companies, particularly large telephone, cellular and cable television companies."[49] The Commission intended to draw this line so that it includes all Tier 2 local exchange carriers, but "does not exclude many firms that, while not large in comparison with other telecommunications companies, nevertheless are likely to have the financial ability to provide sustained competition for the PCS licensees on the MTA blocks."[50] The Commission's grant of TEC's request to increase the spectrum for the entrepreneurs' block channel C license from 20 MHz to 30 MHz suggests that the Commission intended that TEC be eligible to bid on licenses in the entrepreneurs' blocks.[51]

The Commission also added a gross revenue criterion to its definition of small business.[52] The definition of small business will determine whether an applicant will be allowed bidding credits or to pay for its winning bids in installments.[53] These bidding preferences were adopted to address the major problem facing small businesses -- lack of access to capital.

The Commission defined a small business for purposes of bidding preferences for broadband PCS licenses as an entity that, together with its affiliates, has average annual gross revenues of not more than $40 million for the preceding three calendar years.

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[49] Id.

[50] Id. ¶ 123.

[51] Id. ¶ 126.

[52] Id. ¶ 175.

[53] Id. ¶¶ 133, 137.

In addition, an applicant will not qualify as a small business if any one attributable investor in, or an affiliate of, the entity has a net worth of $40 million or more.[54] Finding the $6 million net worth standard overly restrictive, the Commission stated: "we modify our small business definition for broadband PCS auctions to ensure the participation of small businesses with the financial resources to compete effectively in an auction and in the provision of broadband PCS services."[55]

The Administrative Procedure Act requires agency action to be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[56] An agency must examine the relevant data and articulate a satisfactory explanation for its action based upon the record.[57] An agency action violates the Administrative Procedure Act if the agency has "failed to consider an important aspect of the problem" or has "offered an explanation for its decision that runs counter to the evidence before the agency."[58] An agency must provide a reasoned analysis indicating that prior policies and standards are being deliberately changed.[59]

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[54] Id. ¶ 175.

[55] Id. ¶ 174.

[56] Administrative Procedure Act § 10(e), 5 U.S.C. § 706(2)(A) (West Supp. 1994).

[57] California v. FCC, 905 F.2d at 1230.

[58] Id. (quoting Motor Vehicle Mfrs Ass'n v. State Farm Mutual Auto Ins. Co., 463 U.S. 29, 43-44, 103 S.Ct. 2856, 2866-67 (1983)).

[59] Motor Vehicle Mfrs Ass'n v. State Farm Mutual Auto Ins. Co., 463 U.S. 29, 43-44, 103 S.Ct. 2856, 2866-67 (1983).

The Supreme Court has stated that "unless we make the requirements for administrative action strict and demanding, expertise, the strength of modern government, can become a monster which rules with no practical limits on its discretion."[60]

The Commission must articulate a rational connection between the facts found and the choice made between the two different standards in this case, the net worth test and the gross revenue criteria.[61] The potential advantages of alternatives must be considered by the Commission so that it may discharge its responsibility to select the regulatory course of action most likely to meet the public interest.[62]

There is no rational relationship between the gross revenue criteria of $125 million adopted by the Commission and the regulatory problem -- the lack of access to capital necessary for small businesses to successfully bid against large firms in the auctions for broadband PCS licenses.[63] The Commission reasonably decided to adopt a $500 million total asset threshold to limit the size of firms eligible to bid on the licenses in the entrepreneurs' blocks. However, there is <u>not</u> adequate record support for the Commission's inclusion of a <u>gross</u> <u>revenue</u> criterion of $125 million

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[60] <u>Burlington Truck Lines, Inc. v. U.S.</u>, 371 U.S. 156, 167, 83 S.Ct. 239, 245 (1962) (<u>quoting</u> <u>New York v. U.S.</u>, 342 U.S. 882, 884, 72 S.Ct. 152, 153 (1951) (dissenting opinion)).

[61] <u>Burlington Truck Lines, Inc. v. U.S.</u>, 371 U.S. at 168, 83 S.Ct. at 246.

[62] <u>National Ass'n of Regulatory Util. Comm'rs v. FCC</u>, 737 F.2d at 1129.

[63] <u>Fifth Report and Order</u>, slip op. ¶¶ 110, 121.

for determining eligibility to bid on licenses in the entrepreneurs' blocks. Nor is there a rational basis for adding the criterion of $40 million in annual gross revenues for determining eligibility to receive small business bidding preferences.

The $125 million gross revenue criterion does not achieve the purpose for which it was designed. While the Fifth Report and Order increases the spectrum for the entrepreneurs' block channel C license from 20 MHz to 30 MHz in response to TEC's comments filed in this proceeding, the gross revenue criterion excludes TEC from directly bidding on licenses in the entrepreneurs' blocks. The gross revenue criterion for defining a small business precludes TEC or its small, rural telephone companies from receiving bidding credits or paying for their winning bids in installments. Furthermore, while the $125 million gross revenue figure was designed to include all Tier 2 local exchange carriers, it disqualifies TEC's Tier 2 local exchange carriers from directly bidding on licenses in the entrepreneurs' blocks.[64]

Gross revenue, however, is no indication of the amount of funds that an entity has available to be used for bidding in an auction, especially when that entity is involved in a volume intensive business with high operating costs and small profit margins, such as interexchange resale. As long as there is a $500 million total asset threshold, there is no evidence that an affiliated group of small businesses with $350 million in gross

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[64] Id., ¶ 123.

revenue but less than $30 million net worth could outbid a single company with less than $125 million in annual gross revenues, but $99 million net worth.[65] It is more likely that the single company, which has more than triple the net worth of the affiliated group and therefore more unencumbered assets with which to bid, will outbid the affiliated group. The gross revenue criteria is irrational because it would permit the company with more resources with which to bid to participate in the auction for the entrepreneurs' block licenses while excluding the affiliated group with less resources.

VII. A Small Business Should be Defined as an Entity that, Together with its Corporate Affiliates, Has a Net Worth Of Less Than $30 Million, Total Assets of Less Than $300 Million and No Attributable Individual Investor With a Personal Net Worth of $125 Million or More

Eliminating the gross revenue criteria will cure the defects in the Commissions current eligibility standards. A small business should be defined as an entity that together with its corporate affiliates has (i) a net worth of less than $30 million at the time the applicant's short-form (Form 175) application is filed; (ii) total assets of less than $300 million at the time the applicant's short-form (Form 175) application is filed; (iii) no attributable investor or affiliate who has a personal net worth of $125 million or more; (iv) a control group all of whose members and corporate affiliates are considered in determining whether the entity meets

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[65] This example uses $99 million net worth because Section 24.709(a)(2) of the Commission's rules currently prohibits an entity from bidding in the auction for the entrepreneurs' blocks if any attributable individual investor has a personal net worth of $100 million or more.

the $30 million net worth standard and the $300 million total asset threshold; and (v) such control group holds 50.1% of the entity's voting interest, if a corporation, and at least 25% of the entity's equity on a fully diluted basis. An entity that meets this standard should be eligible to bid directly on licenses in the entrepreneurs' blocks, receive bidding credits as a small business and be eligible to pay for its winning bids in installments.

The assets and personal net worth of individuals should not be considered in determining whether a PCS applicant meets the $300 million total asset threshold or the $30 million net worth standard for a small business. Including the value of stock in a PCS applicant held by individual investors in the calculation of these eligibility thresholds would count those amounts twice: once, when determining the total assets and net worth of the PCS applicant and its corporate affiliates and, again, when including the value of the stock of the PCS applicant and its corporate affiliates held by individual investors. Such double counting would also limit the ability of small businesses to attract individual investors with the financial, managerial and technical expertise needed to "provide sustained competition for the PCS licensees on the MTA blocks."[66]

A net worth standard of $30 million for defining a small business coupled with a $300 million total asset cap and a personal net worth limit of less than $125 million for any attributable investor or affiliate is a superior alternative to the gross

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[66] Fifth Report and Order, slip op. ¶ 123.

revenue criteria and is the regulatory course of action most likely to further the public interest. A $30 million net worth test is also less complicated than the rules adopted by the Commission and can be more effectively administered. The complexity of the current rules was shared by Commissioner Rachelle B. Chong, who stated that "the competitive bidding plan we have crafted is more complicated than I would have preferred."[67] Furthermore, the many years of Small Business Administration application of a net worth test for defining a small business provides the Commission with an extensive body of caselaw upon which it may rely.

VIII. Conclusion

For the reasons discussed herein, Telephone Electronics Corporation respectfully requests that the Commission reconsider its Fifth Report and Order in order to more fully carry out the goals of Congress to ensure participation by small and rural telephone companies in the provision of broadband personal communications services.

Respectfully submitted,

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Its Attorney

August 22, 1994

[67] Fifth Report and Order (separate statement of Rachelle B. Chong).

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

EXHIBIT A

PETITION FOR RECONSIDERATION OF
TELEPHONE ELECTRONICS CORPORATION

EMBARGOED UNTIL: AUGUST 22, 1994 (MONDAY)

Bureau of the Census **Statistical Brief**

Phoneless in America

You could have picked up a phone and called almost every American household in 1990, but not all of them.

That's because there were nearly 5 million households (5 percent) without a telephone. Though the number and proportion seem fairly high, they were much higher only a few decades ago. As recently as 1960, for instance, more than 11 million households — just over 1 in 5 — were phoneless. This Brief uses data collected by the 1990 Census of Population and Housing to show which types of households were most likely to still be phoneless.

The phoneless tended to be in the South.

Though the South accounted for about one-third of the Nation's households, it contained one-half of those that lacked a phone. The region was home to 4 of the 5 States with phonelessness rates that exceeded 10 percent. Mississippi and New Mexico, where about 1 in 8 households lacked a telephone, led the Nation, followed by Arkansas, West Virginia, and Kentucky. All five of these States also had a 1989 median household income well below the national average.

Meanwhile, Northeastern householders were the likeliest to have a phone. Massachusetts, at 98 percent, led the Nation in householders with a phone. (See table on back.)

Most often, the young were the phoneless.

The elderly, due to their greater risk of having a medical emergency, were probably the age group most in need of telephones. It was found the older the householder, the smaller their chances were of lacking a phone. The proportion who were phoneless fell steadily from 15 percent of those under age 25 to 2 percent aged 75 or older. As a result, nearly half of all householders without a telephone were under age 35.

Nonetheless, there were still half a million elderly householders (aged 65 or older) who lacked a phone. The table on back shows the percentage of elderly householders without phones, by State.

Most of the phoneless were renters.

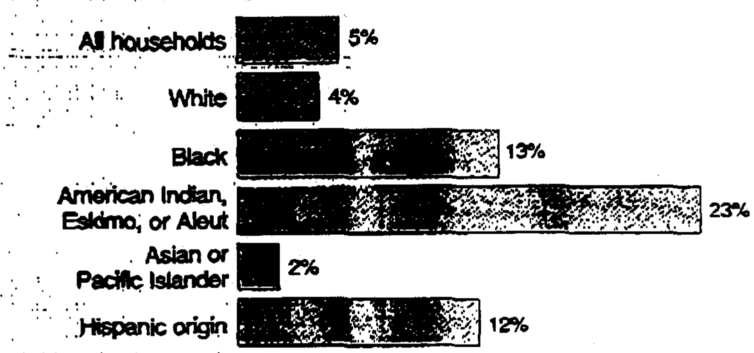
Nearly 3 in 4 phoneless households lived in rental units. All in all, 11 percent of renter households lacked a phone.

Men living alone were likeliest to have no phone.

Twelve percent of men living alone were phoneless; meanwhile, women living alone and married-couple families were much less likely to be without a phone (3 percent each). Though households without a married couple made up 44 percent of all households, they comprised 68 percent of those without a phone.

About 1 in Every 4 Native American Households Did Not Have a Telephone

Percent of households without a telephone in their home, by race and ethnicity of householder: 1990



Note: Persons of Hispanic origin may be of any race.

SB/94-16
Issued July 1994

U.S. Department of Commerce
Economics and Statistics Administration
BUREAU OF THE CENSUS

Households in single-family homes were least likely to be phoneless.

A mere 3 percent of householders in single-family houses had no phone; the rate rose to 8 percent for householders in buildings with two or more apartments. In other types of units (mostly mobile homes), the phonelessness rate reached 13 percent. Consequently, phoneless householders were far less likely than all householders to reside in a single-family home (38 percent versus 66 percent).

More information:

Subject Summary Tape File 7 (Metropolitan Housing Characteristics) presents 1990 census data for States and metropolitan areas on the likelihood of households not having a telephone; the statistics are presented by various household characteristics. *SSTF 7* comes on both computer tape and CD-ROM. Contact Customer Services (301-763-4100) for more information about 1990 census products.

Contacts:

Telephone availability — Robert Bonnette 301-763-8553

Statistical Briefs — Robert Bernstein 301-763-1584

This Brief is one of a series that presents information of current interest. It examines data from the 1990 census. A complete description of statistical quality and limitations is included in the SSTF 7 *technical documentation.*

Where the Phoneless Were

State and regional rankings by households without a telephone in their home: 1990

	Households with no phone				Elderly householders with no phone			
	Number	Rank	Percent of all households	Rank	Number	Rank	Percent of all elderly householders	Rank
United States	4,817,457		5.2%		522,123		2.5%	
Alabama	131,554	12	8.7%	8	18,386	9	5.1%	5
Alaska	15,730	42	8.3%	11	1,209	46	8.2%	1
Arizona	116,408	17	8.5%	10	13,887	15	4.5%	11
Arkansas	97,536	22	10.9%	3	11,922	18	5.0%	6
California	313,140	3	3.0%	45	29,937	4	1.5%	42
Colorado	53,582	28	4.2%	31	4,388	32	2.0%	28
Connecticut	32,316	35	2.6%	47	3,139	36	1.1%	51
Delaware	7,684	51	3.1%	42	807	51	1.5%	42
D.C.	10,529	46	4.2%	31	1,094	47	2.0%	28
Florida	270,242	4	5.3%	23	32,627	3	2.2%	24
Georgia	195,689	5	8.3%	11	20,182	5	4.6%	9
Hawaii	9,394	48	2.6%	47	1,562	43	2.1%	26
Idaho	21,079	40	5.8%	19	1,967	41	2.5%	21
Illinois	192,216	6	4.6%	27	19,525	6	2.1%	26
Indiana	121,762	15	5.9%	18	10,940	20	2.4%	22
Iowa	36,487	34	3.4%	39	3,743	34	1.4%	48
Kansas	41,733	32	4.4%	30	3,764	33	1.7%	38
Kentucky	140,881	9	10.2%	5	16,831	11	5.3%	4
Louisiana	124,455	13	8.3%	11	14,603	14	4.6%	9
Maine	17,382	41	3.7%	35	2,027	40	1.9%	32
Maryland	56,103	27	3.2%	41	5,326	30	1.6%	39
Massachusetts	47,382	31	2.1%	51	6,534	27	1.2%	50
Michigan	139,082	10	4.1%	33	11,696	19	1.6%	39
Minnesota	40,353	33	2.4%	50	5,357	29	1.5%	42
Mississippi	115,130	18	12.6%	1	16,286	12	7.3%	2
Missouri	102,725	21	5.2%	24	10,643	22	2.2%	24
Montana	21,123	39	6.9%	16	2,498	37	3.5%	17
Nebraska	21,682	37	3.6%	38	2,405	38	1.6%	39
Nevada	25,118	36	5.4%	21	3,532	35	4.2%	12
New Hampshire	14,067	44	3.4%	39	1,377	45	1.8%	35
New Jersey	85,851	23	3.1%	42	10,069	23	1.5%	42
New Mexico	67,532	25	12.4%	2	7,859	25	7.2%	3
New York	332,408	2	5.0%	25	36,606	2	2.4%	22
North Carolina	178,690	8	7.1%	14	19,444	7	3.6%	15
North Dakota	8,515	50	3.5%	37	1,084	48	1.8%	35
Ohio	191,994	7	4.7%	26	18,739	8	2.0%	28
Oklahoma	106,381	20	8.8%	7	10,879	21	3.8%	14
Oregon	50,052	30	4.5%	28	5,160	31	2.0%	28
Pennsylvania	116,779	16	2.6%	47	17,770	10	1.5%	42
Rhode Island	11,873	45	3.1%	42	1,437	44	1.5%	42
South Carolina	114,695	19	9.1%	6	12,717	17	4.7%	8
South Dakota	15,518	43	6.0%	17	2,041	39	3.0%	18
Tennessee	132,331	11	7.1%	14	15,073	13	3.6%	15
Texas	529,034	1	8.6%	9	46,445	1	4.1%	13
Utah	21,472	38	4.0%	34	1,767	42	1.8%	35
Vermont	9,392	49	4.5%	28	808	50	1.9%	32
Virginia	123,638	14	5.4%	21	12,920	16	3.0%	18
Washington	64,667	26	3.5%	37	7,197	26	1.9%	32
West Virginia	70,754	24	10.3%	4	9,090	24	4.9%	7
Wisconsin	50,840	29	2.8%	46	5,917	28	1.4%	48
Wyoming	9,487	47	5.6%	20	907	49	2.8%	20
Regions								
Northeast	667,450	4	3.5%	4	79,767	4	1.8%	4
Midwest	962,897	2	4.3%	2	95,854	2	1.9%	3
South	2,398,326	1	7.5%	1	264,632	1	3.7%	1
West	788,784	3	4.2%	3	81,870	3	2.2%	2