

preference program to be narrowly tailored because it included specific provisions for exemption and waiver).

To ensure that the minority preference provisions established in the instant matter survive constitutional scrutiny, AWCC encourages the Commission to consider promulgating safeguards similar to the exemption and waiver provisions detailed above. The Commission's proposals for assessing the eligibility of entities applying for minority preferences will operate effectively as exemption safeguards for the purposes of constitutional scrutiny. AWCC has commented on those proposals below. In addition, the Commission should consider establishing procedures under which set-aside spectrum blocks are released to general bidding if no qualified minority entities apply to bid on the blocks. In concert with the manifest connection between licensing preferences and minority economic opportunities, these provisions will help to ensure that the instant minority preferences are "substantially related to the important governmental purpose."

For these reasons, AWCC submits that the preferences recommended by Congress and proposed by the Commission can pass constitutional muster.

### **III. IMPLEMENTING THE MINORITY PREFERENCE PROVISIONS**

#### **A. Types of Preferences to be Utilized**

##### **1. Set-Aside Spectrum Blocks**

The Commission proposes to set aside for designated entity-only bidding one 20 MHz block of spectrum (Block C) and one 10 MHz block of spectrum (Block D), each of which would be classified for BTA service. NPRM ¶ 121. AWCC supports the Commission's proposal to set aside these blocks. This reservation of space will ensure that designated entities are able to bid for PCS licenses without having to compete against the more-entrenched parties that Congress did not identify for special consideration. In turn, designated entities will have a greater opportunity to participate in the provision of spectrum-based services and to experience increased economic opportunity. AWCC does, however, believe that the Commission should establish special aggregation rules for the set-aside blocks to avoid limiting the economic and technical value of the licenses awarded for the spectrum. Please see the aggregation discussion in section V below.

## 2. Bidding Preferences

The Commission proposes to adopt bidding preferences for designated entities, presumably applying when a designated entity bids for a non-set-aside block of spectrum against a non-designated entity. NPRM ¶ 73. AWCC supports this proposal and encourages the Commission to establish such a preference. Toward that end, AWCC suggests that the Commission should look to the procedure recommended by the

Small Business Advisory Committee (SBAC) and referenced in footnote 61 of the NPRM.

One variation of that procedure would permit a bidder to discount the price that would otherwise be paid based on a qualitative assessment of the bidder's business development plan (in pursuit of technical innovation). NPRM ¶ 80 n.61. Instead of tying the discount to business development or technical innovation, AWCC suggests that the Commission offer a discount linked to a bidder's status as a designated entity. This would enable a designated entity to compete for licenses in the non-set-aside spectrum blocks against bidders with greater financial resources. AWCC suggests that the Commission employ a 10 percent discount on a cash bid by a designated entity.

In the alternative, AWCC suggests that the Commission should fashion a discount linked to a level of minority ownership or control of a bidding enterprise or consortium. This discount would function in much the same manner as minority application enhancements presently offered in the broadcast license comparative hearing field. See, e.g., Waters Broadcasting Corp., 91 F.C.C.2d 1260 (1982). Since the "application" in the instant case would be in the form of a bid for a license, the Commission could "enhance" that bid by applying a discount rate linked to the percentage of minority ownership or control of the entity. In that way, an entity with a greater degree of minority participation can

receive a greater discount against the figure bid at auction. AWCC believes that such a system would almost certainly operate to increase designated entity participation in the provision of spectrum-based services.

### 3. Installment Payments

The Commission requests comment on whether to allow designated entities to use installment payment plans with interest for bids within set-aside spectrum blocks, and whether to utilize installment payments when designated entities bid for non-set-aside blocks of broadband PCS spectrum. NPRM ¶ 121. The Commission proposes to assess interest on installment payments at the prime rate, plus 1 percent, on a fixed or variable basis. NPRM ¶¶ 80 n.57, 121 n. 116.

AWCC supports the Commission's proposal to afford installment payment options to designated entity bidders. AWCC believes that the Commission should utilize a straight note with a term of ten years to link the period of amortization to the term of the license awarded. Rather than utilize the prime rate as the benchmark for the rate of interest, however, AWCC believes that the Commission should utilize the federal funds rate (perhaps plus 1 percent) as the benchmark in order to offer the best possible payment terms to the successful designated entity bidder. The rate of interest should be fixed for the duration of the

indebtedness to foster ease of administration both for the bidding entity and for the Commission.

In addition, AWCC encourages the Commission to permit designated entities to amortize the note through interest-only payments in the first several years of the repayment term, followed by interest plus principal payments for the balance of the term. Alternatively, the Commission could authorize interest-only payments for the full term, with a balloon principal payment at the end of the repayment period. Each of these options would afford designated entities the benefits of an aggressive venture financing plan and would help to ensure the participation of designated entities in the provision of spectrum-based services.

The Commission also requests comment on how to treat licensees who default on timely payments to the Commission. NPRM ¶ 71. Instead of canceling the license immediately, AWCC suggest that the Commission should permit a three-to-six month grace period for the licensee to cure the shortfall in order to foster continuity of service. If, however, the licensee cannot cure the shortfall in that period, or if the licensee has defaulted on several prior occasions, the Commission should cancel the license and offer it for reauction.

#### 4. Tax Certificates

The Commission requests comment on whether to provide tax certificates for designated entities, either within or outside of the set-aside spectrum blocks. NPRM ¶ 121. The Commission proposes, inter alia, to issue tax certificates to investors in minority owned or controlled entities subject to competitive bidding whenever those investors sell their interests in the entity (provided the entity remains a "designated entity". NPRM ¶ 80 n.64 (detailing SBAC tax certificate proposals). AWCC supports this proposal. Offering tax certificates to investors in designated entities will help the Commission to attract capital to those entities.<sup>3</sup> Improved capital formation, in turn, will aid those entities in bidding for licenses and constructing service facilities, and will help the Commission to satisfy the congressional mandate to ensure designated entity participation in the provision of spectrum-based services.

For that reason, AWCC believes that tax certificate benefits should be afforded to designated entities (including consortia) regardless of whether they are subject to competitive bidding. To deny tax certificate treatment to entities that bid for set-aside blocks would be to force those

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<sup>3</sup>AWCC notes that, in adding section 309(j) to the Communications Act of 1934, Congress directed the Commission to consider using tax certificates to ensure the participation of designated entities in the provision of spectrum-based services. Budget Act, § 6002(a). Thus, the Commission's authorization to employ tax certificate treatment outside of the broadcast area is clear.

entities to choose between bidding for the more accessible set-aside spectrum blocks on one hand, and attracting capital by way of stock-sales on the other. Instead, AWCC urges the Commission to permit designated entities bidding for set-aside spectrum blocks also to attract capital for the venture through the use of tax certificate treatment.

Moreover, AWCC maintains that tax certificates should be granted to designated entity shareholders upon divestiture only when the seller reinvests the sale proceeds in a qualified replacement property. This is the procedure currently employed by the Commission in the broadcast and cable fields. AWCC believes this design to be a sound one primarily because it avoids encouraging designated entity investors to "get out" of the industry in order to qualify for the tax certificate. Utilizing the same design would also facilitate implementation of the program by the Commission.

Finally, AWCC supports the Commission proposal to offer tax certificates to anyone investing in a specialized small business investment company (SSBIC), or to any SSBIC that invests in a designated entity. NPRM ¶ 80 n.64. In addition, AWCC suggests that the Commission consider moving any designated entity tax certificates "back in time" to the initial purchase transaction. Such a mechanism would operate like an investment tax credit to encourage investing in designated entities, as opposed to selling a designated entity interest in order to enjoy favorable tax treatment.

B. Scope of Minority Preferences

The Commission has requested comment on a number of issues related to the scope of the preferences to be afforded to designated entities.

1. Preferences for Non-Set-Aside Blocks

The Commission requests comment on whether to offer installment payments and tax certificates to designated entities bidding for non-set-aside spectrum blocks. NPRM ¶ 121. As noted above, AWCC believes that the Commission should offer these preferences outside of set-aside areas.

Of particular importance in this instance is the fact that the largest block of spectrum the Commission proposes to set-aside for designated entities is the 20 MHz block C. Although the spectrum in block C is contiguous - and, thus, particularly compatible - with that in the 30 MHz block B, the 40 MHz aggregation ceiling announced by the Commission in the PCS Order effectively prevents a combination of the two blocks for the provision of service. A holder of a 30 MHz block is forced to aggregate with one of the 10 MHz blocks, and the 20 MHz block reserved especially for designated entities remains behind. Under the 40 MHz aggregation ceiling, it cannot be joined to a larger system.<sup>4</sup>

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<sup>4</sup>As Commissioner Andrew C. Barrett noted in his Dissenting Statement in the PCS Order, "[T]he 20 MHz block in the lower band [ie. 1850-1990 MHz] contemplated for small

To implement more fully the congressional directive that designated entities be given the opportunity to participate in the provision of spectrum-based services, AWCC suggests that the Commission offer installment payments and tax certificates to designated entities bidding for non-set-aside blocks. A designated entity that wins a 30 MHz license, for example, will be able to offer a broader range of services than with the set-aside 10 or 20 MHz licenses, and will be better able to attract capital as a result. By offering preferences on those non-set-aside 30 MHz blocks, the Commission will increase the likelihood that a designated entity will win a license for that spectrum.

## 2. Rural Telcos

AWCC agrees with Congress and the Commission that rural telcos are entitled to PCS preferences based upon the valuable service they provide to non-metropolitan areas. For this reason, AWCC agrees that rural telcos should be afforded preferential measures when the coverage of the licenses for which they are bidding effectively coincide with their franchised service areas.

It is also important that those rural telcos who receive financing from the REA be allowed to use such financing for

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business could become an 'albatross' allocation." Second Report and Order in GEN Docket No. 90-314, FCC 93-451 (Sept. 23, 1993), Dissenting Statement of Commissioner Andrew C. Barrett, at 10.

the construction and operation of important PCS services available to all of rural telco constituents. Given the importance of this REA funding, the Commission is correct in concluding that rural telcos should focus those funds on infrastructure development and should not be allowed to use any REA funds for bidding related up-front payments, deposits, or license costs.

### 3. Designated Entities and Consortia

The Commission requests comment on whether consortia that include designated entities should be afforded preferences in the same manner as are designated entities standing alone. NPRM ¶¶ 78, 121. AWCC supports the Commission's proposal to extend preferential treatment to designated entity-inclusive consortia. Although it is not detailed in the NPRM, AWCC assumes that such a provision would afford full preferential treatment to any consortium that can show designated entity control. If enacted, this proposal will encourage partnerships between designated entities and non-designated entities for the provision of spectrum-based services.<sup>5</sup> Those partnerships will help designated entities gain access to

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<sup>5</sup>The FCC Small Business Advisory Committee has recognized that making possible strategic alliances with large entities is a crucial part of providing economic opportunity for the groups singled out for special treatment by Congress. See Report of the FCC Small Business Advisory Committee to the Federal Communications Commission Regarding GEN Docket 90-314, 10 (Sept. 15, 1993) (SBAC Report).

larger markets, to more sources of capital, and to increased service opportunities.

Moreover, AWCC encourages the Commission to consider a "percent participation benefit" that extends preferential treatment to consortia based on the percentage of designated entity involvement in the group. Such a system would help to avoid affording preferences only to consortia that are effectively controlled by designated entities. Where a consortium with only 20 percent designated entity involvement bids for a license, for example, the Commission could permit installment payments for 20 percent of the consortium's winning bid price. Under this system, smaller designated entities (i.e., those that are less likely to gain a controlling interest in an industry consortium) will still be viewed as viable partners by non-designated entities interested in pooling resources. This, in turn, will improve access to markets, capital, and service opportunities for big and small designated entities alike.

#### 4. Small Business Eligibility

The Commission seeks comment on whether it should rely on Small Business Administration (SBA) definitions for the purpose of determining "small business" eligibility standards. In this regard, AWCC notes that there are a number of cost factors attendant to the development of PCS which to date remain uncertain. For example, at this point nobody knows for

sure what it will cost to relocate incumbent microwave users. As those costs become more certain, the Commission will be in a better position to determine what constitutes a "small" PCS business. Thus, whether or not the Commission chooses to adopt the SBA guidelines, the Commission should avoid locking itself into any rigid criteria at this early date. At a minimum, the Commission must maintain the flexibility to revise its eligibility criteria as the cost factors attendant to the development of PCS become more apparent.

C. Financial Issues for Designated Entities

1. Financial Information in the Bidder Application

The Commission requests comment on what type of financial information should be required of entities applying to bid in an auction. Specifically, the Commission sets forth the SBAC proposal to permit designated entities to self-certify their financial qualifications to hold a PCS license. NPRM ¶ 80 n.60. The SBAC envisions that this type of self-certification would include an investment banker's letter in support of the designated entity's business plan, and disclosure of the applicant's internal funds and bank commitments. SBAC Report, at 12.

AWCC supports the self-certification proposal set forth by the SBAC. In concert with disclosure of the applicant's internal funds and available bank commitments, the review by an investment banker of an applicant's ability to develop and

maintain a sophisticated PCS network should be adequate assurance to the Commission of the applicant's financial qualifications. See SBAC Report, at 12 (citing Advanced Mobil Phone Service, Inc., 91 F.C.C.2d 512, 517 (1982)). Moreover, the self-certification procedure, coupled with up-front payments and license deposits, will help to see that only serious and qualified bidders participate in the auction process. In light of the high cost of establishing a PCS system - and the corresponding need for outside financing - permitting self-certification based on a private analysis in connection with that financing will ensure increased designated entity participation in the provision of spectrum-based services.

## 2. Up-Front Payments and Deposits

The Commission requests comment on what types of up-front payments and deposits should be required of designated entities during and after the bidding process. First, as a condition of entry to an auction, the Commission proposes to require each bidding applicant to tender to the Commission an up-front payment calculated according to the amount of spectrum and population covered by the license sought. NPRM ¶ 102-03. Second, the Commission proposes to require a deposit to be paid to the Commission by the high bidder in an auction before that bidder is declared officially to be the auction winner. NPRM ¶ 107. The Commission proposes to set

the deposit rate at the difference between the amount tendered as an up-front payment and 20 percent of the winning bid. NPRM ¶ 107. Third, the Commission proposes to retain the up-front payment and deposit of any auction winner that is later found to be ineligible, unqualified, or unable to meet installment payments. NPRM ¶ 109. The Commission also proposes to bar any such auction winner from all future auctions. NPRM ¶ 109.

AWCC supports the Commission's proposals in this area. The Commission is correct to assert that only serious and qualified bidders should be allowed to participate in the auction process. Nonetheless, AWCC believes that the Commission should consider the merits of applying a lowered standard to designated entities applying for entry to an auction. In particular, AWCC maintains that a 50 percent discount applied to the up-front payment and deposit required of designated entities will serve the same deterrent function as the full-priced charges, but will also take into account the economies of scale that otherwise might discourage even a qualified designated entity. Indeed, it would be an inharmonious construction to permit designated entities to pay for licenses on installment plans to encourage bidding, but require them to tender unusually large sums to gain admittance to the bidding site. AWCC believes that a designated entity 50 percent discount for designated entities would ameliorate this dilemma.

Moreover, to satisfy the Commission's need to ensure the financial strength of winning bidders, AWCC encourages the Commission to accept investment bankers' "highly confident" letters on behalf of designated entities in lieu of a full deposit price. Accepting these letters would permit the Commission to review the financial position of a winning designated entity bidder - without the concomitant burden of undertaking the examination itself - while relieving the designated entity of the burden of tendering a unmanageable deposit.

Finally, AWCC believes that the Commission should consider requiring up-front payments to be made not with the bidder application, but at the auction site itself. This would afford applicants more time to arrange for financing, and would permit them to retain the interest earned on the funds up to the auction date. Given the size of the payments contemplated by the Commission, that interest income in many cases will be significant. Since the SBAC has noted that capital formation is one of the major barriers to entry facing certain designated entities, NPRM ¶ 80, permitting day-of-auction up-front payments would be consistent with the congressional directive to increase designated entity participation in the provision of spectrum-based services.

#### IV. AGGREGATION AND DESIGNATED ENTITIES

As noted above, AWCC supports the Commission's proposal to set aside the 20 MHz spectrum block and one 10 MHz spectrum block for designated entity-only bidding. Nonetheless, AWCC is concerned that the 20 MHz block will be rendered technologically and economically useless by virtue of the 40 MHz aggregation ceiling established in the PCS Order. See discussion in section IV.B.1. above. To avoid restricting the quality of the participation of designated entities in the provision of spectrum-based services, AWCC suggests that the Commission consider a variety of spectrum block aggregation mechanisms for designated entity licensees.

For example, the Commission should consider permitting 30 MHz block licensees to aggregate their spectrum with a 20 MHz block licensed to a designated entity. By creating this exception to the 40 MHz aggregation ceiling, the Commission would make the 20 MHz block set aside for designated entities even more attractive to larger PCS operators than it would be under the plan detailed above - particularly since the spectrum in the 30 MHz block B is contiguous with the spectrum in the set-aside 20 MHz block C. This, in turn, will generate partnering and capital formation opportunities for designated entity holders of 20 MHz blocks, and will help to effectuate the Commission's legislative mandate.

In the alternative, AWCC suggests that the Commission consider permitting the aggregation of a 10 MHz block licensed to a local cellular provider with a spectrum block licensed

to a designated entity. As in the preceding cases, this would render the designated entity-held blocks more attractive for aggregation and, thus, will help to ensure designated entity participation in the provision of spectrum-based services and increased economic opportunities for members of the designated groups.

**V. SAFEGUARDS: ANTITRAFFICKING, ANTISHAM, & COLLUSION**

**A. Antitrafficking Provisions**

The Commission requests comment on how to implement effective antitrafficking provisions to prevent unjust enrichment of licensed entities. NPRM ¶ 84. Although the Commission is directed by the Budget Act to establish these measures to avoid license speculation within set-aside spectrum blocks, the Commission is concerned that unduly restrictive antitrafficking provisions ultimately could delay the provision of service to the public. NPRM ¶¶ 83-84. Consequently, the Commission proposes to implement a series of financial disincentives to premature trafficking in lieu of a bright line trafficking prohibition. NPRM ¶ 84. AWCC, however, favors a bright line prohibition.

Specifically, AWCC supports a prohibition on all license trafficking for the three years following the award of the license. AWCC maintains that the goal of Congress to ensure designated entity participation in the provision of spectrum-based services is furthered by discouraging those who would

bid on a set-aside block simply to speculate on the value of the license following the auction. Of course, the Commission could provide flexibility by way of a waiver of the bright line prohibition when a designated entity license-holder seeks to transfer the license to another designated entity. In that case, the congressional purpose would be served despite the "premature" transfer. In either case, however, the bright line rule would require far fewer administrative resources than a system of financial disincentives based either on projected license values outside of the preferred blocks, or on a percentage of the value of the transfer transaction.

Moreover, AWCC believes that implementation of the bright line rule would be relatively simple because the Commission utilizes similar transfer restrictions in other contexts. For example, the Commission applies a three-year antitrafficking restriction to new cable licensees, 47 C.F.R. § 76.502 (1993), and a variable blackout period to recipients of public mobile radio licenses. See, e.g., Cellular Renewals, 7 F.C.C. Rcd. 719, 725 (1991). In those cases, as in the instant matter, concerns about delaying the provision of service to the public were outweighed by the need to avoid license value speculation. In this rule making, then, AWCC encourages the Commission to consider utilizing a three year bright line rule.

B. Antisham Provisions

The Commission requests comment on how to structure eligibility criteria for designated entities. In particular, the Commission asks whether, to qualify for preferential measures, women and minority backed applicants should be 50.1 percent owned by those groups, or whether simple control is enough to qualify regardless of the percentage of equity held. NPRM ¶ 77. The Commission also requests comment on how to ensure that measures adopted to aid designated entities operate to aid those groups alone. NPRM ¶ 78. In effect, the two queries go hand in hand as an effort to screen out enterprises with no real designated group participation will operate to assist organizations that truly qualify as designated entities. For this reason, and for the purposes of surviving constitutional scrutiny, AWCC believes that strict eligibility requirements are crucial.

Specifically, AWCC suggests that the Commission employ an eligibility standard that calls for control of an entity by designated groups members coupled with at least 20 percent minimum designated group member equity holdings. This is the standard utilized by the Commission when assessing the application of a limited partnership to acquire a broadcast facility through a distress sale. In that context, the Commission requires that a general partner be a member of a minority group and own more than 20 percent of the broadcasting entity. Minority Ownership in Broadcasting, 92 F.C.C.2d 849, 855 (1982). The control element is satisfied

by virtue of the general partner status of the minority group member. Id.

AWCC maintains that the application of the same standard to the instant matter would effectively screen organizations that lack significant minority involvement. To gauge whether designated group members have "control" of an organization, AWCC suggests that the Commission adopt a fixed requirement of 50.1 percent voting interest in addition to the 20 percent equity holding. This test would be simple to administer and would not be as susceptible to manipulation as would a qualitative test. See, e.g., Southwest Texas Broadcasting Council, 85 F.C.C.2d 713, 715 (1981) (defining control as having the authority to determine the basic policies of a broadcast station). By utilizing this standard, the Commission can help to ensure that only legitimate designated entities have the opportunity to participate in the provision of spectrum-based services.

#### C. Collusion Provisions

The Commission requests comment on how to structure provisions to regulate collusion among bidders at and before auction. NPRM ¶ 93. The Commission recognizes that unduly restrictive collusion rules would effectively prevent small firms from pooling capital and expertise in order to compete against larger, more-entrenched communications firms. NPRM ¶ 93. AWCC agrees with the Commission in this regard.

To restrict the ability of firms to organize into bidding consortia, and to coordinate their bids, would be to undermine the ability of those firms to participate in the provision of spectrum-based services alongside firms with substantially greater capital resources. Indeed, permitting designated entities to work together will operate as a check against large firms as they attempt to dominate certain markets through collusive action. In turn, this will help to create economic opportunities for those entities that were singled out by Congress for special treatment. The Commission will, thus, have satisfied its legislative mandate, and furthered the important governmental purposes underlying the Budget Act.

#### VI. SEQUENCE OF BIDDING

The Commission requests comment on how to structure the order of bidding on licenses to be offered through the auction system. In particular, the Commission proposes to auction all geographic regions within one spectrum block before proceeding to auction the next available spectrum block. NPRM ¶ 52. AWCC supports the Commission's proposal in this regard. Auctioning by spectrum block across all geographic regions will permit bidders to evaluate their spectrum options after each round and to plan more effectively for a coordinated bidding approach. Moreover, AWCC supports the Commission's suggestion to auction blocks in descending order of bandwidth (i.e., top down). NPRM ¶ 54. This structure will afford

designated entities greater opportunities for partnering with non-designated entities in the larger spectrum blocks, and will help the designated groups to participate more fully in the provision of spectrum-based services.

AWCC opposes, however, the Commission's proposal to offer spectrum block regions in descending order of population. NPRM ¶ 53. Offering licenses in this manner would enable wealthy firms to dominate the largest markets in the nation in such a way that smaller entities will not be able to compete. As the Commission noted, this type of bid sequencing primarily would assist those seeking to create regional service areas. NPRM ¶ 53. AWCC believes that each spectrum area should be available equally to all qualified bidders.

Finally, AWCC supports the Commission's proposal to allow bids for groups of licenses (i.e., combinatorial bidding). NPRM ¶ 57. As the Commission has noted, combinatorial bidding will permit greater efficiency in license aggregation. NPRM ¶ 57. Designated entities will benefit from that increased efficiency through both individualized aggregation and consortia bidding, and will have greater opportunities to participate in the provision of spectrum-based services.

## VI. CONCLUSION

AWCC is pleased to offer these Comments to the Commission as it undertakes to ensure that designated entities participate in the provision of spectrum-based services. As

was discussed above, helping designated entities to attract the capital and resources with which to establish sophisticated PCS systems today will pay dividends to those firms for many years. The Commission can provide that help by implementing the preferential measures enumerated by Congress.

For these reasons, AWCC asks the Commission to implement the preference provisions enumerated by Congress, together with the supplemental provisions discussed in these Comments, and all appropriate safeguards and limitations to ensure that the benefits of those provisions assist the groups designated by Congress for special consideration.

Respectfully Submitted,

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