

court still found the program to be narrowly tailored.

Adarand Constructors, 790 F.Supp. at 244.

Since Congress did not set forth "tailoring" mechanisms in section 309(j)(4)(D), but rather left those to be developed by the Commission in the context of this rule-making proceeding, the Commission should now promulgate rules which ensure that the minority preferences utilized in spectrum auctions are not overinclusive and are narrowly tailored to fulfill the governmental objective of assisting previously underrepresented and disadvantaged entities. The Commission has requested comment on various proposals for assessing the eligibility of entities claiming to be minority owned and operated. To the extent that the rules ultimately adopted by the Commission ensure that only legitimate minority enterprises can participate in the spectrum auction preference programs, the exemption requirement detailed above will be satisfied. To satisfy the requirement of a waiver provision, the Commission should consider establishing procedures by which set-aside spectrum blocks are released to general bidding if no qualified minorities apply to bid on the block. This would operate in much the same fashion as the waiver provisions in the Department of Transportation program and in the program detailed in Fullilove.

For all of these reasons, if the Commission establishes appropriate waiver and exemption provisions and otherwise

follows Congress' direction and awards preferences to minority enterprises, concerns about the constitutionality of such preferences should be satisfied. In any event, since there is a sound basis for concluding that the congressionally-mandated preferences will pass constitutional muster, the Commission should defer to that congressional directive and leave to the courts the question whether Congress had the power to authorize such measures.

**B. The Commission Must Adopt Strict Eligibility Requirements and Anti-Sham Provisions**

To ensure that the benefits Congress intended to bestow on certain designated entities flow only to such entities, strict eligibility criteria and anti-sham provisions must be adopted. As far as determining who is a "minority" for purposes of applying "minority" preferences, CIRI supports the Commission's proposal to use its established definition to include "those of Black, Hispanic Surnamed, American Eskimo, Aleut, American Indian and Asiatic American extraction."<sup>14/</sup>

The more significant inquiry posed by the Commission is whether, in order to qualify for a preference, "women and minority backed applications should be 50.1% owned by these groups or whether simple control is enough to qualify regardless of the percentage of equity held." NPRM at ¶ 77.

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<sup>14/</sup> NPRM at ¶ 77 citing Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 FCC 2d 979, 980 n.8 (1978).

The Commission also asks how to ensure that the preferences awarded to minority entities do not in fact benefit non-minorities "who might merely use a member of one of those groups for the purpose of achieving special treatment by the Commission." NPRM at ¶ 78.

The key to fulfilling the purpose behind the award of preferences and to deterring sham applicants is requiring that minorities have actual control of the entity which is to receive a preference and that minorities hold a significant equity interest in that entity. The Commission has applied this approach in determining whether a limited partnership is eligible to acquire a broadcast station pursuant to a distress sale. In such cases, the limited partnership must have a minority general partner, with substantial restrictions on control by any other general partners. The minority general partner(s) must also own at least 20 percent of the equity of the partnership. Minority Ownership in Broadcasting, 92 FCC 2d 849, 855 (1982). The same standard is applied to determine whether a limited partnership has sufficient minority involvement to entitle a third party to receive a tax certificate for the sale of a broadcast property to the partnership. Id.

Prior to adopting its 1982 Minority Ownership Policy, the Commission had expressed "serious concern" about requests for tax certificates "for sales to limited partnerships in which minorities exercise control but have

no substantial ownership interest." William M. Barnard, 44 R.R. 2d 525, 527 (1978). The Commission therefore found in the Minority Ownership Policy that the coupling of control plus substantial (20%) equity ownership results in the type of "significant minority involvement" in the enterprise which furthers the purpose of its Minority Ownership Policy. 92 FCC 2d at 855.

In contexts other than those involving limited partnerships, the Commission's stated approach is to apply its minority ownership policies "where the minority ownership interest in the entity exceeded fifty percent or was controlling." Id. at 853. See also Distress Sale Policy, FCC 85-543, MM Docket No. 85-299 (released Oct. 8, 1985) at ¶ 2 ("the ownership interest held by minorities in the proposed transferee or assignee must exceed 50 percent or constitute a controlling interest"). The "ownership interests" considered by the Commission in these cases are voting interests, not equity interests, because voting interest is equated with control. See, e.g., 47 C.F.R. § 1.1621(c)(5); 47 C.F.R. § 73.3555 Note f.

In CIRI's view, this approach has led far too often to the grant of favorable treatment to an enterprise in which a minority group owns a bare majority of the voting interests but a minuscule and often contingent (e.g., subject to a "call" mechanism) amount of the equity. In such cases it is the non-minority owners, with the overwhelming majority of

the equity interest, who have de facto control, while the minority acts as a facade. CIRI has previously opposed such transactions before the Commission on the basis that they were shams.<sup>15/</sup> As shown above, the Commission recognized and addressed this concern with respect to limited partnerships. It should do the same with respect to other types of business structures.

In addressing the concern in the spectrum auction context, the Commission might consider requiring that, in order for an entity to be eligible for a minority preference, a minority have both de jure control (over 50% voting interests) and de facto control over that entity. However, as the Commission has recognized, "the search for control necessarily calls for an investigation beyond stock ownership in order to determine effectively where actual control resides." Stereo Broadcasters Inc., 55 FCC 2d 819, 821-822 (1975). An analysis of de facto control would involve analysis of a number of issues including: who has the power to direct the company's operations; who determines the make-up of the board of directors; whether a large minority shareholder also holds an influential executive

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<sup>15/</sup> See Letter to Ms. Donna R. Searcy, from Roy M. Huhndorf, President and CEO, Cook Inlet Region, Inc., in File No. BALCT-930408KF, et al., June 4, 1993. See also The Washington Post, "FCC Minority Program Spurs Deals -- and Questions," June 3, 1993, at A-1, A-9.

post — in sum, who has the right to determine the company's basic policies.<sup>16/</sup>

In light of the complexity involved with adopting de facto control as an element of any qualification standard, CIRI urges the Commission to require that the following easily discernable elements be present in order for entities to be eligible for minority preferences:

First, minorities must have clear structural control over the applicant. To this end, in a limited partnership applicant the minority must have general partner status and there must be substantial restraints on management control by any other general partner. In a corporate applicant, minorities must at least possess 51% of the voting stock.

Second, minorities must have a minimum equity stake in the applicant and the stake must be substantial: At a minimum, minorities should hold not less than 20% of the total equity interests in the applicant.

Third, certain elements in an organizational structure which call into question the minority principal's involvement in the entity will disqualify the entity. For example, if non-minorities have the ability to "call" the minimum minority equity stake, the applicant should not be

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<sup>16/</sup> See William S. Paley, 1 FCC Rcd 1025, 1026 (1986); Metromedia, Inc., 98 FCC 2d 300, 306 (1984), recon. denied, 56 R.R.2d 1198 (1985), appeal dismissed, California Ass'n of the Physically Handicapped v. FCC, 778 F.2d 823 (D.C. Cir. 1985); Southwest Texas Public Broadcasting Council, 85 FCC 2d 713, 715 (1981).

considered eligible for minority preferences. Fourth, the Commission must require the applicant to disclose in its application -- in easily understandable terms -- how it meets each element of the minority eligibility test.

Finally, the applicant must be required to certify that it meets each element of the test and the Commission should make clear that if the applicant's statements are found to be false, the applicant (and all of its principals) will be subject to substantial penalties -- both civil and criminal -- as well as being disqualified from applying for any Commission license in the future. A warning such as the following (which is similar to that included in all FCC applications) should have a place of prominence in the "minority eligibility" certification block:

WILLFUL FALSE STATEMENTS MADE ON THIS APPLICATION INCLUDING CERTIFICATION WITH RESPECT TO THE APPLICANT'S ELIGIBILITY AS A MINORITY-CONTROLLED ENTITY ARE PUNISHABLE BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18 SECTION 1001), CIVIL PENALTIES (U.S. CODE TITLE 47, SECTION 503), REVOCATION OF ANY STATION LICENSE OR CONSTRUCTION PERMIT (U.S. CODE, TITLE 47, SECTION 312(A)(1)); AND/OR DISQUALIFICATION FROM HOLDING ANY OTHER LICENSES ISSUED BY THE FEDERAL COMMUNICATIONS COMMISSION

This test and its requirements would be relatively simple to administer and would ensure that the preferences adopted to increase minority participation in telecommunications would in fact serve that purpose instead of inuring to the benefit of non-minority enterprises which

purport to be eligible for minority preferences, but, in fact, are shams.

**C. The Commission Should Adopt an Array of Minority Preferences in Order to Fulfill its Congressional Mandate**

**1. Set-Asides**

The Commission has proposed to set aside one 20 MHz spectrum block (Block C) and one 10 MHz spectrum block (Block D) exclusively for designated entity bidding. Each of the blocks would be classified for BTA service. The purpose of this set-aside would be to ensure that designated entities will participate in spectrum-based services as mandated by Congress and will not have to bid against other parties that do not need special measures under Section 309(j)(4)(D). NPRM at ¶¶ 73, 121.

**a. The Proposed Set-Aside Alone will not Fulfill the Congressional Mandate**

While CIRI supports the concept of a set-aside, the Commission's proposal unfortunately does not fulfill the congressional purpose to provide minorities enhanced economic opportunities to provide spectrum-based services. The set-aside of only one 20 MHz PCS block and one 10 MHz PCS block will create a spectrum ghetto for minorities because those bands simply are economically inadequate by themselves for viable PCS service.

The 10 MHz set-aside is inadequate on its face to provide viable PCS service. As Commissioner Barrett

observed in his Separate Statement on this NPRM: "I continue to be concerned about the additional complexity of aggregating several 10 MHz slivers of spectrum in order to get to a point where one can start a viable, economic PCS service . . . . [B]idders will be required to bid for at least two 10 MHz licenses before they can start any PCS service that will provide at least 70-80% coverage of BTAs in major markets." Commissioner Barrett's dissent in the PCS Order is also on point: "Until more thorough band study is provided on 10 MHz allocations above 2 GHz, I question their feasibility in terms of geographic coverage and economic service."<sup>17/</sup> For these reasons, the 10 MHz set aside will not fulfill the congressional purpose in directing the Commission to consider minority set-asides.

The 20 MHz block may be even more problematic. Again, Commissioner Barrett has highlighted the problem: "[T]he 20 MHz BTA block in the lower band . . . could become an 'albatross' allocation" because it "may not provide full geographic coverage from the start."<sup>18/</sup> Moreover, because the Commission has limited to 40 MHz the maximum amount of PCS spectrum any PCS licensee may acquire, the holders of 30 MHz MTA blocks would be precluded from joining with minority holders of a set-aside 20 MHz block to provide service in an

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<sup>17/</sup> Dissenting Statement of Commissioner Andrew C. Barrett to PCS Order at 9.

<sup>18/</sup> Id. at 10-11.

MTA. In addition, the 20 MHz block is not particularly attractive to holders of the 10 MHz blocks -- the ones who might be expected to seek aggregation with others -- because not all of the bands are contiguous and a 10 MHz licensee would be more apt to attempt to aggregate with the 30 MHz MTA licensee in a particular BTA to maximize the available spectrum up to the Commission's 40 MHz limit.

Putting aside technical compatibility problems, the holders of the 20 MHz block also will have to overcome the concerns of other potential co-venturers about significant transaction costs if they are to participate in an economically viable PCS system. For this reason, with regard to PCS, 20 MHz and 10 MHz "set-asides" by themselves will not achieve the congressional purpose to provide minorities with an enhanced opportunity to participate in spectrum-based services. However, as discussed below, permitting aggregation of those bands with others -- above and beyond what is currently authorized -- can achieve Congress' goals and serve the public interest.

**b. Aggregation of Set-Asides and MTA/Cellular Bands**

Because the 20 MHz and 10 MHz set-asides will not by themselves provide a viable economic opportunity for designated entities to participate in PCS, the Commission should permit the designated entities to aggregate the set-

aside bands in a way which will make their set-asides more attractive to others.

The Commission has requested comment on whether to permit combinatorial bidding on the two blocks set aside for designated groups. NPRM at ¶ 123. At a minimum, group bidding must be permitted for the set-aside blocks. But that is only a half-measure which will still not by itself effectively enhance the economic opportunities for the designated entities.

In addition to group bidding for the two set-aside blocks, the Commission should permit designated entities to aggregate their 20 MHz set-aside with the 30 MHz MTA bands despite the 40 MHz limitation otherwise imposed by the Commission. See PCS Order at ¶ 61. One 30 MHz band is contiguous with the 20 MHz band so there are sound technological reasons for permitting such an aggregation. But more specifically, permitting such a 50 MHz aggregation will make the 20 MHz set-aside instantly more viable economically.

For similar reasons, the Commission should permit a designated entity to aggregate its 20 MHz set-aside band (or at least its 10 MHz set-aside) with the bands held by an in-region cellular operator which would otherwise be limited to its 10 MHz PCS allocation. See PCS Order at ¶ 106. Again, this approach would also increase the likelihood that the set-aside spectrum will not become a ghetto but will become

instead an attractive option for cellular carriers, thereby increasing the participation of minorities in viable PCS systems.

Both of these proposals can be accomplished by exemptions to the PCS aggregation rules and would serve to expand the economic opportunities for designated entities while at the same time providing better service to the public.

**c. Reclassification of 20 MHz Block**

The Commission has the ability to make a dramatic move which, by itself, would significantly enhance the opportunities for designated entities to participate in PCS. Having already determined that a 20 MHz BTA set-aside is warranted, the Commission should reclassify that block for MTA use, thereby giving it instant viability, reducing the transaction costs to those bidding for regional or nationwide systems on that block and making that block more attractive to others which will increase the economic potential of the set-aside.

Again, Commissioner Barrett's dissent in the PCS Order makes the salient point: "The MTA licenses will be strong from the start and get stronger over time. Other than cellular companies who can use a 10 MHz sliver in a BTA,

. . . [the other] BTA allocations will wither in the ensuing chaos."<sup>19/</sup>

By reallocating the 20 MHz set-aside for MTA use, the potential for economic and technological isolation of the set aside 20 MHz BTA will be eliminated, and the congressional mandate will be significantly advanced.

## 2. Bidding Preferences

In the NPRM the Commission briefly references the possibility of adopting "bidding preferences" for designated entities. NPRM at ¶ 73. Although this proposal is not further discussed in detail in the NPRM, CIRI assumes that such a preference would be applied when a designated entity is bidding for a non-set-aside block of spectrum and, thus, is bidding against non-designated entities for that spectrum. In this regard, the "preferences" appear similar to the "bidding credits" proposed by the FCC's Small Business Advisory Council ("SBAC") and discussed by the Commission in footnote 61 of the NPRM. The SBAC approach involves "alternative bidding calculations" pursuant to which certain bidders would be permitted to discount or amortize the bid they would otherwise pay based on a

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<sup>19/</sup> Id. at 12.

qualitative assessment of the applicant's business development proposal.<sup>20/</sup>

CIRI urges the Commission to adopt bidding preferences for designated entities when bidding for non-set-aside spectrum. To implement such a bidding preference, the Commission should adopt the SBAC recommendation to discount the price payable by a winning designated entity by a predetermined factor. As an alternative, CIRI suggests looking to the minority preference program maintained by the Department of Defense.<sup>21/</sup> Under that program, the Secretary of Defense must establish a goal of awarding five percent of the dollar value of several types of Department of Defense contracts to small business concerns owned and controlled by socially and economically disadvantaged individuals. To achieve this congressionally-mandated goal, contract bids from small disadvantaged business concerns receive a bidding "preference." However, rather than discounting the amount actually bid by such concerns, ten percent is added to the

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<sup>20/</sup> NPRM at ¶ 80 n.61. The SBAC proposal involves credits for "superior service proposals" by "technical and non-technical innovators." While the Commission sought comment on whether members of minority groups could be deemed to be "technical innovators" for purposes of the SBAC proposal (id.), the congressional mandate to the Commission permits it to apply such credits to minorities regardless of whether they are SBAC-defined "innovators."

<sup>21/</sup> See Section 1207 of the National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, 100 Stat. 3816, 3973 (1986) (codified as amended at 10 U.S.C.A. § 2323 (West Supp. 1993)).

price of all competing offers. See 48 C.F.R. § 219.7002 (1992). A similar add-on to competing bids for spectrum licenses from non-designated entities could achieve the goals of the Budget Act.

The Commission should also consider enhancing bids from entities with minority ownership and participation in management. It could do so by means of an enhancement similar to the enhancement which is provided for minority owned and operated businesses in comparative broadcast licensing hearings. See, e.g., WPIX, Inc., 68 FCC 2d 381, 411-12 (1978) (discussing minority ownership and participation as an affirmative factor enhancing an applicant's proposal).<sup>22/</sup> The enhancement in this circumstance could be a discount rate applied to a minority entity's winning bid calculated against the percentage of minority ownership (or control) of the bidding entity. The higher the percentage, the higher the discount to be applied to the winning bid.

### **3. Installment Payments**

The Commission has requested comment on whether to allow designated entities to use installment payment plans with interest for bids within the set-aside blocks, and whether to afford this installment plan preference to

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<sup>22/</sup> See also, e.g., Alexander S. Klein, Jr., 86 FCC 2d 423 (1981); Waters Broadcasting Corp., 91 FCC 2d 1260 (1982).

designated entities when they bid for non-set-aside blocks of broadband PCS spectrum. NPRM at ¶ 121. The Commission has also proposed to assess interest in an installment plan at the prime rate plus one percent, on a fixed or variable rate basis. NPRM at ¶¶ 80 n.57, 121 n.116.

CIRI supports the Commission's proposal to employ alternative payment plans for minority entities. As the SBAC has noted, installment plans can foster economic opportunities for minorities and women. SBAC Report at 15. However, because the use of installment payments could operate as a loan to entities interested only in speculating on the value of the license, the Commission should permit only a relatively short term payment plan. CIRI believes that a term of five years (and in no event more than 10) would effectively ward off license speculators who would hope to rely on a "government loan" to support their initial acquisition of valuable spectrum.

While CIRI supports a relatively short term payment plan, it also urges the Commission to be more flexible with respect to the interest rate proposed in the NPRM. Whatever rate is selected, it should be one that does not result in the government making money on the "loans" to minorities. The Commission should be free to assess against a debtor charges to cover administrative costs incurred as a result of an installment payment, but it should not apply to a designated entity an interest rate greater than the

government's cost of money. Finally, the rate of interest should be fixed for the duration of the indebtedness to facilitate administration and planning both by the Commission and by the designated entities.

#### **4. Tax Certificates**

The Commission has requested comment on its proposal to employ tax certificates in the context of spectrum auctions. In particular, the Commission has proposed to use tax certificates in conjunction with auctions or the subsequent transfer of licenses (or interests in licenses) won at auction. NPRM at ¶¶ 79 n.58, 121. For the reasons that have traditionally supported the granting of tax certificates for sales of communications properties to minorities,<sup>23/</sup> CIRI supports providing a tax certificate where a minority transfers a spectrum-based license (whether won at auction or not) to a minority.

#### **D. Scope of Minority Preferences**

The Commission seeks comment on a number of issues which deal with the scope of the preferences to be accorded designated entities. In this regard, it asks whether minorities need not be given preferences if small businesses in general receive them (NPRM at ¶ 74); whether minorities should receive preferences outside of the set-aside spectrum

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<sup>23/</sup> See Minority Ownership in Broadcasting, 92 FCC 2d at 856; Nevada Independent Broadcasting, 71 FCC 2d 531, 533 (1979).

(id. at ¶ 21); whether rural telcos should receive preferences outside of their service areas (id. at ¶ 77); and whether a consortium including minority members should receive minority preferences (id. at ¶ 78). To the extent not discussed above, we address those issues in this section.

1. **Limitation of Preferences to Small Businesses**

a. **Congress Required the Commission to Afford Preferences to Minorities as Well as Small Businesses**

The Commission has requested comment on whether it could satisfy the congressional objectives with respect to minorities and women by affording preferences only to small business entities or whether the Commission should offer preferences tied specifically to an applicant's minority or gender status. NPRM at ¶ 74. The short answer to this inquiry is that the Commission cannot -- and should not -- limit preferences in this area to small business entities.

In adding subsection (j) to section 309 of the Communications Act of 1934, Congress directed the Commission "to ensure that small businesses, rural telephone companies, and businesses owned by minority groups and women are given the opportunity to participate in the provision of spectrum-based services" and to consider the use of preferences "for such purposes." Section 309(j)(4)(D) (emphasis added). In so doing, Congress directed the Commission to consider preferences for all of the enumerated groups and made clear

the distinction between the categories of "small businesses" and other (not necessarily "small") "businesses owned by minority groups and women." As the House Report emphasized, "the Commission should adopt regulations . . . to ensure that businesses owned by members of minority groups and women are not in any way excluded from the competitive bidding process."<sup>24/</sup>

If Congress had not intended that the Commission offer preferences to benefit each of the classes of businesses set forth in the legislation, it would not have had to enumerate the various groups. And if Congress had meant to benefit only small business owned by minorities and women it would have said so. Instead, it is clear that both small business generally as well as other businesses owned by minorities and women were the intended beneficiaries of the legislation. Congress directed the Commission to ensure that all of the groups listed are given an opportunity to participate in the provision of spectrum-based services, and the Commission cannot and should not distinguish between the groups in fashioning the benefits called for by the Budget Act.

The Commission's proposal to limit preferences to small businesses appears to have been prompted by a concern that to extend preferences to businesses run by minorities or

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<sup>24/</sup> H.R. Rep. No. 103-111 at 255.

women would run afoul of the Constitution. But as discussed above, the minority preferences proposed in this proceeding -- mandated as they are by Congress and supported by adequate findings -- will pass constitutional muster. This being the case, the Commission should rely on, and adhere to, the considered judgment of Congress in specifically mandating measures to ensure participation in spectrum-based services by minorities and women.

**b. In any Event, the Congressional Intent Would be Served by Affording Preferences to Disadvantaged Entities**

If, because of its constitutional concerns and despite the clear congressional intent to the contrary, the Commission were disposed not to adopt the preferences for businesses owned by minorities and women based solely on race or gender, the Commission should establish bidding preferences addressed to the underlying criteria used by Congress when it adopted its list of designated entities, i.e., the disadvantaged nature of the entity.

When Congress declared that small businesses and minority- and women-owned businesses should be assured meaningful participation in spectrum-based services, its intent was to ensure the participation of groups who were disadvantaged in that they faced unique barriers to participation in the telecommunications industry. Those barriers were based on race, gender and lack of access to financing, as demonstrated by the fact that each of those

designated entities is vastly underrepresented in the industry. In turn, these circumstances were recognized in the Report of the FCC Small Business Advisory Committee ("SBAC Report"), where the SBAC explained that each of the designated groups faced different but equally effective barriers to entry into the telecommunications industry. See SBAC Report at 1-5.

While the SBAC Report recognized that the primary obstacle for small businesses is lack of capital,<sup>25/</sup> it reported that "women and members of minority groups have encountered special barriers to telecommunications ownership."<sup>26/</sup> The SBAC recounted that "there are often similarities between small businesses and minority businesses indicating that capital access is a problem for small businesses across the board, but 'minorities will have additional problems.'" SBAC Report at 4-5 (quoting Statement of Dr. JoAnn Anderson, PhD, Before the FCC Small Business Advisory Committee, May 27, 1993). Those barriers encountered by minorities include lack of traditional sources of financing, "undisguised discrimination in

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<sup>25/</sup> SBAC Report at 2.

<sup>26/</sup> SBAC Report at 3 (citing Letter of Hon. Larry Irving, Asst. Sec. for Communications and Information, to Hon. James H. Quello, Acting Chairman, FCC, September 14, 1993 ("We encourage the Commission to develop rules to implement competitive bidding for PCS that will provide greater opportunities for participation by groups currently underrepresented in telecommunications industries.")).

education [and] employment opportunities," and "systemic barriers to technical training and employment opportunities."<sup>27/</sup>

Therefore, although, as shown above, preferences based on race or gender would in this case be constitutionally permissible, if the Commission is disposed not to adopt such preferences, it should adopt preferences for those broad economic -- as opposed to race or gender-based -- groups which Congress intended to benefit, i.e., those which are economically disadvantaged with respect to opportunities to participate in the provision of spectrum-based services. Under such a procedure, a preference would not be given solely on the basis of race or gender. Nor, however, would a preference be given solely on the basis of size. For example, a "small" business comprised of a group of white males with great personal net worth would not be faced with lack of capital, nor would it face the social disadvantages faced by minorities. Therefore, such a small businesses would not be "disadvantaged," would not be within the group of businesses about which Congress was concerned, and would not receive a preference.

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<sup>27/</sup> SBAC Report at 5 (citing Brief of the U.S. Senate as Amicus Curiae in Metro Broadcasting, Inc. v. FCC, 110 S.Ct. 2997, (1990) at 32, 33; Telecommunications Minority Assistance Program, 1978 Pub. Papers 253 (President Carter)).

Accordingly, contrary to the Commission's suggestion in the NPRM, affording preferences based only on size will not fulfill the objectives of Congress. The best way to fulfill those objectives is to follow the law as Congress passed it by giving preferences to the entities enumerated in the legislation. Failing that, the Commission will fulfill the legislative intent only if it affords preferences based on disadvantage, be it social or economic disadvantage. The SBA definitions of socially and economically disadvantaged entities provided a good starting point in adopting eligibility standards under this approach. See 13 C.F.R. Part 124.

**2. Minority Preferences Outside of Set-Aside Spectrum Blocks**

The Commission has requested comment on whether to afford installment plan preferences and apply its tax certificate policies in the context of transactions by (or with) designated entities involving non-set-aside blocks of broadband PCS spectrum. NPRM at ¶ 121. To fulfill Congress' mandate to enhance the participation of designated entities in the provision of spectrum-based services, the Commission should apply any installment payment or tax certificate policies to transactions involving designated entities generally; those preferences should not be limited to transactions affecting the blocks of spectrum to be set aside for such entities.

As noted above, the largest block of spectrum identified by the Commission as likely to be set aside for designated entities is the 20 MHz PCS Block C. Although the Block C spectrum is contiguous with the 30 MHz of spectrum in Block B, the 40 MHz aggregation limit announced by the Commission in the PCS Order prevents the holder of a 30 MHz license from aggregating spectrum with a minority-held 20 MHz license. The result is a set-aside 20 MHz block classified for BTA service that cannot be joined to a larger system (unless the Commission adopts the designated entity exemption proposed by CIRI in these Comments).

For this reason, the Commission will effectively relegate minority businesses to highly insulated service opportunities unless it assists minority enterprises in competing for spectrum blocks other than those set-aside for minority bidding. While minorities technically will be given the opportunity to participate in the provision of services in the set-aside spectrum, the quality of that participation will be limited by virtue of the aggregation ceiling and the other negative characteristics of the set-aside spectrum.

Affording installment payment preferences and tax certificates for transactions involving the non-set-aside spectrum blocks (including the 30 MHz MTA blocks) will assist minority enterprises in competing for those non-set-aside blocks. A winning minority enterprise will be able to

offer a broader range of services with a 30 MHz license than with the set-aside 10 or 20 MHz licenses and, as a result, will be better able to attract capital from outside investors. Accordingly, designated entities should be entitled to bid for -- and receive preferences in auctions for -- spectrum in non-set-aside PCS spectrum blocks. Similarly, licensees who assign 30 MHz or other PCS licenses to designated entities should be eligible for tax certificates. In this way, the congressional mandate to ensure that businesses owned by minority group members have an opportunity to participate in the provision of spectrum-based services will be realized.

### **3. Limitations on Preferences for Rural Telcos**

The Commission has requested comment on whether rural telcos should be afforded preferential measures only where the license at issue covers a market area/reliable service area that also encompasses all or some significant portion of their franchised service area. NPRM at ¶ 77. The Commission is correct in suggesting that preferential measures for rural telcos should be limited to bids for licenses in their specific operating areas.

The opportunities that Congress mandated for rural telcos obviously were addressed to the concern that those telcos would be unable to win auctions for licenses in their service areas, thus perhaps sounding the death-knell for those telcos as wealthy outsiders provided PCS and other