### *F. MMTC's White Paper Requests*

169. *Background.* In February 2014, MMTC submitted a White Paper detailing several policy recommendations to advance minority and women spectrum license ownership. In addition to requesting the elimination of the AMR rule, an increase in bidding credits, and a substantive review of proposed DE

rules, the White Paper requested that the Commission take action in several additional areas. In the *Part 1 NPRM*, the Commission sought comment on MMTC's additional proposals, including its tentative conclusion that some of them are outside the scope of this proceeding, including: (1) Incorporating diversity and inclusion in the Commission's public interest analysis of mergers and acquisitions and secondary market spectrum transactions; and (2) supporting increased funding for and statutory amendments to the Telecommunications Development Fund (TDF). The Commission notes that MMTC's request with respect to "ongoing recordkeeping of DE performance" refers to "retain[ing] specific information about the [minority-owned business enterprises] and [woman-owned business enterprises] status of bidders, in addition to the small business status." The Commission has sought comment in WT Docket No. 13–135 on the need to collect information on the participation of minority and women-owned enterprises in the mobile wireless industry, pursuant to similar MMTC requests.

170. *Discussion.* Outside of the request to eliminate the AMR rule as discussed elsewhere, the Commission declines to adopt MMTC's other proposals. Besides the comments regarding the repeal of the AMR rule, the Commission received two comments on the other proposals including in MMTC's White Paper. The DE Coalition urged the Commission to adopt MMTC's proposals to incorporate diversity and inclusion into the Commission's public interest analysis of mergers and acquisitions and secondary market spectrum transactions, complete the *Adarand* studies updating the section 257 studies released in 2000, and finally regularize procedural requirements. The National Urban League argues that the Commission should use proceeds from the incentive auction to "reinvigorate and fully underwrite the Telecommunications Development Fund." The Commission adopts its proposal to repeal the AMR rule and replaces it with a two-pronged analysis. The lack of a record on MMTC's proposals other than repeal of the AMR rule suggests that this is the key proposal in MMTC's White Paper and the Commission believes that repeal of the AMR rule and replacement with a two-pronged analysis adequately addresses MMTC's concerns regarding minority and women spectrum license ownership. The Commission is committed to providing innovative,

*bona fide* small businesses—including minority- and women-owned businesses—the opportunity to participate meaningfully in the Incentive Auction, and to spur additional competition, investment and consumer choice in the wireless marketplace. The Commission believes that the other decisions being made here will promote the overall objectives that are the goals of MMTC within the bounds of its authority. Accordingly, except for repeal of the AMR rule, the Commission declines to adopt MMTC's proposals.

### III. Other Part 1 Considerations

171. The Commission continues to standardize and streamline its competitive bidding rules in advance of the Incentive Auction by adopting other revisions to its Part 1 competitive bidding rules. These revisions will improve transparency and efficiency of the auctions process, as well as ensure that appropriate safeguards are in place to maintain the integrity of the auctions process. Specifically, the Commission revises the former defaulter rule consistent with the relief granted to applicants for Auction 97, codifies a prohibition on multiple auction applications by the same entities, and imposes limits on the filing of applications by commonly-controlled entities. The Commission also prohibits joint bidding arrangements, while permitting certain pre-existing operational, business, and pro-competitive relationships and makes related modifications to the rule prohibiting certain communications. Finally, the Commission harmonizes the modifications adopted with the Part 1 competitive bidding rules adopted in past proceedings.

#### A. Former Defaulter Rule

172. *Background.* In the *Part 1 NPRM*, the Commission proposed to modify its former defaulter rule. The former defaulter rule requires an applicant that has defaulted on any Commission license or has been delinquent on any non-tax owed to any federal agency, but has since remedied all such defaults and delinquencies, to pay an upfront payment that is 50 percent more than the normal upfront payment amount in order to be eligible to bid in an auction, provided that the applicant is otherwise qualified. The Commission tentatively concluded that, given the tremendous growth of the wireless industry since the inception of the rule, the time was ripe to modify it. Consistent with the provisions in the *Former Defaulter Waiver Order* adopted for applicants in Auction 97, the *Part 1 NPRM* proposed

to narrow the reach of the Commission's former defaulter rule by codifying four exclusions from the general rule that were first announced in the *Former Defaulter Waiver Order*. See *Part 1 NPRM*, 79 FR at 68186.

173. The Commission also sought comment in the *Part 1 NPRM* on several approaches to limit the scope of individuals and entities that an auction applicant must consider when determining its status as a former defaulter. See *Part 1 NPRM*, 79 FR at 68188–89. In the subsequent *Part 1 NPRM*, the Commission asked for comment on additional viewpoints and suggestions from commenters, specifically whether to adopt an additional exclusion based on an applicant's credit rating, as suggested by AT&T or, alternatively, whether to eliminate the former defaulter rule entirely, as originally proposed by NTCH and Sprint. Nearly all commenters support the *NPRM's* proposal to codify the four exclusions articulated in the *Former Defaulter Waiver Order*. Some, such as AT&T and Chugach, request modest changes, such as the adoption of another exclusion based on an applicant's "investment grade" credit or to index the proposed \$100,000 threshold for inflation. Moreover, AT&T, CCA, CTIA, and Chugach contend that the current rule sweeps too broadly and imposes unnecessary and disproportionate financial burdens on auction applicants.

174. *Discussion.* In an effort to simplify the auction process and minimize the administrative and implementation costs for bidders, the Commission adopts the *NPRM's* proposed changes to the former defaulter rule, none of which any party opposes. Specifically, the Commission excludes any cured default on a Commission license or delinquency on a non-tax debt owed to a Federal agency for which any of the following criteria are met: (1) The notice of the final payment deadline or delinquency was received more than seven years before the relevant short-form application deadline (Notice to a debtor may include notice of a final payment deadline or notice of delinquency and may be express or implied, and for purposes of the certifications required on a short-form auction application, a debt will not be deemed to be in default or delinquent until after the expiration of a final payment deadline. See, e.g., Letter to Cheryl A. Tritt, Esq., from Margaret W. Wiener, Chief, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, 19 FCC Rcd 22907 (2004)); (2) the default or delinquency amounted to less than

\$100,000; (3) the default or delinquency was paid within two quarters (*i.e.*, six months) after receiving the notice of the final payment deadline or delinquency (on which the date of receipt of the notice of a final default deadline or delinquency by the intended party or debtor is the triggering mechanism for verifying receipt of notice); or (4) the default or delinquency was the subject of a legal or arbitration proceeding and was cured upon resolution of the proceeding. This approach aims to balance commenters' concerns that the rule is overly broad with the Commission's long-standing goals of ensuring that auction participants are financially responsible. Additionally, the Commission will implement its revised rules on a prospective basis, including for the Incentive Auction. See generally *Incentive Auction R&O*, 79 FR 48442.

175. The Commission declines to adopt AT&T's proposal to exempt an applicant from former defaulter status if it has an "investment grade" credit rating by a credit agency such as Moody's and Standard and Poor's, or to accept letters of credit from a Federal Deposit Insurance Corporation member institution for those businesses that do not have a credit rating. No commenters squarely addressed these ideas. Investment credit ratings, standing alone, are not necessarily indicative of an entities' financial wherewithal to participate in a Commission auction. Moreover, as a practical matter, the Commission concludes that implementing the AT&T proposal, as part of its time-limited auction application review process, would be administratively burdensome and unnecessary given the additional flexibility the Commission provides with the changes. Inevitably, the Commission recognizes there may be unique or unusual circumstances that may not squarely fall under one of the exclusions the Commission adopts. Consistent with the waiver standard of 47 CFR 1.925, the Commission will therefore consider requests for clarification and/or waiver of former defaulter status under its rules.

176. The Commission adopts in part commenters' proposals to narrow the scope of the individuals and entities considered for purposes of the former defaulter rule. CCA contends that the scope should be limited to those that are in a position to affect whether the applicant meets its auction-related financial responsibilities. NTCH would narrow the scope of the rule to controlling shareholders or executive officers of the former defaulter or affiliate thereof. No commenters,



however, oppose tailoring the scope of the individuals and entities evaluated under the rule. The Commission agrees that the relevant inquiry should be limited to those individuals and entities that have positions of control over the auction applicant or licensee and may be able to influence the ability of that entity to fulfill its auction-related financial obligations. The Commission will therefore adopt a controlling interest definition for purposes of the certifications required under 47 CFR 1.2105(a)(2) including the certification as to whether an applicant has ever been in default on any Commission license or been delinquent on non-tax debt owed to any Federal agency. See 47 CFR 1.2105(a)(4)(i), as adopted herein. Under the definition for this rule, a “controlling interest” includes individuals or entities with positive or negative *de jure* or *de facto* control of the licensee. Under this new rule, the defaults or delinquencies of certain individuals and entities will no longer be attributed to the auction applicant for purposes of any former defaulter determination. By narrowing the scope of the former defaulter rule to attribute only defaults or delinquencies of controlling interests, the Commission will ensure that the underlying purposes of the rule are met, while minimizing costs for auction applicants.

177. Finally, the Commission rejects calls of NTCH, Sprint, and AT&T to eliminate the former defaulter rule. NTCH and Sprint reason that the rule is “ineffective” and “counterproductive,” and point to a lack of evidence to support any material benefit of the rule. AT&T suggests that the Commission could use other existing mechanisms in lieu of the rule, such as the Commission’s Red Light Display System database. While the Commission recognizes that the former defaulter rule was adopted during the nascent stages of the auction program and mobile wireless industry, the Commission believes that the underlying policy reasons for the rule continues to be relevant given the importance of ensuring that auction participants are financially responsible. Because the integrity of the auctions program and the licensing process dictates requiring a more stringent financial showing from former defaulters, the Commission declines to revisit these long-standing policies.

#### B. Joint Bidding Prohibition

178. Consistent with Congressional directives and the Commission’s policy goals, the Commission has adopted policies regarding joint bidding to promote competition in the mobile

wireless marketplace and between bidders in auctions. These rules and policies sought to provide additional safeguards designed to reinforce existing laws and facilitate detection of harmful anticompetitive conduct without being unduly burdensome so that they hinder parties from gaining access to the capital necessary to participate in Commission auctions. The current joint bidding rules were adopted at the time when the mobile wireless industry was nascent. Since that time, and particularly in the past decade, the wireless marketplace has changed significantly. After consideration of the record, the Commission amends its rules to prohibit joint bidding. The Commission seeks to prohibit certain arrangements involving auction applicants and relating to the licenses being auctioned that address or communicate bids or bidding strategies, including arrangements regarding price and specific licenses on which to bid, as well as any such arrangements relating to the post-auction market structure. The Commission excludes from the prohibition certain agreements, including those that are solely operational and those the Commission finds will promote competition. These changes will provide additional clarity for potential applicants while affording opportunities for non-nationwide providers and DEs to pool their resources to promote more robust competition in future auctions and in today’s evolving mobile wireless marketplace.

179. In the *NPRM*, the Commission observed that joint bidding and other arrangements have the potential to promote competition by enabling greater participation in auctions. However, the Commission recognized that because some joint bidding and other competitor collaborations could reduce competition between participants post-auction, they raise the risk that spectrum licenses acquired at auction could be distributed in a manner that could harm the public interest. Therefore, the Commission tentatively concluded that joint bidding arrangements between nationwide providers likely would raise competitive concerns that would outweigh any public interest benefits from such arrangements. In contrast, the Commission tentatively concluded that joint bidding arrangements between non-nationwide providers were far less likely to lead to competitive harm or otherwise harm the public interest. The Commission sought comment on the policies and procedures that should apply to bidding arrangements between a single nationwide provider and other entities. Specifically, the Commission

sought comment on whether any limits should apply to these types of arrangements or whether the Commission should continue to review such arrangements on a case-by-case basis.

180. In the *Part 1 PN*, the Commission sought further comment on specific, alternative proposals offered into the record in response to the *NPRM*. The Commission also sought to expand the record on its proposals in the *NPRM* to prohibit parties to a joint bidding agreement from bidding separately on licenses in the same market, prohibit communications between joint bidders when bidding on licenses in the same market, and prohibit any individual or entity from serving on more than one bidding committee.

181. *Discussion. Promoting Competition in Auctions and in the Marketplace.* In the *NPRM*, the Commission stated that when assessing the competitive effects of joint bidding and other arrangements, it must ensure that its policies and rules facilitate access to spectrum licenses in a manner that promotes competition within auctions and in the current wireless marketplace. In light of the changes in the structure of the wireless marketplace in recent years, the Commission generally agrees with commenters that updates to its joint bidding rules are necessary to promote more robust competition in future auctions and in today’s evolving mobile wireless marketplace. In addition, joint bidding arrangements among separate applicants in an auction generally raise the risk of undesirable strategic bidding during auctions, such as by means of “bid stacking.” By “bid stacking,” the Commission refers to coordinated bidding activity among bidders to place multiple bids on the same licenses in an auction round. In light of the evolution of the marketplace and the potential future risks of undesirable strategic and/or anticompetitive behavior, the Commission takes this opportunity to refine the definition of joint bidding arrangements, prohibit joint bidding arrangements generally, and adopt certain bright-line rules to promote competition. More specifically, the Commission prohibits joint bidding arrangements between applicants (including any party that controls or is controlled by, such applicants), regardless of whether the applicants are nationwide or non-nationwide providers. In addition, the Commission prohibits joint bidding arrangements involving two or more nationwide providers as well as joint bidding arrangements involving a nationwide and non-nationwide provider, where

any one of the parties is an applicant for auction.

182. The Commission notes that it has always made clear with respect to its rules and policies governing joint bidding that “conduct that is permissible under the Commission’s Rules may be prohibited by the antitrust laws,” review under which is subject to other and differing standards under the Sherman and Clayton Acts. The Commission’s auction procedures public notices for specific auctions caution that “[c]ompliance with the disclosure requirements of 47 CFR 1.2105(c) will not insulate a party from enforcement of the antitrust laws.” Auction applicants that are found to have violated the antitrust laws or the Commission’s rules in connection with their participation in the competitive bidding process may be subject to forfeiture, prohibition from auction participation, and other sanctions.

**183. Joint Bidding Arrangements Between Nationwide Providers.**

Consistent with its tentative conclusion in the *NPRM*, the Commission finds that joint bidding arrangements between any two or more nationwide providers, of which there are currently four, have a potential to harm the public interest by negatively affecting the competitive bidding process during an auction as well as downstream competition in the provision of mobile wireless services. The Commission notes that, while not all parties advocate the same responsive measures, the record does not include significant disagreement with its analysis of the underlying risk factors present in today’s marketplace—high degrees of concentration, high barriers to entry, and high margins. Collaboration between nationwide providers raises the risk of reduced competition in the greatest number of markets both during an auction and afterwards. In light of the record before it, and the underlying risk factors present in the marketplace today, the Commission prohibits joint bidding arrangements between nationwide providers. For purposes of the Commission’s competitive bidding rules, the entities that qualify as nationwide providers will generally be identified in procedures public notices released before each auction.

184. AT&T, Verizon Wireless, King Street Wireless, Tristar, and Spectrum Financial argue that the Commission should prohibit joint bidding arrangements altogether, including between nationwide providers, because such a restriction would be the most effective way to prevent anticompetitive bidding coordination in auctions. In contrast, Sprint and T-Mobile argue that

joint bidding arrangements between some nationwide providers can promote post-auction competition and have the potential to increase consumer welfare. Apparently focused on the upcoming Incentive Auction, Sprint specifically proposes that joint bidding arrangements should be permitted in areas in which parties to an agreement collectively hold less than 45 megahertz of sub-1 GHz spectrum. T-Mobile argues that the Commission should not adopt any bright-line restrictions on joint bidding, and should instead address all joint bidding arrangements on a case-by-case basis. T-Mobile additionally comments that if the Commission would limit joint bidding arrangements in some form, then T-Mobile supports Sprint’s proposal to permit joint bidding arrangements where parties to an agreement hold less than 45 megahertz of sub-1 GHz spectrum. This proposal, in effect, would allow joint bidding between Sprint and T-Mobile, the two nationwide providers currently without significant low-band spectrum holdings. CCA and T-Mobile support the proposal to prohibit parties to a joint bidding agreement from bidding separately on licenses in the same market.

185. As the Commission stated in the *NPRM* and based upon the record before it, the Commission finds that joint bidding arrangements between nationwide providers present significant risks by enabling market competitors to reduce competition within auctions in a large number of geographic areas. Nationwide providers, whether or not they have significant low-band spectrum holdings, all have significant resources and actively compete against one another across the country. Joint bidding among nationwide providers, who are the entities most likely to bid in auctions for licenses across the entire country, could significantly reduce rivalry within auctions to the detriment of the Commission’s objectives for auctions, and increases the risk of facilitating anticompetitive behavior by dividing markets on a national scale, thus reducing competition in numerous markets.

186. The Commission has recognized the significance of access to low-band spectrum for promoting competition in the marketplace, as argued by Sprint and T-Mobile, but the Commission disagrees with their arguments that allowing them to enter into joint bidding arrangements with each other to obtain low-band spectrum is a necessary or appropriate response to promote competition. The Commission is mindful of the anticompetitive risk factors present in the marketplace today, but it finds that the risks of

anticompetitive behavior by joint bidding between any nationwide providers outweigh the potential benefits that might come from allowing Sprint and T-Mobile, or any other nationwide providers that lack significant low-band spectrum holdings, to bid jointly. Therefore, the Commission adopts its proposal to prohibit nationwide providers from entering into joint bidding arrangements in auctions.

187. The Commission also finds that the risk of anticompetitive behavior, including market division, from these arrangements is not limited to circumstances where both nationwide providers are applicants in an auction. Accordingly, the prohibition against joint bidding between nationwide providers extends to bidding arrangements in which one (or more) of the nationwide providers is not itself an applicant in an auction.

**188. Joint Bidding Arrangements Between Non-Nationwide Providers.** In the *NPRM*, the Commission tentatively concluded that the benefits of joint bidding between non-nationwide providers outweighed the risks of public interest harms, given the structure of the wireless marketplace, the current distribution of spectrum, and the lesser ability of non-nationwide providers to engage in anticompetitive behavior. After review of the record before it, the Commission prohibits joint bidding arrangements between non-nationwide providers as separate applicants in an auction, given the risk of undesirable strategic bidding during auctions, but allows the use of joint ventures and consortia as single applicants. For these purposes, “non-nationwide provider” refers to a provider of communications services that is not a “nationwide provider.”

189. In response to the *NPRM* and the *Part 1 PN*, CCA, NCTA, ARC, and RWA emphasize the challenges faced by small and rural providers and these parties contend that joint bidding arrangements between non-nationwide providers are generally pro-competitive. Several commenters note the financial difficulty that smaller rural providers face in bidding on larger geographic areas on their own, and argue that given the high cost of spectrum, joint bidding arrangements between non-nationwide providers can enable smaller companies to compete effectively for licenses that they would otherwise be unable to acquire on their own.

190. By contrast, as with joint bidding arrangements between nationwide providers, AT&T, Verizon Wireless, King Street Wireless, Tristar, and Spectrum Financial argue that the

Commission should prohibit joint bidding arrangements among non-nationwide providers because of the risk of undesirable strategic behavior. Some of these parties argue that if smaller providers want to pool resources, they can do so by forming joint ventures or bidding consortia and bidding through those entities.

191. The Commission recognizes both the need to prohibit arrangements between multiple bidders to coordinate bidding during an auction, and the potential benefits, with relatively small risks, from non-nationwide providers working together to pool resources or otherwise realize financial economies of scale in its auctions. The Commission also recognizes, as some commenters point out, that joint ventures and bidding consortia allow smaller providers to combine resources, thus promoting competition in the mobile wireless marketplace and facilitating competition between bidders at auction. In the Commission's judgment, these arrangements can be an effective means of allowing smaller entities to compete in auctions, and, ultimately, promote post-auction competition. The Commission finds that joint ventures and consortia can capture the benefits sought by smaller providers wishing to combine resources while not risking the potential for anticompetitive behavior during the course of an auction. Accordingly, while the Commission prohibits joint bidding arrangements among non-nationwide providers as separate applicants in an auction, it will allow the use of joint ventures and consortia in light of the potential for smaller providers to use consortia and joint ventures to realize the benefits of pooling resources that are sometimes associated with some kinds of joint bidding arrangements. For purposes of competitive bidding, consortium and joint ventures are defined in 47 CFR 1.2105(a)(4), as adopted herein. In addition, the Commission does not prohibit joint bidding arrangements between non-nationwide providers where only one of the non-nationwide parties is the entity filing an auction application and other(s) are non-applicants.

192. *Joint Bidding Arrangements Between Nationwide and Non-Nationwide Providers.* In the *NPRM*, the Commission sought comment on possible policies and procedures that could enable joint bidding between nationwide and non-nationwide providers to be in the public interest and suggested that it might consider these arrangements on a case-by-case basis. After review of the record, the Commission prohibits joint bidding

arrangements between nationwide and non-nationwide providers, rather than attempting to review such arrangements on a case-by-case basis.

193. In this proceeding, some commenters agree that the Commission should adopt a case-by-case approach to reviewing arrangements between nationwide and non-nationwide providers, but also stress the importance of providing pre-auction clarity to bidders regarding the permissibility of such agreements. A number of commenters urge the Commission to adopt bright-line rules to protect the integrity of auctions, promote efficient pre-auction application review, and avoid undue delay of auctions. The Commission agrees with commenters that providing pre-auction certainty to bidders regarding permissible joint bidding arrangements will facilitate competitive auctions. However, because the Commission would need to determine with finality during pre-auction application review whether any particular joint bidding arrangement should be permitted during the auction, it finds that a case-by-case review of all such arrangements as part of that review process runs an unacceptable risk of significantly delaying auctions and therefore would not be in the public interest.

194. In adopting bright-line rules governing joint bidding arrangements between nationwide and non-nationwide providers, the Commission first observes that such arrangement among separate applicants raise the same concerns with respect to the risk of undesirable strategic bidding during auctions. Accordingly, the Commission prohibits joint bidding arrangements between nationwide and non-nationwide providers when parties to the arrangements are filing separate applications. Further, as with the prohibition against joint bidding between nationwide providers, the Commission's prohibition here extends to joint bidding arrangements that include providers that are not themselves an applicant in an auction. In particular, joint bidding arrangements that involve a nationwide provider could significantly reduce rivalry within auctions to the detriment of the Commission's objectives for auctions.

195. In addition, unlike its determination with respect to arrangements between non-nationwide providers, the Commission does not permit nationwide and non-nationwide providers to participate in auctions through a joint venture. While the Commission recognizes that joint ventures formed between nationwide providers and non-nationwide providers

could provide additional opportunities for those entities to participate in auctions, the potential for reduced rivalry within the auction outweighs any such benefits.

196. *Implementation of Joint Bidding Prohibition.* To promote clarity and certainty and to achieve its stated goals, the Commission clarifies that "joint bidding arrangements" for these purposes include arrangements relating to the licenses being auctioned that address or communicate, directly or indirectly, bidding at the auction, bidding strategies, including arrangements regarding price or the specific licenses on which to bid, and any such arrangements relating to the post-auction market structure. Due to the potential benefits to smaller providers and for promoting post-auction competition, the Commission is permitting DEs to join in bidding consortia and non-nationwide providers to form certain joint ventures to apply to participate at auction as a single entity. The Commission notes that "non-nationwide provider" refers to any provider of communications services that is not a "nationwide provider." The Commission also makes clear that the prohibition does not encompass agreements that are solely operational in nature, that is, agreements that address operational aspects of providing a mobile service, such as agreements for roaming, spectrum leasing and other spectrum use arrangements, or device acquisition, as well as agreements for assignment or transfer of licenses, provided that any such agreement does not both relate to the licenses at auction and address or communicate, directly or indirectly, bidding at auction (including specific prices to be bid) or bidding strategies (including the specific licenses on which to bid or not to bid) or post-auction market structure. Consistent with its new approach to joint bidding agreements, the Commission also revises its rule prohibiting communications relating to bids or bidding strategies. To provide transparency, the Commission retains its long-standing requirement regarding disclosure of agreements to which auction an applicant is party, but revises it to more effectively monitor its new prohibition on joint bidding agreements.

197. As spelled out in the revised rules, each auction applicant must certify on behalf of itself and any party that controls, or is controlled by, such applicants, that it has not entered and will not enter into a joint bidding arrangement with any other applicant(s), with any nationwide provider that is not an applicant, or, if the applicant is a nationwide provider,

with any non-nationwide provider that is not an applicant, other than agreements that fall within the limited exceptions the Commission provides. Under 47 CFR 1.2105, as adopted herein, the Commission's rules will now contain a definition of "controlling interest" that includes all individuals or entities with positive or negative *de jure* or *de facto* control of the licensee. The Commission recognizes that certain agreements and relationships may exist prior to an auction as well as that communications of information other than bids and bidding strategies may be permitted to continue during an auction if made pursuant to and within the scope of specified types of agreements that are excluded from the general prohibition and disclosed in the relevant short-form application(s). Under the Commission's revised prohibited communications rule, parties to these specific kinds of agreements may communicate during this "quiet period" provided that any communications are within the scope of the pre-existing agreement that is disclosed on the applicants' short-form auction applications and do not convey specific bids or the substance of an applicant's bidding strategy.

198. The Commission does not include within its definition of prohibited joint bidding arrangements any agreement that is solely operational in nature, including agreements relating to roaming, spectrum leasing and other spectrum use arrangements, or device acquisition, as well as any agreements for assignment or transfer of licenses, provided that any such agreement expressly does not both relate to the licenses at auction and address or communicate directly or indirectly bidding at auction (including prices) or bidding strategies (including the specific licenses on which to bid) or post-auction market structure. Thus, when an applicant certifies to its compliance with its competitive bidding rules, it is certifying that any operational agreement that it may have does not involve a shared bidding strategy and therefore is solely operational. Similarly, any agreement for the transfer or assignment of licenses existing at the deadline for filing short-form applications will not be regarded as a prohibited arrangement, provided that it does not both relate to the licenses at auction and include terms or conditions regarding a shared bidding strategy and expressly does not communicate bids or bidding strategies. Further, the Commission notes that agreements between an applicant and another entity solely for funding

purposes, *i.e.*, with no agreements with regard to bids, bidding strategies, or post-auction market structure relating to the licenses at auction, are not prohibited joint bidding arrangements.

199. The prohibition on joint bidding agreements does not prevent certain agreements to form consortia or joint ventures, which result in one party applying to participate in an auction. In particular, to promote competition within auctions and in the marketplace, the Commission continues to allow DEs to form and use consortia and are allowing non-nationwide providers to form joint ventures to bid in auctions. Eligible entities may use a consortium or joint venture to pool resources and realize financial economies of scale to compete more effectively in its auctions, and, ultimately, in the marketplace. In order to address the potential for undesirable strategic bidding through the use of these vehicles, the Commission specifies that: (1) DEs can participate in only one consortium in an auction, which shall be the exclusive bidding vehicle for its members in that auction, and (2) non-nationwide providers may participate in an auction through only one joint venture, which also shall be the exclusive bidding vehicle for its members in that auction. These provisions should effectively ensure that each auction participant, whether bidding individually, or through consortium or joint venture, has one bid per license per round.

200. The Commission also revises its rule prohibiting certain communications in light of its new rules prohibiting joint bidding agreements. Its revised prohibition on communications prohibits an applicant from communicating bids or bidding information, either directly or indirectly, with any other auction applicant, with any nationwide provider that is not an applicant, or, if the applicant is a nationwide provider, with any non-nationwide provider that is not an applicant. The revised rule provides limited exceptions for communications within the scope of any arrangement consistent with the exclusions from its rule prohibiting joint bidding, provided such arrangement is disclosed on the applicant's short-form. An applicant may continue to communicate pursuant to any pre-existing agreements, arrangements, or understandings that are solely operational or that provide for a transfer or assignment of licenses, provided that such agreements, arrangements or understandings do not involve the communication or coordination of bids (including amounts), bidding strategies, or the particular licenses on which to bid and

provided that such agreements, arrangements or understandings are disclosed on its application. Moreover, as discussed elsewhere, if an applicant has a non-controlling interest with respect to more than one application, the Commission requires the applicants to certify that it has established internal control procedures to preclude any person acting on behalf of the applicant from possessing information about the bids or bidding strategies of more than one applicant or communicating such information with respect to either applicant to another person acting on behalf of and possessing such information regarding another applicant. The Commission cautions, however, that, as with certifications submitted to it in other contexts, submission of such certification in an application will not outweigh specific evidence that a communication violating its rules has occurred, nor will it preclude the initiation of an investigation when warranted.

201. *Authorized Bidders.* On a separate but related issue, the Commission sought comment in the *Part 1 PN* on a proposal to prohibit an individual from serving as an authorized bidder for more than one auction applicant. Commenters generally agree with this proposal, and the Commission adopts it here. This prohibition ensures that an individual is not in a position to be privy to bidding strategies of more than one entity in the auction, and therefore not a conduit, intentional or not, for bidding information between auction applicants.

202. *Non-Controlling Interests.* The Commission recognizes that in some circumstances entities may have non-controlling interests in other entities and both entities may wish to bid in the auction. In so far as there is no overlap between the employees in both entities that leads to the sharing of bidding information, such an arrangement may not implicate its concerns over joint bidding among separate applicants. Such an arrangement, however, could allow for the non-controlling interest or shared employee to act as a conduit for communication of bidding information unless the applicants establish internal controls to ensure that bidding information would not flow between them. To address this possibility and ensure that such arrangements do not serve or appear as conduits for information, the Commission adopts a rule requiring all applicants to certify that they are not, and will not be, privy to, or involved in, in any way the bids or bidding strategy of more than one auction applicant. Commenters generally agree with the proposal to

require a more comprehensive certification process. The Commission's new rules provide that an applicant can certify that it has established procedures to preclude its agents, employees, or related parties, from possessing information about the bids or bidding strategies of more than one applicant or communicating such information regarding another applicant. The Commission cautions, however, that submission of such certification by an applicant will not outweigh specific evidence that a communication violating its rules has occurred, nor will it preclude the initiation of an investigation when warranted.

#### *C. Prohibition on Applications By Commonly Controlled Entities*

203. Background. The Commission has long had a practice of prohibiting the same individual or entity from submitting multiple short-form applications in any Commission auction. In the *Part 1 NPRM*, the Commission proposed to codify this established procedure and sought comment on its proposal. The Commission noted that the prohibition protects against the burden of duplicative, repetitious, or conflicting filings. The *Part 1 NPRM* expressed concern that the same individual or entity could potentially use multiple short-form applications to engage in anticompetitive bidding activity by manipulating elements of the auction process. The *Part 1 NPRM* invited comment on the related issue of whether to permit the filing of short-form applications by commonly controlled entities that could bid on any of the same licenses. In doing so, the Commission acknowledged that auction participation by commonly controlled applicants potentially could serve legitimate business purposes while also presenting possible risks to the auction process.

204. In the *Part 1 PN*, the Commission solicited input on commenters' proposals suggesting that applicants should be limited in holding ownership interests in multiple auction applicants. Specifically the Commission sought comment on how to define any such ownership limits or limits on financial investments by one entity in other auction applicants, including what attribution standards might be implemented in such a context.

205. Several commenters note that where an investor holds non-controlling interests in multiple auction applicants, such an arrangement could facilitate undesirable strategic bidding at auction. T-Mobile asserts that entities sharing non-controlling cognizable interests

could engage in problematic behavior and argues that the Commission should address the potential for coordinated behavior by bidders that are linked by common attributable interests. C Spire points out that "an applicant that bids on a standalone basis but that also has multiple non-controlling investments in other applicants may be privy to and participate in the financing and bidding strategy of multiple applicants." KSW favors a "reasonable" prohibition on multiple auction entries by related parties and proposes to prohibit parties from holding equity in multiple auction applicants, but would allow the holding of interests in multiple applicants where such interest does not exceed a "reasonable" threshold and in cases "where the party at issue is pulled into the auction and has no awareness or participation of bidding strategies." Spectrum Financial proposed an ownership limit on cross-owned bidders of something "much less than controlling interest, certainly less than 50 percent." The Commission addresses concerns about applicants with shared non-controlling interests above through its prohibition on joint bidding and its revisions to its prohibited communications rule.

206. *Discussion. Duplicate auction applications.* The Commission confirms its long-standing prohibition on the filing of more than one auction application by the same individual or entity. That is, if a party submits multiple short-form applications for any license(s) in a particular auction, only one of its applications can be found to be complete when reviewed for completeness and compliance with the Commission's rules. This prohibition will minimize unnecessary burdens on the Commission's resources by eliminating the need to process duplicative, repetitious, or conflicting applications. This rule will also protect against a party manipulating the auction by placing bids through two bidding entities. Accordingly, the Commission concludes that its decision to codify its long-standing prohibition is in the public interest.

207. *Applications by entities controlled by the same individual or set of individuals.* Consistent with its prohibition on joint bidding agreements the Commission will generally permit any entity to participate in a Commission spectrum auction only through a single bidding entity. This means that the Commission will no longer permit the filing of applications by entities controlled by the same individual or set of individuals. The Commission has previously recognized that the participation of commonly

controlled entities in an auction may serve legitimate business purposes because such entities may have different business plans, financing requirements, or marketing needs, while acknowledging such situations might create risk to the competitiveness of the auction process. The Commission notes, however, that such determination was made in the context of an auction conducted without the use of anonymous bidding where the identities of competing bidders were identified in each bidding round. Under the limited information procedures the Commission has used in more recent auctions, certain information on bidder interests, bids, and bidder identities that typically had been revealed prior to and during prior Commission auctions are withheld until after the close of the auction. The approach the Commission adopts is consistent with the views of commenters that broadly supported the *NPRM's* proposal to prohibit the filing of short-form applications by entities under the common control of a single individual or set of individuals in a particular geographic license area or overlapping areas. Sprint notes that this change should enhance the transparency of Commission auctions and minimize anti-competitive bidding activity. Some commenters, however, suggest that this approach does not go far enough because the rule does not address situations when applicants with lesser degrees of shared ownership agree to coordinate bids. The Commission disagrees because these concerns are now addressed by the prohibition on joint bidding agreements. The prohibition on a single party, or commonly controlled parties, from filing multiple applications is designed to ensure that auction participants bid in a straightforward manner. Consistent with its newly-adopted prohibition on joint bidding agreements, this restriction will apply across all short-form applications in a particular auction without regard to the licenses or geographic areas selected.

208. The Commission will determine common control for purposes of this prohibition using the controlling interest principle set out in 47 CFR 1.2105(a)(4)(i), as adopted herein. Under this newly adopted definition, a "controlling interest" includes individuals or entities with positive or negative *de jure* or *de facto* control of the licensee. This new rule will allow an applicant that has a disclosable non-controlling interest holder in another applicant to participate separately in an auction provided each applicant certifies that it has established internal

control procedures to preclude any person acting on behalf of the applicant from possessing information about the bids or bidding strategies of more than one applicant or communicating such information with respect to either applicant to another person another person acting on behalf of and possessing such information regarding another applicant. The Commission cautions, however, that, as with certifications submitted to it in other contexts, submission of such certification in an application will not outweigh specific evidence that a communication violating its rules has occurred, nor will it preclude the initiation of an investigation when warranted.

209. The Commission concludes that implementation of the principle that an entity may generally participate in bidding only through a single auction applicant will promote transparency in Commission auctions and will promote straightforward bidding activity by separate bidding entities. A transparent process will promote participation and competition in its future auctions, which is vital to ensuring the Commission meets its statutory goals. The Commission finds therefore that this prohibition is in the public interest.

210. *Limited Exception to Commonly Controlled Entity Limitation for Existing Rural Partnerships.* The Commission establishes a limited exception to the general prohibition on multiple applications by commonly controlled entities for existing rural partnerships. A broad set of rural interests have expressed concern that this prohibition could adversely impact rural telephone companies that may have an ownership interest in more than one licensee in a particular market. As the Rural-26 Coalition explains, “historic B Block cellular partnerships are a readily identifiable group of entities that were created as part of the cellular settlement process for rural wireline carriers established by the Commission in CC Docket No. 85–388.” Without such an exception, its new rule could limit participation in auctions by such partnerships and the rural telephone companies that comprise those rural wireless partnerships. The Rural-26 Coalition points out that an “issue arises primarily with rural telcos that have telephone exchange areas in more than one Rural Service Area (RSA), and therefore ended up a part of more than one cellular RSA partnership as a result of the cellular B Block settlement process that applied to wireline companies in the mid to late 1980s.” Such settlements provided that each telephone carrier operating in a

particular RSA would hold a partnership interest in a partnership to operate the B Block cellular license. Often such rural wireless partnerships were structured with each partner holding a general partnership interest with one of the general partners serving as managing partner. Because a rural telephone company may have operated telephone exchanges in more than one RSA, such company may be a partner in multiple rural wireless partnerships. The Commission recognizes that such long-standing partnerships and their component rural telephone companies may each seek to participate in Commission auctions with different bidding objectives and that the unique ownership structures of such partnerships should not be an obstacle to these entities separate participation, particularly where, the Commission believes that the anticompetitive concerns underlying the general prohibition are unlikely to be implicated.

211. Under this limited exception to its governing commonly controlled entities rule for existing rural partnerships, each qualifying rural wireless partnership and its individual members will be permitted to participate separately in an auction. For purposes of this rule, a qualifying rural wireless partnership is one that was established as a result of the cellular B block settlement process established by the Commission in CC Docket No. 85–388 in which no nationwide provider is a managing partner or a managing member of the management committee, and partnership interests have not materially changed as of the effective date of the *Part 1 Report and Order*. The Commission’s use of “materially changed” in regard to any changes over time in the composition of the rural wireless partnership is intended to allow this exception to apply even if the partnership has undertaken *de minimis* changes or partners have dropped out. A partnership member would qualify if it is a partner or successor-in-interest to a partner in a qualifying partnership that does not have day-to-day management responsibilities in the partnership and holds 25 percent or less ownership interest, and certifies that it will insulate itself from the bidding process of the cellular partnership and any other members of the partnership (other than expressing prior to the deadline for resubmission of short-form applications the maximum it is willing to spend as a partner). Such individual qualifying members of a rural wireless partnership may bid separately at

an auction, in addition to the rural wireless partnership itself.

#### *D. Miscellaneous Part 1 Revisions*

212. *Background.* In the *NPRM*, the Commission proposed changes to 47 CFR 1.2111 and 1.2112, both of which are in Part 1, Subpart Q, of its rules, the subpart that generally governs competitive bidding proceedings to assign spectrum licenses. The Commission received no comments on these proposals.

213. *Discussion.* 47 CFR 1.2111. The Commission proposed to repeal the first two paragraphs of 47 CFR 1.2111. The Commission proposed to repeal 47 CFR 1.2111(a), under which applicants for assignments or transfers during the first three years of a license term must provide the Commission with detailed contract and marketing information. As the Commission discussed in the *NPRM*, this requirement appears to burden licensees without providing a corresponding benefit to the Commission or the public. The Commission also proposed to repeal 47 CFR 1.2111(b), a never-used unjust enrichment payment requirement for broadband PCS C and F block set-aside licenses. In the absence of opposition to either of these proposals, the Commission adopts them both.

214. 47 CFR 1.2112. The Commission proposed to modify 47 CFR 1.2112 to clarify the auction application requirements for reporting an entity’s percentage ownership in the applicant and in FCC-regulated entities. The Commission proposed further changes to specify application requirements for bidding consortia. Finally, the Commission proposed to correct two errors in the rule caused by the inadvertent substitution of an incorrect paragraph in the Code of Federal Regulations publication of the rule for the correct one published in the **Federal Register** summary of the *DE Second Report and Order*, 71 FR 26245, May 4, 2006. The first error was the addition of a requirement that DE short-form applicants list and summarize all their agreements that support their DE eligibility, a requirement that the Commission had intended to apply only to long-form applicants. The Commission proposed to repeal this requirement for the short-form application. The second error was the deletion of a requirement that DE short-form applicants list the parties with which they have lease or resale arrangements for any of the DE applicants’ spectrum licenses. The Commission proposed to reinstate this requirement. In the absence of opposition to any of these proposed

changes to 47 CFR 1.2112, the Commission adopts them all.

#### **IV. Order on Reconsideration of the First Report and Order in WT Docket No. 05–211**

215. *Background.* In this and the next two sections, the Commission addresses pending matters in WT Docket No. 05–211. In this *Order on Reconsideration of the CSEA and Competitive Bidding Report and Order*, the Commission resolves two petitions for reconsideration filed in response to the 2006 amendments to its consortium exception to the attribution requirements of 47 CFR 1.2110. Prior to 2006, the rules were silent as to whether consortium members would continue to enjoy the attribution exception when filing a long-form applications and being granted licenses. Under the Commission rules for determining eligibility for size-based bidding credits, the Commission allows parties that individually qualify as small businesses to form consortia and to apply for and participate in spectrum auctions together without being required to attribute their gross revenues to one another. 47 CFR 1.2110(b)(3)(i).

216. In the 2006 *CSEA and Competitive Bidding Report and Order*, 71 FR 6214, February 7, 2006, the Commission modified the consortium exception to its attribution rules for determining an applicant's eligibility for small business bidding credits. After receiving no opposition to its proposals offered in the 2005 *CSEA and Competitive Bidding NPRM*, 70 FR 43372, July 27, 2005, the Commission adopted all three of the modifications discussed in its notice. Thus, the Commission amended its rules to require that (1) consortium members file individual long-form applications for their respective, mutually agreed-upon license(s), following an auction in which the consortium has won one or more licenses; (2) two or more consortium members seeking to be licensed together for the same license(s), or the disaggregated or partitioned portions thereof, form a legal business entity, such as a corporation, partnership, or limited liability company, to hold the license(s); and (3) any such business entity to comply with the applicable financial limits for eligibility. The Commission explained that a newly formed legal entity comprising two or more consortium members that did not qualify for as large a size-based bidding credit as that claimed by the consortium on its short-form application would be awarded a bidding credit, if at all, based on the entity's eligibility for such credit at the

long-form filing deadline. The Commission also clarified that the consortium exception is available only to short-form applicants and not to prospective licensees, assignees, or transferees.

217. In adopting the changes, the Commission observed that the consortium exception had seldom been used, perhaps in part because of insufficient direction from the Commission as to how members of consortia that win licenses could be formally organized and how they could hold their licenses. The Commission also explained that the rule changes should “invest the consortium exception with greater transparency, thereby promoting clearer planning by smaller entities, while continuing to allow them to enhance their competitiveness with efficiencies of scale and strategy.” The Commission noted as well that ensuring that licenses are granted only to legal business entities would facilitate enforcement of the Communications Act and of Commission rules and policies, particularly in the event of a disagreement among consortium members.

218. *Discussion.* The Commission denies the two petitions for reconsideration filed in response to the 2006 amendments to the consortium exception, one by NTCA and the other by Blooston Rural, and retain the rule modifications. While neither party filed comments in response to the *CSEA and Competitive Bidding NPRM*, both claimed in 2006 that the adopted rule modifications would limit the consortium exception's usefulness (and use) by preventing small entities that wished to be licensed as consortia from pooling their resources.

219. In its petition, NTCA declares that previously unavailable information—the results of a late fall 2005 survey that NTCA conducted of its members—led to NTCA's petition for reconsideration. According to NTCA, 62 percent of its survey respondents found it difficult to obtain financing for wireless projects, and 27 percent were concerned about their ability to obtain spectrum at auction. The Commission rejects this position, however, because NTCA does not connect the survey to its concern with the consortium exception. Indeed, neither NTCA nor the NTCA 2005 Wireless Survey Report indicates that the survey, conducted several months after the Commission sought comment on possible changes to the consortium exception, considered the consortium exception.

220. Blooston Rural states that it did not comment in 2005 on possible

changes to the consortium exception, because the effect of the changes put out for comment was unclear. Blooston Rural also complains that the import of the possible modifications was obscured by the fact that they were part of a rulemaking focused on CSEA matters. Blooston Rural argues further that the Commission did not make clear that a licensee comprising consortium members would have to meet the designated entity financial caps. It contends that the Commission's clarification regarding the consortium exception with respect to the secondary market was not put out for comment in the *CSEA and Competitive Bidding NPRM* and is “contrary to prior statements and practices of the Commission in dealing with small business consortia.” Finally, Blooston Rural submits that notice of all consortium exception rule changes was inadequate because the Commission did not provide text of the proposed rule.

221. The Commission concludes that these objections are without merit. The *CSEA and Competitive Bidding NPRM* addressed non-CSEA matters at least as much as it did matters concerning the CSEA. A separate section of the non-CSEA portion of the item, identified as such in the table of contents, dealt solely with possible changes to the consortium exception. Moreover, the Commission articulated in the *CSEA and Competitive Bidding NPRM* all of the primary elements of the rule changes ultimately adopted. The Commission sought comment, for example, on whether it “should adopt a new requirement that each member of the consortium file an individual long-form application for its respective, mutually agreed-upon license(s), following an auction in which a consortium has won one or more licenses,” explaining that, “[t]o comply with this requirement, consortium members would, prior to filing their short-form application, have reached an agreement as to how they would allocate among themselves any licenses (or disaggregated or partitioned portions of licenses) they might win.”

222. Blooston Rural also claims that the Commission's NPRM did not articulate what would happen to a consortium at the licensing stage. The Commission disagrees. The Commission sought comment on “whether, in order for two or more consortium members to be licensed together for the same license(s) (or disaggregated or partitioned portions thereof), they should be required to form a legal business entity, such as a corporation, partnership, or limited liability company, after having disclosed this



intention on their short-form and long-form applications.” In particular, the Commission asked for comment on “whether such new entities would have to meet [the] small business or entrepreneur financial limits and whether allowing these entities to exceed the limits would be consistent with [the] existing designated entity and broadband PCS entrepreneur rules, as well as [the Commission’s] obligations under the Communications Act.”

223. Thus the notice was sufficient to apprise even a casual reader of all the specific rule changes ultimately adopted. Further, notwithstanding Blooston Rural’s intimations otherwise, there is no requirement in the Administrative Procedure Act (APA) that the specific wording of a proposed rule be provided in the notice. Rather, an agency must notify the public of “either the terms or substance of the proposed rule or a description of the subjects and issues involved.” 5 U.S.C. 553(b)(3). Accordingly, the consortium exception provisions put out for comment in the *CSEA and Competitive Bidding NPRM* fulfilled the notice requirements of the APA.

224. Addressing Blooston Rural’s procedural and substantive objection to the Commission’s clarification that the consortium exception does not apply in secondary market transactions, the Commission concludes that the clarification was an interpretive rule and thus exempt from APA notice requirements. 5 U.S.C. 553(b)(3)(A); see also *Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199, 1204 & n.1 (2015). As modified, the consortium exception provides a benefit beginning with the short-form filing and continuing throughout the course of an auction to facilitate the pooling of resources for auction preparation and bidding. Given that participants in secondary market transactions are, by definition, not engaged in auction preparation or bidding, there is no rationale for assignees, transferees, or spectrum lessees (or their assignors, transferors, or spectrum lessors) to use the exception. And, while Blooston Rural claims that this clarification is contrary to prior Commission statements and practices, it provides no examples to support the claim. Accordingly, the clarification will stand.

225. The Commission also finds the petitioners’ substantive objections to the primary rule modifications to be without merit. Both Blooston Rural and NTCA argue that the rule changes will reduce use of the consortium exception, contrary to the statutory mandate that the Commission promote the involvement of small businesses in the

provision of spectrum-based services. NTCA contends, moreover, that under the modified exception small businesses will find spectrum financing more difficult than before, because they will not be able to “pool their resources and enhance the value of their bidding credits.”

226. Petitioners’ unsubstantiated claims have not convinced the Commission that the 2006 clarifications to the consortium exception have either limited its proper use—i.e., to facilitate the pooling of resources for auction preparation and bidding—or negatively affected spectrum financing for small businesses. The consortium exception was so rarely employed before the 2006 rule changes took effect that any benefit from its prior use should, at best, be characterized as negligible. In the absence of evidence to the contrary, the Commission continues to believe that the rule changes have not adversely affected small businesses and that the changes instead prevent many of the structural and contractual pitfalls to which members of a consortium lacking a legally enforceable organizational structure could be vulnerable, particularly should any members file for bankruptcy protection.

227. Equally important, the modifications to the consortium exception strengthen the Commission’s ability to enforce its rules by allowing it to identify and maintain legal access to those parties receiving license grants. The result is more efficient regulation, which ultimately benefits both licensees and the public. The Commission also finds that the rule modifications help ensure that small businesses and now rural service providers are not able to use the consortium exception as a means of evading the requirements for designated entity eligibility. The Commission therefore affirms its 2006 *CSEA and Competitive Bidding Report and Order* rule modifications to the consortium exception to the attribution rules for determining an applicant’s eligibility for small business bidding credits.

#### **V. Third Order on Reconsideration of the Second Report and Order in WT Docket No. 05–211**

228. In the *Third Order on Reconsideration of the DE Second Report and Order*, the Commission resolves two remaining petitions for reconsideration received in response to the 2006 *DE Second Report and Order*, the Blooston Rural June 2, 2006 Petition and the Cook Inlet June 5, 2006 Petition. The Commission dismisses the Blooston Rural June 2, 2006 Petition because all of the issues raised in that petition were

either resolved in 2010 by the Third Circuit’s *Council Tree* decision or have been rendered moot by other adopted rule changes. In the interest of thoroughness, however, the Commission nonetheless provide the clarification requested by Cook Inlet.

229. *Background.* As detailed in its *Part 1 NPRM*, in its 2006 *DE Second Report and Order*, the Commission adopted two bright-line “material relationship” attribution rules—the AMR rule and the “impermissible material relationship” (IMR) rule—for the leasing or resale of spectrum held by designated entities. At the same time, the Commission lengthened the unjust enrichment period from five to ten years and adopted new DE reporting requirements, including an annual reporting requirement, to ensure compliance with its rules and policies.

230. The Commission received three petitions for reconsideration of the *DE Second Report and Order*, one opposition to the petitions, and one reply to the opposition. Council Tree, the Minority Media Telecommunications Council, and Bethel Native Corporation (collectively, the “Joint Petitioners”) together filed a petition for expedited reconsideration before the Commission adopted, on its own motion, on June 1, 2006, the *Order on Reconsideration of the DE Second Report and Order*, 71 FR 34272, June 14, 2006. The Blooston Rural June 2, 2006 Petition and the Cook Inlet June 5, 2006 Petition were received by the Commission after its adoption of the *Order on Reconsideration of the DE Second Report and Order*.

231. The Commission addressed many of the arguments raised in these filings in the *Order on Reconsideration of the DE Second Report and Order*. The Commission denied the petition filed by the Joint Petitioners in the *DE Second Order on Reconsideration of the Second Report and Order*. Other arguments were subsequently resolved by the litigation initiated by the Joint Petitioners against the Commission in the United States Court of Appeals for the Third Circuit. The litigation culminated in 2010 with the Third Circuit’s *Council Tree* decision in which the court vacated the IMR rule and the ten-year unjust enrichment period, holding that both provisions had been adopted with insufficient notice and opportunity for comment under the APA. While the court upheld the AMR rule the Commission has eliminated it. The Commission has also addressed objections to the annual DE reporting requirement and resolved the relevant aspect of Blooston Rural’s June 2, 2006 Petition accordingly.

232. *Discussion.* With respect to the arguments that were still pending from the Blooston Rural June 2, 2006 Petition after the *Council Tree* decision, the Commission concludes that the actions it takes in this *Part 1 Report and Order* render these remaining arguments moot. In particular, the Blooston Rural June 2, 2006 Petition raised objections to the adequacy of notice and opportunity for comment on the Commission's AMR rule, as well as certain substantive objections about the rules' effectiveness. Further, Blooston Rural objected to aspects of the DE annual reporting requirement. Because the Commission has eliminated the AMR rule in the *Part 1 Report and Order*, Blooston Rural's June 2, 2006 objections to the rule are now moot.

233. Blooston Rural also objected to the DE annual reporting requirement. It criticized the rule on two bases: first, that the rule was unduly burdensome in that licensees with multiple auction licenses, each having a different grant date, would have to file multiple annual reports numerous times per year, and, second, that the requirement was duplicative of the DE reporting requirements of other Commission rules. The Commission has retained the annual DE reporting requirement, finding that it does not duplicate any of its other DE reporting requirements and continues to serve an important purpose, particularly in light of the additional flexibility it is affording DEs. Thus, the Commission denies Blooston Rural's request that it eliminate the requirement. Nevertheless, the Commission concludes that, while it has not repealed the annual DE reporting requirement, the Commission has eliminated any basis for Blooston Rural's objections to complying with the rule. For example, the Commission has greatly reduced the burden on DEs by modifying the annual reporting requirement to give all filers the same deadline for all licenses of September 30 of each calendar year. The Commission has further reduced the filing burden on DEs, and eliminated any redundancy caused by the annual reporting requirement, by clarifying that filers need not report agreements and arrangements otherwise required to be reported under 47 CFR 1.2110(n), so long as the current information is already on file in ULS and the filers provide in their annual reports the applicable ULS file number and filing date of the report containing the current information. Thus, the Commission concludes that, insofar Blooston Rural's June 2, 2006 Petition addresses the

annual DE reporting requirement, it is, in part, denied and is otherwise moot.

234. The Cook Inlet June 5, 2006 Petition, in contrast, maintained that an issue raised in the Commission's *Order on Reconsideration of the DE Second Report and Order* required further clarification. Cook Inlet asserted that the consideration of DE status in the context of an assignment or transfer is unfair and discourages DEs from participating in the secondary market.

235. Simply stated, the Commission did not previously, and will not as a result of any of its rule changes, evaluate the eligibility of a DE for benefits when that DE is a transferor or assignor in a secondary market transaction. Instead, in the context of such transactions, the Commission evaluates the eligibility, if any, of the transferee or assignee of a license. Accordingly, the Commission concludes that Cook Inlet's arguments concerning retroactive consideration of DE status and 47 CFR 309(j)(3)(E)(ii) are without foundation.

#### **VI. Third Report and Order in WT Docket No. 05–211**

236. Finally, in this *DE Third Report and Order*, the Commission terminates consideration of proposals issued in a 2006 *DE Second Further Notice of Proposed Rule Making (DE Second FNPRM)*, 71 FR 50379, August 25, 2006, in which it asked whether it should adopt any additional small business eligibility rules. The majority of commenters responding to the *DE Second FNPRM* opposed any additional modification of the DE eligibility requirements. The Commission concludes that this inquiry has been overtaken by the significant passage of time, the litigation regarding the rules adopted in the *DE Second Report and Order*, and its efforts to amend the Part 1 competitive bidding rules. Moreover, there was no record support for any of the changes the Commission was considering. The Commission therefore declines to adopt any of the proposals raised in the 2006 *DE Second FNPRM*.

237. Background. The *DE Second FNPRM* sought comment on additional proposals for eligibility restrictions on the relationships of DEs with certain other entities. In particular, the Commission sought comment on whether additional eligibility restrictions should apply to the relationships of DEs with members of a certain entity class or classes, the use of a financial threshold to define the class of entity triggering such restrictions, applying a particular spectrum interest type to define an entity class, and the possible adoption of an in-region

component for the definition of relationships that should be subject to further eligibility restrictions.

238. In addition to these class-based restrictions, the Commission sought comment on whether it should adopt additional rule changes restricting the award of small business benefits under certain circumstances and in connection with relationships with certain entities. The Commission also requested comment on whether the relationships between DE applicants, or licensees, and other entities should be treated differently depending on the nature of the specific entity and the surrounding circumstances. The Commission further sought comment on the adoption of a personal net worth test for DE eligibility determinations.

239. Ten parties filed comments in response to the *DE Second FNPRM*, and five parties filed reply comments. The majority of commenters argued that the Commission should not adopt any further measures beyond the then-newly revised 2006 rules.

240. *Discussion.* The Commission concludes that it will not adopt any designated entity eligibility rules based on the record acquired in the *DE Second FNPRM*, and the Commission hereby closes that inquiry. In the *DE Second FNPRM*, the Commission requested guidance on whether it "should adopt additional rule changes that would restrict the award of designated entity benefits" in certain circumstances and for relationships with certain types of entities. The Commission also sought comment on the possible use of a personal net worth test in determinations of DE eligibility, citing a proposal to restrict individuals with a net worth of \$3 million or more from having a controlling interest in a designated entity.

241. Commenters offered limited support for additional eligibility restrictions based upon the possibility of adopting further restrictions related to class type and/or financial and operational agreements. Most commenters, including *Council Tree*, the original proponent of the rule changes, urged the Commission to refrain from adopting additional eligibility restrictions based on the relationships of a designated entity applicant or licensee with a particular class of entities. Most commenters also responded negatively to the potential use of an in-region component in any further material relationship restrictions. The record compiled in 2006 therefore indicated little support for the adoption of any additional restrictions such as those contemplated

in the *DE Second FNPRM*, and provides no basis upon which to adopt rules.

242. Similarly, no commenter, including Council Tree, the original proponent of a personal net worth test, supported the adoption of such a restriction. Several commenters in 2006 argued strongly that a personal net worth test would be unnecessary and ineffective. The Commission therefore concludes that the widespread opposition to such a restriction reinforces the Commission's previous conclusions on this matter. The Commission has previously observed that personal net worth limits can be difficult to apply and to enforce. Accordingly, the Commission declines to adopt any personal net worth test for determining small business eligibility.

243. In light of the many policy and rule modifications the Commission adopts regarding designated entity eligibility, as well as the general lack of support by commenters, the Commission closes the record compiled in response to the 2006 *DE Second FNPRM*, and terminates the inquiry.

## VII. Procedural Matters

### A. Delegation To Correct Rules.

244. The Commission delegates authority to the Wireless Telecommunications Bureau, as appropriate, to make corrections to the rules set forth in Appendix A as necessary to conform them to the text of the *Part 1 Report and Order*. The Commission notes that any entity that disagrees with a rule correction made on delegated authority will have the opportunity to file an Application for Review by the full Commission.

### B. Final Regulatory Flexibility Act Analysis

245. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), the Commission has prepared this Final Regulatory Flexibility Analysis (FRFA) of the possible significant economic impact on small entities by the policies and rules adopted in the *Part 1 Report and Order*. The Commission will send a copy of the *Part 1 Report and Order*, including this FRFA, to the Chief Counsel for Advocacy of the Small Business Administration ("SBA"). In addition, the *Part 1 Report and Order* and the FRFA (or summaries thereof) will be published in the **Federal Register**.

246. As required by the RFA, an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *NPRM* and a Supplemental Initial Regulatory Flexibility Analysis ("Supplemental IRFA") was incorporated in the *Part 1*

*PN*. The Commission sought written public comment on the proposals in the *NPRM* and *Part 1 PN*, including comment on the IRFA and Supplemental IRFA. The Commission received one written *ex parte* letter addressing the IRFA or Supplemental IRFA. The Office of Advocacy, U.S. Small Business Administration (SBA Office of Advocacy) supports the Commission's repeal of the attributable material relationship (AMR) rule and its decision allowing small businesses, rural telephone companies, and businesses owned by members of minority groups and women more flexibility in their ability to lease spectrum. The SBA Office of Advocacy argues against "arbitrary caps" on DEs, saying that such caps would limit a small business's ability to grow. It also warns against expanding the DE program to include some large businesses, explaining that large businesses do not need another advantage over small entities. Because the Commission amends the rules in the *Part 1 Report and Order* it has included this FRFA which conforms to the RFA.

### A. Need for, and Objectives of, the Order

247. Given the prolific changes witnessed in the wireless industry over the last decade, this *Part 1 Report and Order* adopts revisions to certain of the Part 1 competitive bidding rules in advance of an auction that holds historic potential for interested applicants to acquire licenses for below 1-GHz spectrum in the Broadcast Television Spectrum Incentive Auction (Incentive Auction). The *Part 1 Report and Order* therefore reforms some of the Commission's general Part 1 rules governing competitive bidding for spectrum licenses to reflect changes in the marketplace, including the challenges faced by new entrants. The *Part 1 Report and Order* new rules also advance the statutory directive to ensure that designated entities are given the opportunity to participate in the provision of spectrum-based services while preventing unjust enrichment, and fulfill the commitment made in the *Incentive Auction R&O*. Together these revisions will assure that the Commission's part 1 rules continue to promote the Commission's fundamental statutory objectives.

248. Specifically, the *Part 1 Report and Order* adopts revisions that: (1) Modify its eligibility requirements for small business benefits, and update the standardized schedule of small business sizes, including the gross revenues thresholds used to determine eligibility; (2) establish a new bidding credit for

eligible rural service providers; (3) implement a cap on the overall amount of bidding credits available for eligible designated entities in any one auction; (4) strengthen and target attribution rules to prevent the unjust enrichment of ineligible entities; (5) modify its DE reporting requirements; (6) revise the former defaulter rule, consistent with the waiver the Commission granted in Auction 97; (7) adopt rules prohibiting joint bidding arrangements with limited exceptions, and make related updates to its rule on prohibited communications; and (8) adopt rules prohibiting the same individual or entity as well as entities that have controlling interests in common from becoming qualified to bid on the basis of more than one short-form application in a specific auction, with a limited exception for certain rural wireless partnerships and individual members of such partnerships.

249. The *Part 1 Report and Order* also resolves long standing petitions for reconsideration and adopts necessary clean up revisions to the Commission's Part 1 competitive bidding rules.

250. With respect to small businesses, the *Part 1 Report and Order's* revisions to the Commission's rules reflect that small businesses need greater opportunities to gain access to capital so that they may have an opportunity to participate in the provision of spectrum-based services in today's communications marketplace. In the past decade, the rapid adoption of smartphones and tablet computers and the widespread use of mobile applications, combined with the increasing deployment of high-speed 3G and now 4G technologies, have driven significantly more intensive use of mobile networks. This progression from the provision of mobile voice services to the provision of mobile broadband services has increased the need for access to spectrum. In addition, in the past decade, the number of small and regional mobile wireless service providers has significantly decreased, yet regional and local service providers continue to offer consumers additional choices in the areas they serve. The Commission anticipates that by revising its rules to allow small businesses to take advantage of the same opportunities to utilize their spectrum capacity and gain access to capital as those afforded to larger licensees, it can better achieve its statutory directives. Nonetheless, the Commission remains mindful of its obligation to prevent unjust enrichment of ineligible entities.

### B. Legal Basis

251. The action is authorized under sections 1, 4(i), 303(r), 309(j), and 316 of

the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 303(r), 309(j), and 316.

#### C. Summary of Significant Issues Raised by Public Comments in Response to the IFRA or Supplemental IFRA

252. No commenters directly responded to the IFRA or Supplemental IFRA. The SBA Office of Advocacy raised concerns regarding the analysis contained within the earlier IRFAs. Having reviewed both the initial IFRA and the supplemental IFRA the Commission concludes that the analyses satisfy the requirements of 5 U.S.C. 603, as further specified in 5 U.S.C. 607. The IRFAs sufficiently describe the impact of the rules the Commission proposed. The Commission provides further detail in this FRFA below on the impact of the rules the Commission adopts in this order, the steps the Commission has taken to minimize the significant economic impact on small entities consistent with the stated objectives of the Communications Act, and an analysis of why these rules were adopted herein and other significant alternatives that were considered and rejected. Additionally, a number of commenters raised concerns about the impact on small businesses of various auction-related issues. The Commission has nonetheless addressed these concerns in the FRFA.

#### D. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply

253. The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the proposed rules, if adopted. The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small government jurisdiction.” In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act. A small business concern is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.

254. *Small Businesses, Small Organizations, and Small Governmental Jurisdictions.* The *Part 1 Report and Order's* revisions may, over time, affect small entities that are not easily categorized at present. The Commission therefore describes here, at the outset, three comprehensive, statutory small entity size standards. First, nationwide, there are a total of approximately 28.2 million small businesses, according to

the SBA. In addition, a “small organization” is generally “any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.” Nationwide, as of 2007, there were approximately 1,621,315 small organizations. Finally, the term “small governmental jurisdiction” is defined generally as “governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.” Census Bureau data for 2011 indicate that there were 89,476 local governmental jurisdictions in the United States. The Commission estimates that, of this total, as many as 88,506 entities may qualify as “small governmental jurisdictions.” Thus, the Commission estimates that most governmental jurisdictions are small.

255. *Licenses Assigned by Auction.* The changes and additions to the Commission's rules in the *Part 1 Report and Order* are of general applicability to all auctionable services. Accordingly, this FRFA provides a general analysis of the impact of the proposals on small businesses rather than a service-by-service analysis. The number of entities that may apply to participate in future Commission spectrum auctions is unknown. Moreover, the number of small businesses that have participated in prior spectrum auctions has varied. As a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Also, the Commission does not generally track subsequent business size unless, in the context of changes in control, or assignments or transfers, unjust enrichment issues are implicated.

256. *Wireless Telecommunications Carriers (except satellite).* The Census Bureau defines this category to include “establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves. Establishments in this industry have spectrum licenses and provide services using that spectrum, such as cellular phone services, paging services, wireless Internet access, and wireless video services.” The SBA has developed a small business size standard for Wireless Telecommunications Carriers (except satellite). Under the SBA's standard, a business is small if it has 1,500 or fewer employees. For this category, Census data for 2007 show that there were 1,383 firms that operated for the entire year. Of this total, 1,368 firms (approximately 99 percent) had employment of 999 or fewer employees

and only 15 (approximately 1 percent) had employment of 1,000 employees or more. Similarly, according to Commission data, 413 carriers reported that they were engaged in the provisions of wireless telephony, including cellular service, PCS, and Specialized Mobile Radio (SMR) Telephony services. Of these, an estimated 261 have 1,500 or fewer employees and 152 have more than 1,500 employees. Consequently, the Commission estimates that approximately half or more of these firms can be considered small. Thus under this category and the associated small business size standard, the Commission estimates that the majority of wireless telecommunications carriers (except satellite) are small entities that may be affected by the NPRM's proposed actions.

257. *Broadband Radio Service and Educational Broadband Service.* Broadband Radio Service systems, previously referred to as Multipoint Distribution Service (MDS) and Multichannel Multipoint Distribution Service (MMDS) systems, and “wireless cable,” transmit video programming to subscribers and provide two-way high speed data operations using the microwave frequencies of the Broadband Radio Service (BRS) and Educational Broadband Service (EBS) (previously referred to as the Instructional Television Fixed Service (ITFS)). In connection with the 1996 BRS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of no more than \$40 million in the previous three calendar years. The BRS auction resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, based on its review of licensing records, the Commission estimates that of the 61 small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 86 incumbent BRS licensees that are considered small entities (18 incumbent BRS licensees do not meet the small business size standard). After adding the number of small business auction licensees to the number of incumbent licensees not already counted, there are currently approximately 133 BRS licensees that are defined as small businesses under either the SBA or the Commission's rules. In 2009, the Commission

conducted Auction 86, the sale of 78 licenses in the BRS areas. The Commission established three small business size standards that were used in Auction 86: (i) An entity with attributed average annual gross revenues that exceeded \$15 million and do not exceed \$40 million for the preceding three years was considered a small business; (ii) an entity with attributed average annual gross revenues that exceeded \$3 million and did not exceed \$15 million for the preceding three years was considered a very small business; and (iii) an entity with attributed average annual gross revenues that did not exceed \$3 million for the preceding three years was considered an entrepreneur. Auction 86 concluded in 2009 with the sale of 61 licenses. Of the 10 winning bidders, two bidders that claimed small business status won four licenses; one bidder that claimed very small business status won three licenses; and two bidders that claimed entrepreneur status won six licenses. The Commission notes that, as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service.

258. In addition, the SBA's placement of Cable Television Distribution Services in the category of Wired Telecommunications Carriers is applicable to cable-based educational broadcasting services. Since 2007, Wired Telecommunications Carriers have been defined as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies." Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry. The SBA has developed a small business size standard for this category, which is: All such firms having 1,500 or fewer employees. Census data for 2007 shows that there were 3,188 firms that operated for the duration of that year. Of

those, 3,144 had fewer than 1,000 employees, and 44 firms had more than 1,000 employees. Thus under this category and the associated small business size standard, the majority of such firms can be considered small. In addition to Census data, the Commission's Universal Licensing System indicates that as of July 2014, there are 2,006 active EBS licenses. The Commission estimates that of these 2,006 licenses, the majority are held by non-profit educational institutions and school districts, which are by statute defined as small businesses.

259. *Television Broadcasting.* This economic census category "comprises establishments primarily engaged in broadcasting images together with sound. These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public." The SBA has created the following small business size standard for Television Broadcasting firms: Those having \$38.5 million or less in annual receipts. The Commission has estimated the number of licensed commercial television stations to be 1,387. In addition, according to Commission staff review of the BIA/Kelsey, LLC's *Media Access Pro Television Database* on July 30, 2014, about 1,276 of an estimated 1,387 commercial television stations (or approximately 92 percent) had revenues of \$38.5 million or less. The Commission therefore estimates that the majority of commercial television broadcasters are small entities.

260. The Commission notes, however, that in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations must be included. Its estimate, therefore, likely overstates the number of small entities that might be affected by the *Part 1 Report and Order's* rules because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, an element of the definition of "small business" is that the entity not be dominant in its field of operation. The Commission is unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply does not exclude any television station from the definition of a small business on this basis and is therefore possibly over-inclusive to that extent.

261. In addition, the Commission has estimated the number of licensed noncommercial educational television stations to be 395. These stations are

non-profit, and therefore considered to be small entities.

262. There are also 2,460 LPTV stations, including Class A stations, and 3,838 TV translator stations. Given the nature of these services, the Commission will presume that all of these entities qualify as small entities under the above SBA small business size standard.

263. *Radio Broadcasting.* The SBA defines a radio broadcast station as a small business if such station has no more than \$38.5 million in annual receipts. Business concerns included in this industry are those "primarily engaged in broadcasting aural programs by radio to the public." According to review of the BIA/Kelsey, LLC's *Media Access Pro Radio Database* as of July 30, 2014, about 11,332 (or about 99.9 percent) of 11,343 commercial radio stations have revenues of \$38.5 million or less and thus qualify as small entities under the SBA definition. The Commission notes, however, that, in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations must be included. This estimate, therefore, likely overstates the number of small entities that might be affected, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies.

264. *Cable and Other Subscription Programming.* This industry comprises establishments primarily engaged in operating studios and facilities for the broadcasting of programs on a subscription or fee basis. The broadcast programming is typically narrowcast in nature (e.g., limited format, such as news, sports, education, or youth-oriented). These establishments produce programming in their own facilities or acquire programming from external sources. The programming material is usually delivered to a third party, such as cable systems or direct-to-home satellite systems, for transmission to viewers. Since 2007, the prior but now discontinued service involving distribution of programming via cable television was placed within the broad economic census category of Wired Telecommunications Carriers. The SBA has developed a small business size standard for this category, which consists of all such firms with gross annual receipts of 38.5 million dollars or less. Census data for 2007, when data about Wired Telecommunications Carriers were used for Cable and Other Program Distribution, show that there were 3,188 Wired Telecommunications Carrier firms that operated for the entire year. Of this total, 3,144 had fewer than 1,000 employees. Thus under this size

standard, the majority of firms offering cable and other subscription programming can be considered small.

265. In addition, an element of the definition of “small business” is that the entity not be dominant in its field of operation. The Commission is unable at this time to define or quantify the criteria that would establish whether a specific radio station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply does not exclude any radio station from the definition of a small business on this basis and therefore may be over-inclusive to that extent. Also, as noted, an additional element of the definition of “small business” is that the entity must be independently owned and operated. The Commission notes that it is difficult at times to assess these criteria in the context of media entities and the estimates of small businesses to which they apply may be over-inclusive to this extent.

#### E. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

266. The updated reporting, recordkeeping, and other compliance requirements resulting from the *Part 1 Report and Order* will apply to all entities in the same manner. The Commission believes that these rules assist it meeting its statutory goals by providing DEs more flexibility in finding the capital needed for acquisition and provisions of spectrum-based services while ensuring that designated entity benefits go to bona fide small businesses and eligible rural service providers. The Commission does not believe that the costs and/or administrative burdens associated with the rules will unduly burden small entities. The *Part 1 Report and Order* makes a number of rule changes that will affect reporting, recordkeeping, and other compliance requirements. Each of these changes is described below.

267. *Eligibility for Bidding Credits.* The *Part 1 Report and Order* makes changes to the Commission’s process for evaluating small business eligibility for bidding credits. In particular, the *Part 1 Report and Order* repeals the AMR rule and replaces it with a more flexible approach under which the Commission would evaluate small business eligibility on a license-by-license basis, using a two-pronged test. The first prong would evaluate whether an applicant meets the applicable small business size standard and is therefore eligible for benefits. To evaluate small business eligibility, the *Part 1 Report and Order* applies the Commission’s existing

controlling interest standard and affiliation rules to determine whether an entity should be attributable based on whether that entity has *de jure* or *de facto* control of, or is affiliated with, the applicant’s overall business venture. Once the first prong has been met, the Commission would evaluate eligibility under the second prong. Under the second prong, the *Part 1 Report and Order* determines an entity’s eligibility to retain small business benefits on a license-by-license basis, based on whether it has maintained *de jure* and *de facto* control of the license. Under this license-by-license approach, an entity will not necessarily lose its eligibility for all current and future small business benefits solely because of a decision associated with any particular license. Instead, while a small business might incur unjust enrichment obligations if it relinquishes *de jure* or *de facto* control of any particular license for which it claimed benefits, so long as the revenues of its attributable interest holders (*i.e.*, the DE’s affiliates, its controlling interests, and the affiliates of its controlling interests) continue to qualify under the relevant small business size standard, it could still retain its eligibility to retain current and future benefits on existing and future licenses. The *Part 1 Report and Order* determines, on the basis of the express language of section 309(j), that there is no statutory requirement for DEs to directly provide primarily facilities-based service to the public with each license.

268. The *Part 1 Report and Order* also modifies the Commission’s secondary market rules to comport with the Commission’s proposed approach to assessing small business eligibility. Specifically, the *Part 1 Report and Order* amends the language in 47 CFR 1.9020(d)(4) to remove the conflicting reference to the control standard of 47 CFR 1.2110 in order to make clear that small business lessors are fully subject to the same *de facto* control standard for spectrum manager leasing that applies to all other licensees. This modification should clarify that 47 CFR 1.9010 alone defines whether a licensee, including a small business, retains *de facto* control of the spectrum that it leases to a spectrum lessee in the context of spectrum manager leasing.

269. *Attribution Rules.* The *Part 1 Report and Order* adopts an additional attribution requirement under which, during the five-year unjust enrichment period, the gross revenues (or the subscribers in the case of a rural service provider) of a disclosable interest holder in a DE applicant or licensee will become attributable, on a license-by-

license basis, for any license in which the disclosable interest holder uses, in any manner, more than 25 percent of the spectrum capacity of a DE’s license awarded with bidding credits. Under this rule, a disclosable interest holder is defined as any party holding a ten percent or greater interest of any kind in the DE, including but not limited to, a ten percent or greater interest in any class of stock, warrants, options or debt securities in the applicant or licensee. However, for DEs that acquire licenses with the new rural service provider bidding credit, this new attribution rule will not apply to any disclosable interest holder that would independently qualify for a rural service provider bidding credit.

270. The *Part 1 Report and Order* declines to make any adjustments to the Commission’s unjust enrichment rules and applies these rules to the new rural service provider bidding credit.

271. *Bidding Credits.* The *Part 1 Report and Order* refines the primary way that the Commission facilitates participation by small businesses at auction through its bidding credit program. Bidding credits operate as a percentage discount on the winning bid amounts of a qualifying small business. By making the acquisition of spectrum licenses more affordable for new and existing small businesses, bidding credits facilitate their access to needed capital. The Commission establishes eligibility for bidding credits for each auctionable service, adopting one or more definitions of the small businesses that will be eligible. The Commission’s small business definitions have been based on an applicant’s average annual gross revenues over a three-year period. The *Part 1 Report and Order* retains the existing three-tiered schedule for determining eligibility for bidding credits but utilizes the GDP price index to increase the general schedule of size standards in its part 1 rules, measured by gross revenues, for purposes of determining an entity’s eligibility for a bidding preference. Specifically, the *Part 1 Report and Order* revises the standardized schedule in 47 CFR 1.2110(f) as follows: (1) Businesses with average annual gross revenues for the preceding three years not exceeding \$4 million would be eligible for a 35 percent bidding credit; (2) Businesses with average annual gross revenues for the preceding three years not exceeding \$20 million would be eligible for a 25 percent bidding credit; and (3) Businesses with average annual gross revenues for the preceding three years not exceeding \$55 million would be eligible for a 15 percent bidding credit.

272. The rules adopted in the *Part 1 Report and Order* will apply to the 600 MHz band spectrum licenses to be offered in the Incentive Auction and all Commission auctions in which the short-form deadline falls on or after the release date of the *Part 1 Report and Order*. In the Incentive Auction proceeding, the Commission adopted a 15 percent bidding credit for small businesses (defined as entities with average annual gross revenues for the preceding three years not exceeding \$40 million) and a 25 percent bidding credit for very small businesses (defined as entities with average annual gross revenues for the preceding three years not exceeding \$15 million). Accordingly, the *Part 1 Report and Order* adopts for the 600 MHz band increases in the gross revenues thresholds associated with the 25 percent and 15 percent bidding credits that are consistent with the increased gross revenues thresholds in the *Part 1 Report and Order* for the standardized schedule in its part 1 competitive bidding rules.

273. The *Part 1 Report and Order* adopts a 15 percent bidding credit for qualifying service providers that provide commercial communications services to a customer base of fewer than 250,000 combined wireless, wireline, broadband, and cable subscribers and serve primarily rural areas. To determine whether a provider has fewer than 250,000 combined subscribers, the Commission will attribute the subscribers of all the provider's affiliates. The Commission will apply its existing definition of rural, a county with a population density of 100 persons or fewer per square mile. To qualify for a rural service provider bidding credit, an applicant must certify in its short-form application that it serves predominantly rural areas. An applicant will be permitted to claim a rural service provider bidding credit or a small business bidding credit, but not both.

274. The *Part 1 Report and Order* adopts a limit or cap on the total amount of that a small business or rural service provider can receive in any particular auction, to be determined on an auction-by-auction basis. Specifically, the *Part 1 Report and Order* establishes a cap floor for any particular auction at \$25 million for each eligible small business, and \$10 million for each eligible rural service provider. Additionally, the *Part 1 Report and Order* sets the caps for the upcoming incentive auction at \$150 million for a small business and \$10 million for a rural service provider. For markets with a population of 500,000 or

less, a DE bidder may not receive more than \$10 million in bidding credits. To the extent a small business does not claim the full \$10 million in bidding credits in the smaller markets, it may apply the remaining balance to its winning bids on larger licenses, up to the aggregate \$150 million cap for small businesses.

275. *DE Reporting Requirements.* The *Part 1 Report and Order* modifies the DE annual reporting requirement in 47 CFR 1.2110(n) require that all annual reports be filed no later than September 30 of each calendar year, reflecting the status of each license subject to unjust enrichment requirements held by a particular licensee as of August 31 of that same calendar year. Any licensee required to file a report between the release date of the *Part 1 Report and Order* and the effective date of the amended rule may defer filing its annual report until September 30, 2016. The new rule only applies to licenses acquired with DE benefits and still held subject to unjust enrichment obligations. If a license is transferred from a DE to a DE, the licensee who holds the license on September 30 of that year is responsible for filing the annual report. The annual report does not need to list agreements and arrangements that otherwise are included in the report if the information has already been filed with the Commission and the information is current. Instead the filer must provide both the ULS file number of the report containing such information and the date that the report was filed. These new DE reporting requirements will be applied to the new rural service provider bidding credit.

276. *Former Defaulter Rule.* The *Part 1 Report and Order* adopts changes to the Commission's former defaulter rule to narrow the scope of the defaults and delinquencies that will be considered in determining whether or not an auction participant is a former defaulter. Specifically, the *Part 1 Report and Order* excludes any cured default on any Commission license or delinquency on any non-tax debt owed to any Federal agency for which any of the following criteria are met: (1) The notice of the final payment deadline or delinquency was received more than seven years before the relevant short-form application deadline; (2) the default or delinquency amounted to less than \$100,000; (3) the default or delinquency was paid within two quarters (*i.e.*, 6 months) after receiving the notice of the final payment deadline or delinquency; or (4) the default or delinquency was the subject of a legal or arbitration proceeding that was cured

upon resolution of the proceeding. This rule will be applied on a prospective basis, including for the Incentive Auction.

277. *Joint Bidding.* The *Part 1 Report and Order* prohibits joint bidding arrangements between nationwide providers and between nationwide and non-nationwide providers. The *Part 1 Report and Order* also prohibits joint bidding arrangements between non-nationwide providers who are separate auction applicants but allows the use of joint ventures and consortia. The *Part 1 Report and Order* defines "joint bidding arrangements" as arrangements that involve a shared strategy for bidding in auction. This definition does not include agreements that are solely operational in nature, like agreements for roaming and leasing, which continue to be permitted. The Commission are permitting non-nationwide providers to form consortia and joint ventures. However, the Commission specify that: (1) DEs can participate in only one consortium in an auction, which shall be the exclusive bidding vehicle for its members in that auction, and (2) non-nationwide providers may participate in an auction through only one joint venture, which also shall be the exclusive bidding vehicle for its members in that auction. The *Part 1 Report and Order* also adopts a rule prohibiting individuals from serving as an authorized bidder for more than one auction applicant. The *Part 1 Report and Order* adopts a rule requiring all applicants to certify that they are not, and will not be, privy to, or involved in, in any way the bids or bidding strategy of more than one auction applicant. An applicant is also allowed to certify that it has established internal controls to preclude any person serving as an agent or employee for an applicant from having information about the bids or bidding strategies of more than one applicant or communicating such information to either applicant. The *Part 1 Report and Order* modifies its prohibited communications rule to prohibit an applicant from communicating bids or bidding information with any other applicant or any nationwide provider but provides limited exceptions for any arrangements that are solely operational in nature and are disclosed on an applicant's short-form application.

278. *Commonly Controlled Entities.* The *Part 1 Report and Order* codifies an established competitive bidding procedure that prohibits the same individual or entity from filing more than one short-form application to participate in an auction. The *Part 1 Report and Order* also adopts a new rule



that would prevent entities that are controlled by a single individual or set of individuals from qualifying to bid on licenses in the same or overlapping geographic areas in a specific auction on more than one short-form application. The *Part 1 Report and Order* adopts a limited exception to this general prohibition for existing rural partnerships. Under this exception, a qualifying wireless partnership and their individual rural telephone company members will be permitted to participate separately in an auction. The *Part 1 Report and Order* defines “controlling interest” as individuals or entities with positive or negative *de jure* or *de facto* control of the licensee.

279. *Miscellaneous Part 1 Revisions.* In addition to changes that would implement the foregoing proposals, the *Part 1 Report and Order* amends two of the Commission’s Part 1, Subpart Q, rules, 47 CFR 1.2111 and 1.2112.

280. The *Part 1 Report and Order* eliminates two provisions of 47 CFR 1.2111: (1) 47 CFR 1.2111(a), under which applicants for assignments or transfers during the first three years of a license term must provide the Commission with detailed contract and marketing information, and (2) 47 CFR 1.2111(b), a never-used unjust enrichment payment requirement for broadband PCS C and F block set-aside licenses.

281. The *Part 1 Report and Order* clarifies the auction application requirements for reporting an entity’s percentage ownership in the applicant and in FCC-regulated entities under 47 CFR 1.2112. The *Part 1 Report and Order* further changes the rule to specify application requirements for bidding consortia. The *Part 1 Report and Order* also corrects two errors in the rule caused by the inadvertent substitution of an incorrect paragraph in the Code of Federal Regulations publication of the rule for the correct one published in the **Federal Register** summary of the DE Second Report and Order. The first error was the addition of a requirement that DE short-form applicants list and summarize all their agreements that support their DE eligibility, a requirement that the Commission intended to apply only to long-form applicants. The *Part 1 Report and Order* deletes the requirement with respect to the short-form. The second error was the deletion of a requirement that DE short-form applicants list the parties with which they have lease or resale arrangements for any of the DE applicants’ spectrum. The *Part 1 Report and Order* reinstates this requirement.

#### F. Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

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

283. The *Part 1 Report and Order* repeals the AMR rule and replaces it with a two-pronged analysis. This approach to evaluating attribution and establishing small business eligibility should provide small businesses with greater opportunities to participate in the provision of spectrum-based services. Moreover, insofar as the *Part 1 Report and Order* should allow small businesses greater flexibility to engage in business ventures that include increased forms of leasing and other spectrum use arrangements, the Commission anticipates that the combined intent of the updated rules should increase the potential sources of revenue for the small business and decrease the likelihood that it would be subject to undue influence by any particular user of a single license. The *Part 1 Report and Order*’s two-pronged approach to establishing small business eligibility would also ensure that a licensee retains control of all licenses for which it seeks bidding credits, while providing greater flexibility for any acquired without such benefits. Further, the elimination of the AMR rule and clarification of how spectrum manager leasing rules apply to DEs should allow small businesses greater certainty to participate in secondary markets transactions.

284. The Commission’s determination that section 309(j) does not require a DE to directly provide primarily facilities-based service to the public removes one barrier facing small businesses in providing spectrum-based services. The *Part 1 Report and Order* retains the focus of the facilities-based requirement, specifically to prevent unjust enrichment, by strengthening other aspects of its rules, like its attribution and unjust enrichment provisions. A facilities-based requirement would operate as an impediment, while the

Commission’s adjustments are narrowly tailored to better strike the balance between the Commission’s statutory goals. In eliminating this requirement, DEs now have more flexibility in how they may utilize their licenses won with bidding credits.

285. The *Part 1 Report and Order*’s new attribution rule is an additional safeguard to ensure that benefits are award only to eligible, *bona fide* entities. The Commission declines a number of alternative proposals focusing on restricting financing or agreements with large or regional carriers due to concerns that these proposals would impede a DE’s ability to raise capital and gain operational experience. The Commission also declines proposals for an exception to its attribution rules for rural service providers who hold a minority interest in a cellular general partnership and to relax attribution rule in regards to immediate family members and of officers and directors. The Commission declines proposals to modify or eliminate its tribal exclusion to the attribution rule. The attribution rule is carefully tailored to ensure that DE benefits are not awarded to ineligible entities, while not being overly broad. The declined proposals would have affected the balance of the attribution rule, and in doing so, weaken the Commission’s safeguards against the flow of DE benefits to ineligible entities.

286. The *Part 1 Report and Order* retains the Commission’s three-tiered structure of small business bidding credits while increasing the gross revenues thresholds that define the three tiers of small businesses in the Part 1 schedule by which the Commission provides the corresponding available bidding credits would encourage small business participation in spectrum license auctions. The gross revenues thresholds, based on the GDP index, are intended to more accurately reflect what constitutes a “small business” in today’s marketplace, taking into consideration the relative size of the large, national providers. This update to the thresholds will provide an economic benefit to small entities by making it easier to acquire spectrum licenses. The *Part 1 Report and Order* declines other bidding credit percentages proposed by commenters and the use of a MHz per pop methodology for setting thresholds at levels that would be over inclusive. It also declines proposals favoring a single bidding credit in lieu of the current three-tier system, and the creation of a new entrant bidding credit. The three-tiered system gives it flexibility to adjust the bidding credits available to reflect

the spectrum being offered at auction. Furthermore, the current percentages will enable those who qualify to compete in a Commission auction while not giving an unfair advantage against auction participants who do not qualify for a bidding credit.

287. The *Part 1 Report and Order's* new rural service provider bidding credit is designed to better enable rural service providers to compete for spectrum at auction and increase the availability of mobile voice and broadband services in rural areas. The new rural service provider bidding credit is 15 percent. The Commission rejected proposals for a 25 percent rural service provider bidding credit. The Commission believes that a bidding credit of 15 percent is the proper amount. While this new bidding credit will promote the provision of service in rural areas, many of the service providers that are eligible for the rural service provider bidding credit have well over \$55 million in annual revenues and thus have far greater access to capital than most small businesses. The 15 percent bidding credit strikes the right balance between its existing DE system where rural providers are often unable to win a license covering their service areas limiting an unnecessary advantage received by an existing rural provider in certain markets. The Commission also declines the proposal to allow a winning bidder to deduct from its auction purchase price the *pro rata* value of any area partitioned to a rural telephone company, where the area includes all or a portion of the rural telephone company's service area. This proposal was declined because it would be overly burdensome and benefit those choosing not to serve rural areas. The Commission also declines proposals to make the small business and rural service provider bidding credits cumulative because cumulative bidding credits would provide an unnecessary advantage in certain markets.

288. The *Part 1 Report and Order* adopts bidding caps for the small business and rural service provider bidding credits. These caps will be determined for all future spectrum auctions on an auction-by-auction basis. The *Part 1 Report and Order* sets the cap floor for any particular auction at \$25 million for the small business bidding credit and \$10 million for the rural service provider bidding credit. The *Part 1 Report and Order* also set the bidding credit caps for the upcoming incentive auction at \$150 million for the small business bidding credit and \$10 million for the rural service provider bidding credit. Additionally, the *Part 1*

*Report and Order* limits the amount of bidding credits a bidder in the upcoming Incentive Auction may obtain to \$10 million in markets with a population of 500,000 or less. If the full \$10 million is not claimed, a bidder may apply its remaining balance to winning bids on larger licenses, up to \$150 million. The Commission declines proposals advocating for no caps and for set caps of varying amounts. The caps will assist DEs by providing some level of assurance of bidding activity. Additionally, the caps will protect the integrity of the Commission's auction process by discouraging those who may try to game the DE system. While caps limit the amount of assistance a DE may receive, the Commission has the flexibility to calibrate the caps to the spectrum being offered in a particular auction. Based on past auction data, the *Part 1 Report and Order* adopts caps for the upcoming incentive auction. In the most recent auctions of CMRS spectrum, the \$150 million cap would have allowed the vast majority of the bidding credits awarded to DEs. The 500,000 population threshold provides an easily administrable delineation between larger urban and smaller rural markets and the average population density for markets with a population of 500,000 or less roughly corresponds with its approach in defining rural areas. Additionally, a \$10 million cap on the rural service provider bidding credit is the appropriate amount to stimulate rural service while not giving the larger companies who don't qualify for a small business bidding credit an unnecessary advantage.

289. The *Part 1 Report and Order* declines to adopt bidding preferences or credits based on criteria other than business size, except for the new rural service provider bidding credit. The repeal of the AMR rule, expanded eligibility for the DE program, and new rural service provider bidding credit are more than sufficient to address the challenges new entrants, minority- and women-owned companies, individuals who have overcome significant disadvantages, and service providers in areas that are unserved or underserved, areas of persistent poverty, and in tribal lands face today. The *Part 1 Report and Order* also declines proposals in the MMTc white paper, except for the proposal to repeal the AMR rule which was adopted. These additional proposed bidding credits or preferences, along with the other alternatives proposed to promote small business participation in the wireless sector, would add unnecessary complexity, which in turn

could negatively affect the Commission's auction process.

290. The *Part 1 Report and Order's* modification of the Commission's DE reporting requirements reduces a significant regulatory burden placed on a DE by eliminating the requirement on DEs to provide information multiple times. Updating the deadline of the report reduces the administrative and related burdens on DEs. The DE reporting requirements provide a safeguard helping to prevent unjust enrichment. Additionally, the modifications adopted in the *Part 1 Report and Order* reduce administrative difficulties the Commission has in managing the information. The *Part 1 Report and Order* declines to eliminate the DE reporting rule altogether because other decisions, like the elimination of the AMR rule, have reduced the safeguards preventing unjust enrichment.

291. The *Part 1 Report and Order's* joint bidding rules are intended to preserve and promote robust competition in the mobile wireless marketplace and facilitate competition among bidders at auction, including small entities. These rules provide potential bidders with greater clarity regarding the types of joint bidding arrangements that would be permissible. In addition, the *Part 1 Report and Order's* rule to allow consortia and joint ventures among non-nationwide providers would maintain flexibility for small businesses to enter into such arrangements.

292. Finally, the additional changes to the part 1 rules will apply to all entities in the same manner as the Commission will apply these changes uniformly to all entities that choose to participate in spectrum license auctions. The Commission believes that applying the same rules equally to all entities in these contexts promotes fairness. The Commission does not believe that the limited costs and/or administrative burdens associated with the rule revisions will unduly burden small entities. In fact, many of the proposed rule revisions clarify the Commission's competitive bidding rules, including short-form application requirements, as well as a reduction of reporting requirements.

G. Federal Rules That May Duplicate, Overlap, or Conflict With the Final Rules

293. None.

H. Report to Congress

294. The Commission will send a copy of the *Part 1 Report and Order*, including this FRFA, in a report to be

sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act.

#### I. Report to Small Business Administration

295. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, will send a copy of this *Part 1 Report and Order*, including this FRFA, to the Chief Counsel for Advocacy of the SBA.

#### VIII Ordering Clauses

296. *It is ordered* that, pursuant to sections 1, 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 303(r), and 309(j), the *Part 1 Report and Order* is adopted.

297. *It is further ordered* that, pursuant to sections 1, 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 303(r), and 309(j), the petitions for reconsideration of the *Order on Reconsideration of the First Report and Order* in WT Docket No. 05–211, filed by Blooston, Mordkofsky, Dickens, Duffy & Pendergast, LLP, and by the National Telecommunications Cooperative Association are *denied*.

298. *It is further ordered* that, pursuant to sections 1, 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 303(r), and 309(j), the petition for partial reconsideration and/or clarification of the *Second Report and Order and Second Further Notice of Proposed Rule Making* in WT Docket No. 05–211 filed by Blooston, Mordkofsky, Dickens, Duffy & Pendergast, LLP, is, to the extent described herein, *denied* and otherwise is *dismissed as moot*.

299. *It is further ordered* that, pursuant to sections 1, 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 303(r), and 309(j), the petition for reconsideration and clarification of the *Second Report and Order and Second Further Notice of Proposed Rule Making* in WT Docket No. 05–211 filed by Cook Inlet Region, Inc., is, to the extent described herein, *denied*, and otherwise is *dismissed as moot*.

300. *It is further ordered* that, pursuant to sections 1, 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 303(r), and 309(j), consideration of the *Second Further Notice of Proposed Rule Making* in WT Docket No. 05–211 is *terminated*.

301. *It is further ordered* that the Commission's rules are hereby amended as set forth in Appendix A of the *Part 1 Report and Order*.

302. *It is further ordered* that the rules adopted herein *will become effective* November 17, 2015, except for §§ 1.2105(a)(2), 1.2105(a)(2)(iii) through (vi), (viii) through (x), and (xii), 1.2105(c)(3) through (4), 1.2110(j), 1.2110(n), 1.2112(b)(1)(iii) through (vi), 1.2112(b)(2)(iii), (v), and (vii) through (viii), 1.2114(a)(1), and 1.9020(e) which contain new or modified information collection requirements that require approval by the Office of Management and Budget (OMB). The Commission will publish a document in the **Federal Register** announcing the effective date of those sections.

303. *It is further ordered* that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of the *Part 1 Report and Order*, including the Final Regulatory Flexibility Analysis to the Chief Counsel for Advocacy of the Small Business Administration.

304. *It is further ordered* that the Commission *shall send* a copy of the *Part 1 Report and Order* in WT Docket Nos. 14–170 and 05–211, GN Docket No. 12–268, in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

#### List of Subjects

##### 47 CFR Part 1

Administrative practice and procedures.

##### 47 CFR Part 27

Communications common carriers. Radio.

Federal Communications Commission.

**Marlene H. Dortch**,  
Secretary.

#### Final Rules

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR parts 1 and 27 as follows:

#### PART 1—PRACTICE AND PROCEDURE

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

**Authority:** 15 U.S.C. 79 *et seq.*; 47 U.S.C. 151, 154(i), 154(j), 155, 157, 160, 201, 225, 227, 303, 309, 332, 1403, 1404, 1451, 1452, and 1455.

■ 1. Section 1.1910 is amended by revising paragraph (b)(3)(ii) to read as follows:

**§ 1.1910 Effect of insufficient fee payments, delinquent debts, or debarment.**

\* \* \* \* \*

(b) \* \* \*

(3) \* \* \*

(ii) The provisions of paragraphs (b)(2) and (b)(3) of this section will not apply where more restrictive rules govern treatment of delinquent debtors, such as 47 CFR 1.2105(a)(2)(xi) and (xii).

\* \* \* \* \*

■ 2. Section 1.2104 is amended by revising paragraph (j)(2) to read as follows:

**§ 1.2104 Competitive bidding mechanisms**

\* \* \* \* \*

(j) \* \* \*

(2) *Apportioned package bid.* The apportioned package bid on a license is an estimate of the price of an individual license included in a package of licenses in an auction with combinatorial (package) bidding. Apportioned package bids shall be determined by the Commission according to a methodology it establishes in advance of each auction with combinatorial bidding. The apportioned package bid on a license included in a package shall be used in place of the amount of an individual bid on that license when the bid amount is needed to determine the size of a designated entity bidding credit (see § 1.2110(f)(1), (f)(2), and (f)(4)), a new entrant bidding credit (see § 73.5007 of this chapter), a bid withdrawal or default payment obligation (see § 1.2104(g)), a tribal land bidding credit limit (see § 1.2110(f)(3)), or a size-based bidding credit unjust enrichment payment obligation (see § 1.2111(b), (c)(2) and (c)(3)), or for any other determination required by the Commission's rules or procedures.

■ 3. Section 1.2105 is revised to read as follows:

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

(a) *Submission of Short-Form Application (FCC Form 175).* In order to be eligible to bid, an applicant must timely submit a short-form application (FCC Form 175), together with any appropriate upfront payment set forth by Public Notice. All short-form applications must be filed electronically.

(1) All short-form applications will be due:

(i) On the date(s) specified by public notice; or

(ii) In the case of application filing dates which occur automatically by operation of law, on a date specified by public notice after the Commission has reviewed the applications that have been filed on those dates and

determined that mutual exclusivity exists.

(2) The short-form application must contain the following information, and all information, statements, certifications and declarations submitted in the application shall be made under penalty of perjury:

(i) Identification of each license, or category of licenses, on which the applicant wishes to bid.

(ii)(A) The applicant's name, if the applicant is an individual. If the applicant is a corporation, then the short-form application will require the name and address of the corporate office and the name and title of an officer or director. If the applicant is a partnership, then the application will require the name, citizenship and address of all general partners, and, if a partner is not a natural person, then the name and title of a responsible person should be included as well. If the applicant is a trust, then the name and address of the trustee will be required. If the applicant is none of the above, then it must identify and describe itself and its principals or other responsible persons; and

(B) Applicant ownership and other information, as set forth in § 1.2112.

(iii) The identity of the person(s) authorized to make or withdraw a bid. No person may serve as an authorized bidder for more than one auction applicant;

(iv) If the applicant applies as a designated entity, a certification that the applicant is qualified as a designated entity under § 1.2110.

(v) Certification that the applicant is legally, technically, financially and otherwise qualified pursuant to section 308(b) of the Communications Act of 1934, as amended;

(vi) Certification that the applicant is in compliance with the foreign ownership provisions of section 310 of the Communications Act of 1934, as amended. The Commission will accept applications certifying that a request for waiver or other relief from the requirements of section 310 is pending;

(vii) Certification that the applicant is and will, during the pendency of its application(s), remain in compliance with any service-specific qualifications applicable to the licenses on which the applicant intends to bid including, but not limited to, financial qualifications. The Commission may require certification in certain services that the applicant will, following grant of a license, come into compliance with certain service-specific rules, including, but not limited to, ownership eligibility limitations;

(viii) Certification that the applicant has provided in its application a brief description of, and identified each party to, any partnerships, joint ventures, consortia or other agreements, arrangements or understandings of any kind relating to the licenses being auctioned, including any agreements that address or communicate directly or indirectly bids (including specific prices), bidding strategies (including the specific licenses on which to bid or not to bid), or the post-auction market structure, to which the applicant, or any party that controls as defined in paragraph (a)(4) of this section or is controlled by the applicant, is a party.

(ix) Certification that the applicant (or any party that controls as defined in paragraph (a)(4) of this section or is controlled by the applicant) has not entered and will not enter into any partnerships, joint ventures, consortia or other agreements, arrangements, or understandings of any kind relating to the licenses being auctioned that address or communicate, directly or indirectly, bidding at auction (including specific prices to be bid) or bidding strategies (including the specific licenses on which to bid or not to bid), or post-auction market structure with: any other applicant (or any party that controls or is controlled by another applicant); with a nationwide provider that is not an applicant (or any party that controls or is controlled by such a nationwide provider); or, if the applicant is a nationwide provider, with any non-nationwide provider that is not an applicant (or with any party that controls or is controlled by such a non-nationwide provider), other than:

(A) Agreements, arrangements, or understandings of any kind that are solely operational as defined under paragraph (a)(4) of this section;

(B) Agreements, arrangements, or understandings of any kind to form consortia or joint ventures as defined under paragraph (a)(4) of this section;

(C) Agreements, arrangements or understandings of any kind with respect to the transfer or assignment of licenses, provided that such agreements, arrangements or understandings do not both relate to the licenses at auction and address or communicate, directly or indirectly, bidding at auction (including specific prices to be bid), or bidding strategies (including the specific licenses on which to bid or not to bid), or post-auction market structure.

(x) Certification that if applicant has an interest disclosed pursuant to § 1.2112(a)(1) through (6) with respect to more than one short-form application for an auction, it will implement internal controls that preclude any

individual acting on behalf of the applicant as defined in paragraph (c)(5) of this section from possessing information about the bids or bidding strategies (including post-auction market structure), of more than one party submitting a short-form application or communicating such information with respect to a party submitting a short-form application to anyone possessing such information regarding another party submitting a short-form application.

(xi) Certification that the applicant is not in default on any Commission licenses and that it is not delinquent on any non-tax debt owed to any Federal agency.

(xii) A certification indicating whether the applicant has ever been in default on any Commission license or has ever been delinquent on any non-tax debt owed to any Federal agency. For purposes of this certification, an applicant may exclude from consideration as a former default any default on a Commission license or delinquency on a non-tax debt to any Federal agency that has been resolved and meets any of the following criteria:

(A) The notice of the final payment deadline or delinquency was received more than seven years before the short-form application deadline;

(B) The default or delinquency amounted to less than \$100,000;

(C) The default or delinquency was paid within two quarters (*i.e.*, 6 months) after receiving the notice of the final payment deadline or delinquency; or

(D) The default or delinquency was the subject of a legal or arbitration proceeding that was cured upon resolution of the proceeding.

(xiii) For auctions required to be conducted under Title VI of the Middle Class Tax Relief and Job Creation Act of 2012 (Pub. L. 112–96) or in which any spectrum usage rights for which licenses are being assigned were made available under 47 U.S.C. 309(j)(8)(G)(i), certification under penalty of perjury that the applicant and all of the person(s) disclosed under paragraph (a)(2)(ii) of this section are not person(s) who have been, for reasons of national security, barred by any agency of the Federal Government from bidding on a contract, participating in an auction, or receiving a grant. For the purposes of this certification, the term “person” means an individual, partnership, association, joint-stock company, trust, or corporation, and the term “reasons of national security” means matters relating to the national defense and foreign relations of the United States.

(3) *Limit on filing applications.* In any auction, no individual or entity may file

more than one short-form application or have a controlling interest in more than one short-form application. In the case of a consortium, each member of the consortium shall be considered to have a controlling interest in the consortium. In the event that applications for an auction are filed by applicants with overlapping controlling interests, pursuant to paragraph (b)(1)(ii) of this section, both applications will be deemed incomplete and only one such applicant may be deemed qualified to bid. This limit shall not apply to any qualifying rural wireless partnership and individual members of such partnerships. A qualifying rural wireless partnership for purposes of this exception is one that was established as a result of the cellular B block settlement process established by the Commission in CC Docket No. 85–388 in which no nationwide provider is a managing partner or a managing member of the management committee, and partnership interests have not materially changed as of the effective date of the Report and Order in WT Docket No. 14–170, FCC 15–80. A partnership member for purposes of this exception is a partner or successor-in-interest to a partner in a qualifying partnership that does not have day-to-day management responsibilities in the partnership and holds 25% or less ownership interest, and provides a certification in its short-form application that it will implement internal controls to insulate itself from the bidding process of the cellular partnership and any other members of the partnership, except that it may, prior to the deadline for resubmission of short-form applications, express to the partnership the maximum it is willing to spend as a partner.

(4) *Definitions.* For purposes of the certifications required under paragraph (a)(2) of this section:

(i) The term *controlling interest* includes individuals or entities with positive or negative *de jure* or *de facto* control of the applicant. *De jure* control includes holding 50 percent or more of the voting stock of a corporation or holding a general partnership interest in a partnership. Ownership interests that are held indirectly by any party through one or more intervening corporations may be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, except that if the ownership percentage for an interest in any link in the chain meets or exceeds 50 percent or represents actual control, it may be treated as if it were a 100

percent interest. *De facto* control is determined on a case-by-case basis. Examples of *de facto* control include constituting or appointing 50 percent or more of the board of directors or management committee; having authority to appoint, promote, demote, and fire senior executives that control the day-to-day activities of the licensee; or playing an integral role in management decisions. In the case of a consortium, each member of the consortium shall be considered to have a controlling interest in the consortium.

(ii) The term *consortium* means an entity formed to apply as a single applicant to bid at auction pursuant to an agreement by two or more separate and distinct legal entities that individually are eligible to claim the same designated entity benefits under § 1.2110, provided that no member of the consortium may be a nationwide provider;

(iii) The term *joint venture* means a legally cognizable entity formed to apply as a single applicant to bid at auction pursuant to an agreement by two or more separate and distinct legal entities, provided that no member of the joint venture may be a nationwide provider;

(iv) The term *solely operational agreement* means any agreement, arrangement, or understanding of any kind that addresses operational aspects of providing a mobile service, including but not limited to agreements for roaming, device acquisition, and spectrum leasing and other spectrum use arrangements, so long as the agreement does not both relate to the licenses at auction and address or communicate, directly or indirectly, bidding at auction (including specific prices to be bid) or bidding strategies (including the specific licenses on which to bid or not to bid), or post-auction market structure.

**Note to paragraph (a):** The Commission may also request applicants to submit additional information for informational purposes to aid in its preparation of required reports to Congress.

(b) *Modification and Dismissal of Short-Form Application (FCC Form 175).* (1) (i) Any short-form application (FCC Form 175) that does not contain all of the certifications required pursuant to this section is unacceptable for filing and cannot be corrected subsequent to the applicable filing deadline. The application will be deemed incomplete, the applicant will not be found qualified to bid, and the upfront payment, if paid, will be returned.

(ii) If:

(A) An individual or entity submits multiple applications in a single auction; or

(B) Entities commonly controlled by the same individual or same set of individuals submit applications for any set of licenses in the same or overlapping geographic areas in a single auction; then only one of such applications may be deemed complete, and the other such application(s) will be deemed incomplete, such applicants will not be found qualified to bid, and the associated upfront payment(s), if paid, will be returned.

(2) The Commission will provide bidders a limited opportunity to cure defects specified herein (except for failure to sign the application and to make certifications) and to resubmit a corrected application. During the resubmission period for curing defects, a short-form application may be amended or modified to cure defects identified by the Commission or to make minor amendments or modifications. After the resubmission period has ended, a short-form application may be amended or modified to make minor changes or correct minor errors in the application. Major amendments cannot be made to a short-form application after the initial filing deadline. Major amendments include changes in ownership of the applicant that would constitute an assignment or transfer of control, changes in an applicant's size which would affect eligibility for designated entity provisions, and changes in the license service areas identified on the short-form application on which the applicant intends to bid. Minor amendments include, but are not limited to, the correction of typographical errors and other minor defects not identified as major. An application will be considered to be newly filed if it is amended by a major amendment and may not be resubmitted after applicable filing deadlines.

(3) Applicants who fail to correct defects in their applications in a timely manner as specified by public notice will have their applications dismissed with no opportunity for resubmission.

(4) Applicants shall have a continuing obligation to make any amendments or modifications that are necessary to maintain the accuracy and completeness of information furnished in pending applications. Such amendments or modifications shall be made as promptly as possible, and in no case more than five business days after applicants become aware of the need to make any amendment or modification, or five business days after the reportable event occurs, whichever is later. An

applicant's obligation to make such amendments or modifications to a pending application continues until they are made.

(c) *Prohibition of certain communications.* (1) After the short-form application filing deadline, all applicants are prohibited from cooperating or collaborating with respect to, communicating with or disclosing, to each other or any nationwide provider that is not an applicant, or, if the applicant is a nationwide provider, any non-nationwide provider that is not an applicant, in any manner the substance of their own, or each other's, or any other applicants' bids or bidding strategies (including post-auction market structure), or discussing or negotiating settlement agreements, until after the down payment deadline, unless such communications are within the scope of an agreement described in paragraphs (a)(2)(ix)(A) through (C) of this section that is disclosed pursuant to paragraph (a)(2)(viii) of this section.

(2) Any party submitting a short-form application that has an interest disclosed pursuant to § 1.2112(a)(1) through (6) with respect to more than one short-form application for an auction must implement internal controls that preclude any individual acting on behalf of the applicant as defined for purposes of this paragraph from possessing information about the bids or bidding strategies of more than one party submitting a short-form or communicating such information with respect to a party submitting a short-form application to anyone possessing such information regarding another party submitting a short-form application. Implementation of such internal controls will not outweigh specific evidence that a prohibited communication has occurred, nor will it preclude the initiation of an investigation when warranted.

(3) An applicant must modify its short-form application to reflect any changes in ownership or in membership of a consortium or a joint venture or agreements or understandings related to the licenses being auctioned.

(4) A party that makes or receives a communication prohibited under paragraphs (c)(1) or (6) of this section shall report such communication in writing immediately, and in any case no later than five business days after the communication occurs. A party's obligation to make such a report continues until the report has been made. Such reports shall be filed as directed in public notices detailing procedures for the bidding that was the subject of the reported communication.

If no public notice provides direction, the party making the report shall do so in writing to the Chief of the Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, by the most expeditious means available, including electronic transmission such as email.

(5) For purposes of this paragraph:

(i) The term *applicant* shall include all controlling interests in the entity submitting a short-form application to participate in an auction (FCC Form 175), as well as all holders of partnership and other ownership interests and any stock interest amounting to 10 percent or more of the entity, or outstanding stock, or outstanding voting stock of the entity submitting a short-form application, and all officers and directors of that entity. In the case of a consortium, each member of the consortium shall be considered to have a controlling interest in the consortium; and

(ii) The term *bids* or *bidding strategies* shall include capital calls or requests for additional funds in support of bids or bidding strategies.

*Example:* Company A is an applicant in area 1. Company B and Company C each own 10 percent of Company A. Company D is an applicant in area 1, area 2, and area 3. Company C is an applicant in area 3. Without violating the Commission's Rules, Company B can enter into a consortium arrangement with Company D or acquire an ownership interest in Company D if Company B certifies either:

(1) That it has communicated with and will communicate neither with Company A or anyone else concerning Company A's bids or bidding strategy, nor with Company C or anyone else concerning Company C's bids or bidding strategy; or

(2) that it has not communicated with and will not communicate with Company D or anyone else concerning Company D's bids or bidding strategy.

(6) Prohibition of certain communications for the broadcast television spectrum incentive auction conducted under section 6403 of the Middle Class Tax Relief and Job Creation Act of 2012 (Pub. L. 112–96).

(i) For the purposes of the prohibition described in paragraphs (c)(6)(ii) and (iii) of this section, the term *forward auction applicant* is defined the same as the term *applicant* is defined in paragraph (c)(5) of this section, and the terms *full power broadcast television licensee* and *Class A broadcast television licensee* are defined the same as those terms are defined in § 1.2205(a)(1).

(ii) Except as provided in paragraph (c)(6)(iii) of this section, in the broadcast television spectrum incentive auction conducted under section 6403 of the Middle Class Tax Relief and Job Creation Act of 2012 (Pub. L. 112–96), beginning on the short-form application filing deadline for the forward auction and until the results of the incentive auction are announced by public notice, all forward auction applicants are prohibited from communicating directly or indirectly any incentive auction applicant's bids or bidding strategies to any full power or Class A broadcast television licensee.

(iii) The prohibition described in paragraph (c)(6)(ii) of this section does not apply to communications between a forward auction applicant and a full power or Class A broadcast television licensee if a controlling interest, director, officer, or holder of any 10 percent or greater ownership interest in the forward auction applicant, as of the deadline for submitting short-form applications to participate in the forward auction, is also a controlling interest, director, officer, or governing board member of the full power or Class A broadcast television licensee, as of the deadline for submitting applications to participate in the reverse auction.

**Note 1 to Paragraph (c):** For the purposes of paragraph (c), “controlling interests” include individuals or entities with positive or negative *de jure* or *de facto* control of the licensee. *De jure* control includes holding 50 percent or more of the voting stock of a corporation or holding a general partnership interest in a partnership. Ownership interests that are held indirectly by any party through one or more intervening corporations may be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, except that if the ownership percentage for an interest in any link in the chain meets or exceeds 50 percent or represents actual control, it may be treated as if it were a 100 percent interest. *De facto* control is determined on a case-by-case basis. Examples of *de facto* control include constituting or appointing 50 percent or more of the board of directors or management committee; having authority to appoint, promote, demote, and fire senior executives that control the day-to-day activities of the licensee; or playing an integral role in management decisions.

**Note 2 to Paragraph (c):** The prohibition described in paragraph (c)(6)(ii) of this section applies to controlling interests, directors, officers, and holders of any 10 percent or greater ownership interest in the forward auction applicant as of the deadline for submitting short-form applications to participate in the forward auction, and any additional such parties at any subsequent point prior to the announcement by public

notice of the results of the incentive auction. Thus, if, for example, a forward auction applicant appoints a new officer after the short-form application deadline, that new officer would be subject to the prohibition in paragraph (c)(6)(ii) of this section, but would not be included within the exception described in paragraph (c)(6)(iii) of this section.

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

**§ 1.2106 Submission of upfront payments.**

(a) The Commission may require applicants for licenses subject to competitive bidding to submit an upfront payment. In that event, the amount of the upfront payment and the procedures for submitting it will be set forth in a Public Notice. Any auction applicant that, pursuant to § 1.2105(a)(2)(xii), certifies that it is a former defaulter must submit an upfront payment equal to 50 percent more than the amount that otherwise would be required. No interest will be paid on upfront payments.

\* \* \* \* \*

■ 5. Section 1.2107 is amended by revising the first sentence in paragraph (g)(1)(i) to read as follows:

**§ 1.2107 Submission of down payment and filing of long-form applications.**

\* \* \* \* \*

(g)(1)(i) A consortium participating in competitive bidding pursuant to § 1.2110(b)(4)(i) that is a winning bidder may not apply as a consortium for licenses covered by the winning bids.

\* \* \*

\* \* \* \* \*

■ 6. Section 1.2110 is amended Amend § 1.2110 by:

■ A. Redesignating paragraphs (b)(3) as (b)(4);

■ B. Revising paragraphs (a), (b)(1)(i) and (ii), newly redesignated paragraph (b)(4)(i), and paragraphs (c)(6), (f)(2), (j) and (n);

■ C. Adding a new paragraph (b)(3), (c)(2)(ii)(J), and (f)(4); and

■ D. Removing newly redesignated paragraph (b)(4)(iv).

**§ 1.2110 Designated entities.**

(a) Designated entities are small businesses (including businesses owned by members of minority groups and/or women), rural telephone companies, and eligible rural service providers.

(b) \* \* \*

(1) *Size attribution.* (i) The gross revenues of the applicant (or licensee), its affiliates, its controlling interests, and the affiliates of its controlling interests shall be attributed to the applicant (or licensee) and considered on a cumulative basis and aggregated for

purposes of determining whether the applicant (or licensee) is eligible for status as a small business, very small business, or entrepreneur, as those terms are defined in the service-specific rules. An applicant seeking status as a small business, very small business, or entrepreneur, as those terms are defined in the service-specific rules, must disclose on its short- and long-form applications, separately and in the aggregate, the gross revenues for each of the previous three years of the applicant (or licensee), its affiliates, its controlling interests, and the affiliates of its controlling interests.

(ii) If applicable, pursuant to § 24.709 of this chapter, the total assets of the applicant (or licensee), its affiliates, its controlling interests, and the affiliates of its controlling interests shall be attributed to the applicant (or licensee) and considered on a cumulative basis and aggregated for purposes of determining whether the applicant (or licensee) is eligible for status as an entrepreneur. An applicant seeking status as an entrepreneur must disclose on its short- and long-form applications, separately and in the aggregate, the gross revenues for each of the previous two years of the applicant (or licensee), its affiliates, its controlling interests, and the affiliates of its controlling interests.

\* \* \* \* \*

(3) *Standard for evaluating eligibility for small business benefits.* To be eligible for small business benefits:

(i) An applicant must meet the applicable small business size standard in paragraphs (b)(1) and (2) of this section, and

(ii) Must retain *de jure* and *de facto* control over the spectrum associated with the license(s) for which it seeks small business benefits. An applicant or licensee may lose eligibility for size-based benefits for one or more licenses without losing general eligibility for size-based benefits so long as it retains *de jure* and *de facto* control of its overall business.

(4) *Exceptions—(i) Consortium.* Where an applicant to participate in bidding for Commission licenses or permits is a consortium of entities eligible for size-based bidding credits and/or closed bidding based on gross revenues and/or total assets, the gross revenues and/or total assets of each consortium member shall not be aggregated. Where an applicant to participate in bidding for Commission licenses or permits is a consortium of entities eligible for rural service provider bidding credits pursuant to paragraph (f)(4) of this section, the

subscribers of each consortium member shall not be aggregated. Each consortium member must constitute a separate and distinct legal entity to qualify for this exception. Consortia that are winning bidders using this exception must comply with the requirements of § 1.2107(g) of this chapter as a condition of license grant.

\* \* \* \* \*

(c) \* \* \*

(2) \* \* \*

(ii) \* \* \*

(J) In addition to the provisions of paragraphs (b)(1)(i) and (f)(4)(i)(C) of this section, for purposes of determining an applicant's or licensee's eligibility for bidding credits for designated entity benefits, the gross revenues (or, in the case of a rural service provider under paragraph (f)(4) of this section, the subscribers) of any disclosable interest holder of an applicant or licensee are also attributable to the applicant or licensee, on a license-by-license basis, if the disclosable interest holder uses, or has an agreement to use, more than 25 percent of the spectrum capacity of a license awarded with bidding credits. For purposes of this provision, a disclosable interest holder in a designated entity applicant or licensee is defined as any individual or entity holding a ten percent or greater interest of any kind in the designated entity, including but not limited to, a ten percent or greater interest in any class of stock, warrants, options or debt securities in the applicant or licensee. This rule, however, shall not cause a disclosable interest holder, which is not otherwise a controlling interest, affiliate, or an affiliate of a controlling interest of a rural service provider to have the disclosable interest holder's subscribers become attributable to the rural service provider applicant or licensee when the disclosable interest holder has a spectrum use agreement to use more than 25 percent of the spectrum capacity of a license awarded with a rural service provider bidding credit, so long as

(1) The disclosable interest holder is independently eligible for a rural service provider bidding credit, and;

(2) The disclosable interest holder's spectrum use and any spectrum use agreements are otherwise permissible under the Commission's rules.

\* \* \* \* \*

(6) *Consortium.* A consortium of small businesses, very small businesses, entrepreneurs, or rural service providers is a conglomerate organization composed of two or more entities, each of which individually satisfies the definition of a small business, very



small business, entrepreneur, or rural service provider as those terms are defined in this section and in applicable service-specific rules. Each individual member must constitute a separate and distinct legal entity to qualify.

\* \* \* \* \*

(f) \* \* \*

(2) *Small business bidding credits.*

(i) *Size of bidding credits.* A winning bidder that qualifies as a small business, and has not claimed a rural service provider bidding credit pursuant to paragraph (f)(4) of this section, may use the following bidding credits corresponding to its respective average gross revenues for the preceding 3 years:

(A) Businesses with average gross revenues for the preceding 3 years not exceeding \$4 million are eligible for bidding credits of 35 percent;

(B) Businesses with average gross revenues for the preceding 3 years not exceeding \$20 million are eligible for bidding credits of 25 percent; and

(C) Businesses with average gross revenues for the preceding 3 years not exceeding \$55 million are eligible for bidding credits of 15 percent.

(ii) *Cap on winning bid discount.* A maximum total discount that a winning bidder that is eligible for a small business bidding credit may receive will be established on an auction-by-auction basis. The limit on the discount that a winning bidder that is eligible for a small business bidding credit may receive in any particular auction will be no less than \$25 million. The Commission may adopt a market-based cap on an auction-by-auction basis that would establish an overall limit on the discount that a small business may receive for certain license areas.

\* \* \* \* \*

(4) *Rural service provider bidding credit—(i) Eligibility.* A winning bidder that qualifies as a rural service provider and has not claimed a small business bidding credit pursuant to paragraph (f)(2) of this section will be eligible to receive a 15 percent bidding credit. For the purposes of this paragraph, a rural service provider means a service provider that—

(A) Is in the business of providing commercial communications services and together with its controlling interests, affiliates, and the affiliates of its controlling interests as those terms are defined in paragraphs (c)(2) and (c)(5) of this section, has fewer than 250,000 combined wireless, wireline, broadband, and cable subscribers as of the date of the short-form filing deadline; and

(B) Serves predominantly rural areas, defined as counties with a population

density of 100 or fewer persons per square mile.

(C) *Size attribution.* (1) The combined wireless, wireline, broadband, and cable subscribers of the applicant (or licensee), its affiliates, its controlling interests, and the affiliates of its controlling interests shall be attributed to the applicant (or licensee) and considered on a cumulative basis and aggregated for purposes of determining whether the applicant (or licensee) is eligible for the rural service provider bidding credit.

(2) *Exception.* For rural partnerships providing service as of July 16, 2015, the Commission will determine eligibility for the 15 percent rural service provider bidding credit by evaluating whether the individual members of the rural partnership individually have fewer than 250,000 combined wireless, wireline, broadband, and cable subscribers, and for those types of rural partnerships, the subscribers will not be aggregated.

(ii) *Cap on winning bid discount.* A maximum total discount that a winning bidder that is eligible for a rural service provider bidding credit may receive will be established on an auction-by-auction basis. The limit on the discount that a winning bidder that is eligible for a rural service provider bidding credit may receive in any particular auction will be no less than \$10 million. The Commission may adopt a market-based cap on an auction-by-auction basis that would establish an overall limit on the discount that a rural service provider may receive for certain license areas.

\* \* \* \* \*

(j) Designated entities must describe on their long-form applications how they satisfy the requirements for eligibility for designated entity status, and must list and summarize on their long-form applications all agreements that affect designated entity status such as partnership agreements, shareholder agreements, management agreements, spectrum leasing arrangements, spectrum resale (including wholesale) arrangements, spectrum use agreements, and all other agreements including oral agreements, establishing as applicable, *de facto* or *de jure* control of the entity. Designated entities also must provide the date(s) on which they entered into each of the agreements listed. In addition, designated entities must file with their long-form applications a copy of each such agreement. In order to enable the Commission to audit designated entity eligibility on an ongoing basis, designated entities that are awarded eligibility must, for the term of the license, maintain at their

facilities or with their designated agents the lists, summaries, dates and copies of agreements required to be identified and provided to the Commission pursuant to this paragraph and to § 1.2114.

\* \* \* \* \*

(n) *Annual reports.* (1) Each designated entity licensee must file with the Commission an annual report no later than September 30 of each year for each license it holds that was acquired using designated entity benefits and that, as of August 31 of the year in which the report is due (the “cut-off date”), remains subject to designated entity unjust enrichment requirements (a “designated entity license”). The annual report must provide the information described in paragraph (n)(2) of this section for the year ending on the cut-off date (the “reporting year”). If, during the reporting year, a designated entity has assigned or transferred a designated entity license to another designated entity, the designated entity that holds the designated entity license on September 30 of the year in which the application for the transaction is filed is responsible for filing the annual report.

(2) The annual report shall include, at a minimum, a list and summaries of all agreements and arrangements (including proposed agreements and arrangements) that relate to eligibility for designated entity benefits. In addition to a summary of each agreement or arrangement, this list must include the parties (including affiliates, controlling interests, and affiliates of controlling interests) to each agreement or arrangement, as well as the dates on which the parties entered into each agreement or arrangement.

(3) A designated entity need not list and summarize on its annual report the agreements and arrangements otherwise required to be included under paragraphs (n)(1) and (n)(2) of this section if it has already filed that information with the Commission, and the information on file remains current. In such a situation, the designated entity must instead include in its annual report both the ULS file number of the report or application containing the current information and the date on which that information was filed.

\* \* \* \* \*

■ 7. Section 1.2111 is amended by removing paragraphs (a) and (b); redesignating paragraphs (c), (d), and (e) as paragraphs (a), (b), and (c); and revising newly redesignated paragraphs (a)(2), (a)(3), and (b)(1) to read as follows:

**§ 1.2111 Assignment or transfer of control: unjust enrichment.**

(a) \* \* \*

(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, debt financing, revenue from operations or other investments, business development or expanded service shall not be considered to result in the licensee losing eligibility 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.

\* \* \* \* \*

(b) *Unjust enrichment payment: bidding credits.* (1) A licensee that utilizes a bidding credit, and that during the initial term seeks to assign or transfer control of a license to an entity that does not meet the eligibility criteria for a bidding credit, will be required to reimburse the U.S. Government for the amount of the bidding credit, plus interest based on the rate for ten year U.S. Treasury obligations applicable on the date the license was granted, as a condition of Commission approval of the assignment or transfer. If, within the initial term of the license, a licensee that utilizes a bidding credit seeks to assign or transfer control of a license to an entity that is eligible for a lower bidding credit, the difference between the bidding credit obtained by the assigning party and the bidding credit for which the acquiring party would qualify, plus interest based on the rate for ten year U.S. Treasury obligations applicable on the date the license is granted, must be paid to the U.S. Government as a condition of Commission approval of the assignment or transfer. If, within the initial term of the license, a licensee that utilizes a bidding credit seeks to make any ownership change that would result in the licensee losing eligibility for a bidding credit (or qualifying for a lower bidding credit), the amount of the

bidding credit (or the difference between the bidding credit originally obtained and the bidding credit for which the licensee would qualify after restructuring), plus interest based on the rate for ten year U.S. Treasury obligations applicable on the date the license is granted, must be paid to the U.S. Government as a condition of Commission approval of the assignment or transfer or of a reportable eligibility event (see § 1.2114).

\* \* \* \* \*

■ 8. Section 1.2112 is amended by revising paragraph (b) to read as follows:

**§ 1.2112 Ownership disclosure requirements for applications.**

\* \* \* \* \*

(b) *Designated entity status.* In addition to the information required under paragraph (a) of this section, each applicant claiming eligibility for small business provisions or a rural service provider bidding credit shall disclose the following:

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

(i) List the names, addresses, and citizenship of all officers, directors, affiliates, and other controlling interests of the applicant, as described in § 1.2110, and, if a consortium of small businesses or consortium of very small businesses, the members of the conglomerate organization;

(ii) List any FCC-regulated entity or applicant for an FCC license, in which any controlling interest of the applicant owns a 10 percent or greater interest or a total of 10 percent or more of any class of stock, warrants, options or debt securities. This list must include a description of each such entity's principal business and a description of each such entity's relationship to the applicant;

(iii) List all parties with which the applicant has entered into agreements or arrangements for the use of any of the spectrum capacity of any of the applicant's spectrum;

(iv) List separately and in the aggregate the gross revenues, computed in accordance with § 1.2110, for each of the following: The applicant, its affiliates, its controlling interests, and the affiliates of its controlling interests; and if a consortium of small businesses, the members comprising the consortium;

(v) If claiming eligibility for a rural service provider bidding credit, provide all information to demonstrate that the applicant meets the criteria for such credit as set forth in § 1.2110(f)(4); and

(vi) If applying as a consortium of designated entities, provide the

information in paragraphs (b)(1)(i) through (v) of this section separately for each member of the consortium.

(2) As an exhibit to its application for a license, authorization, assignment, or transfer of control:

(i) List the names, addresses, and citizenship of all officers, directors, and other controlling interests of the applicant, as described in § 1.2110;

(ii) List any FCC-regulated entity or applicant for an FCC license, in which any controlling interest of the applicant owns a 10 percent or greater interest or a total of 10 percent or more of any class of stock, warrants, options or debt securities. This list must include a description of each such entity's principal business and a description of each such entity's relationship to the applicant;

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

(iv) List and summarize any investor protection agreements, including rights of first refusal, supermajority clauses, options, veto rights, and rights to hire and fire employees and to appoint members to boards of directors or management committees;

(v) List separately and in the aggregate the gross revenues, computed in accordance with § 1.2110, for each of the following: the applicant, its affiliates, its controlling interests, and affiliates of its controlling interests; and if a consortium of small businesses, the members comprising the consortium;

(vi) List and summarize, if seeking the exemption for rural telephone cooperatives pursuant to § 1.2110, all documentation to establish eligibility pursuant to the factors listed under § 1.2110(b)(4)(iii)(A).

(vii) List and summarize any agreements in which the applicant has entered into arrangements for the use of any of the spectrum capacity of the license that is the subject of the application; and

(viii) If claiming eligibility for a rural service provider bidding credit, provide all information to demonstrate that the applicant meets the criteria for such credit as set forth in § 1.2110(f)(4).

■ 9. Section 1.2114 is amended by revising paragraph (a)(1) to read as follows:

**§ 1.2114 Reporting of eligibility event.**

(a) \* \* \*

(1) Any spectrum lease (as defined in § 1.9003) or any other type of spectrum use agreement with one entity or on a cumulative basis that might cause a licensee to lose eligibility for installment payments, a set-aside license, or a bidding credit (or for a particular level of bidding credit) under § 1.2110 and applicable service-specific rules.

\* \* \* \* \*

■ 10. Section 1.2205 is amended by revising paragraph (a)(2) to read as follows:

**§ 1.2205 Prohibition of certain communications.**

(a) \* \* \*

(2) For the purposes of this section, the term forward auction applicant is defined the same as the term applicant is defined in § 1.2105(c)(5).

\* \* \* \* \*

■ 11. Section 1.9020 is amended by revising paragraphs (d)(4) and (e) to read as follows:

**§ 1.9020 Spectrum manager leasing arrangements.**

\* \* \* \* \*

(d) \* \* \*

(4) *Designated entity/entrepreneur rules.* A licensee that holds a license pursuant to small business, rural service provider, and/or entrepreneur provisions (*see* § 1.2110 and § 24.709 of this chapter) and continues to be subject to unjust enrichment requirements (*see* § 1.2111 and § 24.714 of this chapter) and/or transfer restrictions (*see* § 24.839 of this chapter) may enter into a spectrum manager leasing arrangement with a spectrum lessee, regardless of whether the spectrum lessee meets the Commission's designated entity eligibility requirements (*see* § 1.2110 of this chapter) or its entrepreneur eligibility requirements to hold certain C and F block licenses in the broadband personal communications services (*see* § 1.2110 and § 24.709 of this chapter), so long as the spectrum manager leasing arrangement does not result in the spectrum lessee's becoming a "controlling interest" or "affiliate" (*see* § 1.2110 of this chapter) of the licensee such that the licensee would lose its

eligibility as a designated entity or entrepreneur.

\* \* \* \* \*

(e) *Notifications regarding spectrum manager leasing arrangements.* A licensee that seeks to enter into a spectrum manager leasing arrangement must notify the Commission of the arrangement in advance of the spectrum lessee's commencement of operations under the lease. Unless the license covering the spectrum to be leased is held pursuant to the Commission's designated entity rules and continues to be subject to unjust enrichment requirements and/or transfer restrictions (*see* §§ 1.2110 and 1.2111, and §§ 24.709, 24.714, and 24.839 of this chapter), the spectrum manager lease notification will be processed pursuant to either the general notification procedures or the immediate processing procedures, as set forth herein. The licensee must submit the notification to the Commission by electronic filing using the Universal Licensing System (ULS) and FCC Form 608, except that a licensee falling within the provisions of § 1.913(d) of this chapter may file the notification either electronically or manually. If the license covering the spectrum to be leased is held pursuant to the Commission's designated entity rules, the spectrum manager lease will require Commission acceptance of the spectrum manager lease notification prior to the commencement of operations under the lease.

\* \* \* \* \*

■ 12. Section 1.9030 is amended by revising the first two sentences in paragraphs (d)(4)(iii) and (iv) to read as follows:

**§ 1.9030 Long-term de facto transfer leasing arrangements.**

\* \* \* \* \*

(d) \* \* \*

(4) \* \* \*

(iii) The amount of any unjust enrichment payment will be determined by the Commission as part of its review of the application under the same rules that apply in the context of a license assignment or transfer of control (*see* § 1.2111 and § 24.714 of this chapter). If the spectrum leasing arrangement involves only part of the license area and/or part of the bandwidth covered by the license, the unjust enrichment obligation will be apportioned as though the license were being partitioned and/or disaggregated (*see* § 1.2111(c) and § 24.714(c) of this chapter). \* \* \*

(iv) A licensee that participates in the Commission's installment payment program (*see* § 1.2110(g)) may enter into a long-term de facto transfer leasing

arrangement without triggering unjust enrichment obligations provided that the lessee would qualify for as favorable a category of installment payments. A licensee using installment payment financing that seeks to lease to an entity not meeting the eligibility standards for as favorable a category of installment payments must make full payment of the remaining unpaid principal and any unpaid interest accrued through the effective date of the spectrum leasing arrangement (*see* § 1.2111(a)). \* \* \*

\* \* \* \* \*

**PART 27—MISCELLANEOUS WIRELESS COMMUNICATIONS SERVICES**

■ 13. The authority citation for part 27 continues to read as follows:

**Authority:** 47 U.S.C. 154, 301, 302a, 303, 307, 309, 332, 336, 337, 1403, 1404, 1451, and 1452, unless otherwise noted.

■ 14. Section 27.1002 is amended by revising paragraph (a) to read as follows:

**§ 27.1002 Designated entities in the 1915–1920 MHz and 1995–2000 MHz bands.**

\* \* \* \* \*

(a)(1) A small business is an entity that, together with its affiliates, its controlling interests, and the affiliates of its controlling interests, has average gross revenues not exceeding \$40 million for the preceding three years.

(2) A very small business is an entity that, together with its affiliates, its controlling interests, and the affiliates of its controlling interests, has average gross revenues not exceeding \$15 million for the preceding three years.

\* \* \* \* \*

■ 15. Section 27.1104 is amended by revising paragraph (a) to read as follows:

**§ 27.1104 Designated Entities in the 2000–2020 MHz and 2180–2200 MHz bands.**

\* \* \* \* \*

(a) *Small business.* (1) A small business is an entity that, together with its affiliates, its controlling interests, and the affiliates of its controlling interests, has average gross revenues not exceeding \$40 million for the preceding three years.

(2) A very small business is an entity that, together with its affiliates, its controlling interests, and the affiliates of its controlling interests, has average gross revenues not exceeding \$15 million for the preceding three years.

\* \* \* \* \*

■ 16. Section 27.1106 is amended by revising paragraph (a) to read as follows:

**§ 27.1106 Designated Entities in the 1695–1710 MHz, 1755–1780 MHz, and 2155–2180 MHz bands.**

\* \* \* \* \*

(a) *Small business.* (1) A small business is an entity that, together with its affiliates, its controlling interests, and the affiliates of its controlling interests, has average gross revenues not exceeding \$40 million for the preceding three (3) years.

(2) A very small business is an entity that, together with its affiliates, its controlling interests, and the affiliates of its controlling interests, has average gross revenues not exceeding \$15 million for the preceding three (3) years.

\* \* \* \* \*

■ 17. Revise § 27.1301 to read as follows:

**§ 27.1301 Designated entities in the 600 MHz band.**

(a) *Small business.* (1) A small business is an entity that, together with its affiliates, its controlling interests, and the affiliates of its controlling interests, has average gross revenues not exceeding \$55 million for the preceding three (3) years.

(2) A very small business is an entity that, together with its affiliates, its controlling interests, and the affiliates of its controlling interests, has average gross revenues not exceeding \$20 million for the preceding three (3) years.

(b) *Eligible rural service provider.* For purposes of this section, an eligible rural service provider is an entity that meets the criteria specified in § 1.2110(f)(4) of this chapter.

(c) *Bidding credits.* (1) A winning bidder that qualifies as a small business as defined in this section or a consortium of small businesses may use the bidding credit specified in § 1.2110(f)(2)(i)(C) of this chapter. A winning bidder that qualifies as a very small business as defined in this section or a consortium of very small businesses may use the bidding credit specified in § 1.2110(f)(2)(i)(B) of this chapter.

(2) An entity that qualifies as eligible rural service provider or a consortium of rural service providers may use the bidding credit specified in § 1.2110(f)(4) of this chapter.

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