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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 309(j) of the Communications Act - Competitive Bidding Narrowband PCS	)	PP Docket No. 93-253
and		
Amendment of the Commission's Rules to Establish New Narrowband Personal Communication Services	)	GEN Docket No. 90-314 ET Docket No. 92-100

THIRD MEMORANDUM OPINION AND ORDER
AND FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: August 16, 1994 Released: August 17, 1994

Comment Date: September 16, 1994
Reply Comment Date: October 3, 1994

By the Commission:

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I. INTRODUCTION

1. By this action, we respond to petitions for reconsideration of the Third Report and Order in this proceeding.[1] The Third Report and Order established service-specific rules for competitive bidding for the award of licenses for Personal Communications Services in the 900 MHz band (narrowband PCS). Seven such petitions were received, as well as three oppositions and comments and one reply.[2]

2. On August 10, 1993, the Omnibus Budget Reconciliation Act of 1993 (the Budget Act) added a new section 309(j) to the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-173 (the Communications Act). This amendment to the Communications Act gave the Commission express authority to employ competitive bidding procedures to choose from among mutually exclusive applications for initial licenses. The Commission's Second Report and Order established general rules and procedures and a broad menu of competitive bidding methods to be used for all auctionable services.[3]

3. The Third Report and Order established competitive bidding rules for narrowband PCS. The Commission decided that because of the interdependence within certain classes of narrowband PCS licenses and the relatively high expected value of such licenses, where the agency received mutually exclusive applications most narrowband PCS licenses would be awarded through a sequence of simultaneous multiple round auctions. However, we stated that we might alternatively use oral sequential or single round sealed bidding to award certain narrowband PCS licenses if the operational complexity or administrative costs associated with simultaneous auctions proved excessive relative to the expected value of the licenses to be awarded. We stated that in conducting narrowband PCS auctions we would generally follow the payment and procedural rules adopted in the Second Report and Order, and we adopted general procedural and processing rules for the narrowband PCS service based on Parts 22 and 90 of the Commission's rules. We also structured our rules to provide opportunities for

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[1] See Third Report and Order in PP Docket No. 93-253, 9 FCC Rcd 2941 (1994) (Third Report and Order).

[2] Petitions for reconsideration were received from the Association of Independent Designated Entities (AIDE), Mercury Communications, Inc. (Mercury), Paging Network, Inc. (PageNet), Phase One Communications, Inc. (Phase One), the Rural Cellular Association (RCA), Tri-State Radio Co. (Tri-State), and U.S. Intelco Networks, Inc. (USIN). Oppositions or comments were received from United States Telephone Association (USTA), AirTouch Paging (AirTouch), and Paging Network, Inc. (PageNet); a reply was received from American Paging, Inc. (API).

[3] Second Report and Order in PP Docket No. 93-253, 9 FCC Rcd 2348 (1994) (Second Report and Order).

small businesses and businesses owned by women and minorities to participate in the auction and in the provision of spectrum based services.

4. On July 29, 1994 we completed the first spectrum auction for the ten available nationwide narrowband PCS licenses. This auction was the first test of the simultaneous multiple round auction design and of our provisions for designated entities. This auction was enormously successful. One indication of the efficiency of the simultaneous multiple round bidding process is the fact that the winning bids were either identical or virtually identical for virtually identical licenses. As we expected, this auction also attracted broad participation by designated entities. Of the 29 registered bidders 9, or 30 percent, indicated status as either minority or woman-owned firms. The strong bidding competition among relatively large firms and incumbent paging companies, however, may have been a factor in the lack of designated entities among the winning bidders. These results have caused us to reexamine some of the auction rules and designated entity provisions previously adopted in the Third Report and Order. In addition, we request comment on a number of possible further changes in the designated entity provisions that might apply to the upcoming MTA and BTA auctions.

II. AUCTION DESIGN

A. Bidding Procedures

5. In the Third Report and Order, the Commission noted its earlier findings 1) that licenses with strong value interdependencies should be auctioned simultaneously, 2) that multiple round auctions will generally yield more efficient allocations of licenses and higher revenues than other auction methodologies because they provide bidders with information regarding other bidders' valuations of licenses, and 3) that simultaneous multiple round auctions become less cost effective as the value of licenses decreases, because they are relatively time-consuming and expensive to implement.[4] The Commission stated that where the licenses to be auctioned are interdependent and their value is expected to be high, simultaneous multiple round auctions would best achieve the Commission's goals.[5] We stated, however, that we might use methods other than simultaneous multiple round bidding in cases where license values are expected to be relatively low, where bidder participation is expected to be limited, or where the interdependence of licenses is less significant.[6] We stated that in selecting the auction method for each narrowband PCS auction, we would

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[4] Third Report and Order at ¶ 12.

[5] Id. at ¶ 13.

[6] Id. at ¶ 20.

balance the advantages of more sophisticated auction methods, such as simultaneous multiple round bidding, with the greater complexity and cost they might entail.[7]

6. In the Third Report and Order the Commission decided to auction the 12.5 kHz unpaired MTA and BTA response channel licenses in a single round sealed bid auction because the value of those licenses is low relative to the cost of conducting more complex auctions. We also stated that because only incumbent paging licensees already serving the license area are eligible to bid on these licenses, sealed bid auctions might help to reduce the likelihood of collusion. We further stated that information about license values from earlier narrowband auctions would also be available to assist bidders in valuing these licenses. Moreover, because under the sealed bid approach bidders cannot be certain that they will be the high bidder on the licenses they seek to obtain, we allowed bidders to bid without risking a default penalty on more than the two licenses in each service area, provided they specify in advance the order in which they wish to be awarded such licenses if they are the high bidder on more than they are permitted to hold.[8]

7. Petitions. Paging Network, Inc. (PageNet) and Tri-State Radio Co. (Tri-State) seek reconsideration of the decision to use single round sealed bid auction procedures for assignment of the 12.5 kHz unpaired licenses.[9] PageNet and Tri-State assert that the Commission has underestimated the likely value of the response channel licenses.[10] PageNet and Tri-State also assert that great value interdependence exists among the response channel licenses.[11] They state that there are likely to be numerous bidders for most licenses.[12] In this regard, PageNet claims that collusive behavior is no more likely for these licenses than for other narrowband PCS licenses. PageNet and Tri-State question whether bidders for response channel licenses will obtain useful information about license values from previous narrowband PCS auctions. PageNet asserts that license values will vary from one provider and area to another, and that bidders may have no realistic idea as to the value of the licenses.[13] PageNet claims that the single sealed bid mechanism will require exorbitantly expensive

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[7] Id.

[8] Id. at ¶ 29.

[9] PageNet Petition at 2; Tri-State Petition at 3.

[10] PageNet Petition at 2; Tri-State Petition at 7.

[11] PageNet Petition at 5; Tri-State Petition at 3.

[12] PageNet Petition at 10; Tri-State Petition at 8.

[13] PageNet Petition at 5.

market research on the part of bidders, and the result will still depend on chance.[14] Further, PageNet states that it is important to choose an auction method which provides useful information on license values to bidders during the auction. Therefore, PageNet supports adopting an alternative auction method that is streamlined to minimize cost and complexity, and recommends an ascending bid multiple round methodology.[15]

8. Tri-State claims that the rules mandating single round sealed bidding are deficient from an auction design perspective. Tri-State asserts that these rules are poorly structured to allow bidders to obtain a common frequency across regions, and that under the rules bidders cannot know how to prioritize their bids. Tri-State further claims that the sealed bidding procedures require exceedingly complicated bidding strategies, which necessitate the adoption of a clear reallocation mechanism for defaulted licenses. Alternatively, Tri-State recommends a procedure in which bidders submit sealed bids for a given MTA or BTA without specifying which of the available frequencies the bidder is bidding on. Under Tri-State's recommended approach, winning bidders would be ranked for purposes of frequency selection according to the total amount they bid for all the channels on which they hold winning bids. Tri-State claims that this procedure maximizes the number of multiple MTA/BTA bidders who can obtain a common paging response channel in all markets in which they bid.[16] Tri-State argues that its proposed auction procedures will level the playing field between bidders for paging response channels and those for regional and nationwide narrowband PCS authorizations, who do not need to aggregate a common frequency across geographic areas.[17] Tri-State includes a 25 percent bidding credit for minority- and female-owned businesses and small businesses, and states that its plan could be refined by providing that winning bidders pay the highest losing bid for a license.[18] Tri-State asserts that its proposed auction procedures will ensure that the Commission maximizes revenues from paging response license auctions and allow bidders to set priorities more accurately and to adopt relatively simple bidding strategies.[19] AirTouch recommends multiple round simultaneous auctions, and suggests that bids for the response channels be in pool form, such that the highest four bidders would receive a license

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[14] Opposition of PageNet at 3.

[15] PageNet reserves comment on more specific procedures pending conclusion of the nationwide narrowband PCS and Interactive Video and Data Service (IVDS) auctions. Id. at 6.

[16] Tri-State Petition at 12-16.

[17] Id. at 17.

[18] Id. at 18-20.

[19] Id. at 21.

and could agree among themselves as to the licenses to be held by each.[20] American Paging, Inc. (API) supports multiple-round ascending simultaneous bidding methodologies, at least for the MTA response channel licensing.[21]

9. Discussion. Petitioners have convinced us that paging response channel licenses may have more value interdependency, and higher value, than was apparent at the time of the Third Report and Order. We also recognize that alternative auction methodologies proposed by petitioners may offer a low-cost auction method with desirable characteristics for auctioning interdependent licenses, and thus may prove superior to the sealed bid approach set forth in the Third Report and Order. In addition, the recent nationwide narrowband auction demonstrated that simultaneous multiple round auctions are easier and less expensive to implement than we earlier anticipated, and thus they may prove to be an appropriate procedure for auctioning the response channel licenses. However, we will defer our decision regarding the auction design for the 12.5 kHz MTA and BTA paging response channels until we have gained further experience with simultaneous multiple round auctions. We will announce our final choice of auction design and procedures for the response channels by Public Notice prior to the auction.

B. Minimum Opening Bid

10. In the Third Report and Order, we stated that we believe it is necessary to impose a minimum bid increment to ensure that the auctions conclude within a reasonable period of time in narrowband PCS auctions where simultaneous multiple round bidding is used. The bid increment is the amount or percentage by which the bid must be raised above the previous round's high bid in order to be accepted as a valid bid in the current round. We stated that we might impose a minimum bid increment of 5 percent or $0.01 per MHz per pop, whichever is greater, in narrowband PCS auctions where multiple round bidding is used. We also retained the discretion to vary the minimum bid increments for individual licenses or groups of licenses over the course of an auction.[22]

11. In order to expedite the auction process further, we also reserve the discretion to establish a suggested opening bid or a minimum opening bid on each license in addition to the minimum bid increment.[23] If we were to adopt minimum opening bids, we anticipate that we would seek expedited comments on any figures proposed. Once a minimum bid is established for a license, initial bids will have to be above that level to be considered valid.

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[20] Opposition of AirTouch at 7-8.

[21] Reply of API at 2.

[22] Third Report and Order at ¶¶ 30-32.

[23] See ex parte submission of Paul Milgrom, May 19, 1994 and Fifth Report and Order ¶45.

The amount of the suggested opening bid or the minimum opening bid, if one is used, will be set forth in the Public Notice announcing the auction. Generally, we will establish suggested opening bids or minimum opening bids in the range of $.03 - $.20 per MHz-pop for each license.[24] A suggested opening bid or minimum opening bid will provide bidders with an incentive to start bidding at a substantial portion of the license value, thus ensuring a rapid conclusion to the auction.

C. Activity and Stopping Rules

12. In the Third Report and Order, we stated that when we use the three-stage Milgrom-Wilson activity rule, the auction will move from stage I to stage II when, after three rounds of bidding, the high bid has changed on 5 percent or fewer of the licenses (measured in MHz-pops) being auctioned. Stage III will begin when the high bid has changed on 2 percent or fewer licenses over three rounds.[25] We conclude after our experience in conducting the nationwide narrowband auction that we may find it important to move the auctions from one stage to the next at a different pace than would occur under this rule. Accordingly, we retain the discretion to determine and announce during the course of an auction when, and if, to move from one auction stage to the next, based on a variety of measures of bidder activity, (e.g., the percentage of licenses on which there are new bids, the number of new bids, and the percentage increase in revenue). Bidders will be notified at least one round prior to the commencement of the next stage of an auction.

13. We also stated that in stage III, a bidder would have to be active on 100 percent of the MHz-pops for which it wishes to retain eligibility.[26] In order to allow bidders greater flexibility, we think that it may be beneficial in some auctions to reduce this figure slightly, but in no case below 90 percent. We will announce the required activity levels for stage III in a Public Notice in advance of each auction.

14. In the Third Report and Order, we stated that where we use the Milgrom-Wilson activity rule we intend to use a simplified waiver procedure whereby bidders will be permitted

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[24] The number of "MHz-pops" is calculated by multiplying the population of the license service area by the amount of spectrum authorized by the license. In its September 1993 Mid-Session Review of the 1994 Budget, the Office of Management and Budget estimated that spectrum auctions would generate $12.6 billion from 1994 through 1998. A 1992 report by the Congressional Budget Office assumed that $2 billion would be raised from competitive bidding in services other than PCS. Thus, the approximate value of 120 MHz of PCS spectrum is placed at $10.6 billion according to these estimates, or 35 cents per pop per MHz.

[25] Third Report and Order at n. 16.

[26] See Third Report and Order ¶¶38.

five automatic waivers from the activity rule during the course of an auction.[27] A waiver permits a bidder to maintain its eligibility at the same level as in the round for which the waiver is submitted, regardless of the bidder's level of bidding activity in that round. Subsequently, we have concluded based on our experience in conducting the nationwide narrowband auction that fewer waivers may be necessary to maintain the pace of the auction and prevent strategic use of waivers. Consequently, we will allow one automatic waiver from the activity rule during each stage of an auction, or one automatic waiver during a number of bidding rounds specified in a Public Notice. We retain the flexibility, however, to change by Public Notice the number of waivers that will be permitted and the frequency with which they may be exercised by public notice prior to a specific narrowband auction. While we may allow bidders to request proactive waivers that will keep the bidding open, under no circumstances will an automatic waiver prevent an auction from closing.

15. In the Second Report and Order, we retained the discretion to declare by announcement at any point during a multiple round auction that the auction will end after a specified number of additional rounds.[28] We want to clarify however, that if this procedure is used, we will accept bids in the final rounds only for licenses on which the highest bid increased in at least one of the preceding three rounds. No new bids will be accepted for other licenses.[29] There are two reasons not to take bids on licenses on which there has been no recent bidding. First, the fact that bidding on an individual license may close will provide an additional incentive to bid actively and thus speed the conclusion of the auction. If bids are accepted on all licenses in the final rounds there is less cost to a bidder in holding back. Second, closing bidding on licenses for which activity has ceased ensures high bidders for those licenses that they will not lose a license without having an opportunity to make a counter-offer.[30] This reduces the uncertainty associated with aggregating licenses that are worth more to a particular bidder as a package than individually. If final bids are accepted on all licenses, a high bidder on an aggregation of licenses may unexpectedly lose a critical part of the aggregation and have no chance to regain it except in the post-auction market, where bargaining or other transaction costs may be high.

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[27] Third Report and Order at ¶ 40.

[28] Second Report and Order at ¶ 132.

[29] See reply comments of PacBell, appendix to attachment by Milgrom and Wilson at 5. See also Second Report and Order at ¶ 130, n.106.

[30] Either the auction will close only when bidding ceases on all licenses, so the high bidder will have an opportunity to respond to any new bids, or the Commission will call for final bids but not accept new bids on licenses on which there have been no new bids in the previous three rounds, so no other bidder will have the opportunity to outbid the high bidder in a final round.

D. Release of Bidder Information

16. We note that in the reconsideration of the Second Report and Order we reserved additional flexibility with respect to the requirement to release information concerning the identity of bidders, which may affect auctions for narrowband PCS licenses. In the Second Memorandum Opinion and Order we reserved the option to release bidder identities on an auction-by-auction basis, and stated that we would announce by Order and Public Notice prior to each auction whether the identities of bidders would be made public in that auction.[31] In this regard, we retain the flexibility in the context of narrowband PCS auctions to determine on an auction-by-auction basis whether or not to release bidder identities during the course of the auction.

E. Filing Procedures

17. Petition. Phase One asserts that the Communications Act permits the FCC to employ competitive bidding procedures only where mutual exclusivity exists, and that consequently the FCC is prohibited from establishing specific auction dates until it has determined that a particular application is mutually exclusive with another.[32] Phase One states that the FCC must first notify each qualified applicant of its application processing status in advance of scheduling auctions to allow applicants sufficient time to analyze auction strategies and evaluate the competition.[33] Phase One also states that the FCC is obligated to suspend its auctions until each petition in PP Docket No. 93-253 has been addressed.[34] Phase One states that our contractor, Tradewinds International, Inc. (Tradewinds) must be prevented from promoting FCC auctions. Because there can be no auctions without mutual exclusivity, according to Phase One the advertising by Tradewinds amounts to false and misleading advertising and raises conflict of interest questions because Tradewinds may benefit if auctions are actually held.[35]

18. AirTouch Paging (AirTouch) asserts in opposition that the Communications Act only prohibits auctioning of a license for which no mutually exclusive applications have been accepted for filing, and not the establishment of auction dates. In fact, AirTouch notes that mutually exclusive applications were received for each of the nationwide narrowband PCS

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[31] Second Memorandum Opinion and Order at ¶ 46.

[32] Phase One Petition at 2.

[33] Id. at 3.

[34] Id. at 5.

[35] Id. at 5-6.

licenses.[36] PacBell states that there is no legal basis for Phase One's argument that the Commission must delay announcing auction dates until mutual exclusivity has been established.[37]

19. Discussion. The Budget Act provides that if applications are not mutually exclusive no auction will be held.[38] We have found, however, that it is important to begin planning for auctions as early as possible to assure that they will run smoothly. To maintain an expeditious auctioning and licensing schedule it is necessary, for instance, to reserve sites for auctions before all applications have been received. Further, we believe that it is important that we schedule auctions far enough in advance to provide applicants with ample time to attract financing and plan their bidding strategies. In any event, we have previously indicated that we will cancel a scheduled auction if we do not receive mutually exclusive applications.[39] Consequently we believe that our auction schedule and procedures are fully consistent with the provisions of the Budget Act.

20. We find advertising of auctions desirable and in the public interest, even if, because of lack of mutual exclusivity, no auction takes place for some licenses. Among its other beneficial effects, advertising of auctions may be essential for making potential licensees, and in particular designated entities, aware of the opportunities available to them. In order to make service available as rapidly and efficiently as possible, we must ensure that those who value the license most highly, and will offer the services most valued by the public, have an opportunity to bid on them. Mutual exclusivity cannot be established until applications have been received, and at that point advertising will no longer be useful because the purpose of advertising is to inform potential licensees of the opportunity to file applications. Consequently, we retain our existing filing procedures and continue to permit our contractor to advertise auctions even before mutual exclusivity has been established.[40]

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[36] Opposition of Airtouch at 4.

[37] Opposition of PacBell at 8.

[38] 47 U.S.C. § 309(j)(1).

[39] See Second Report and Order at ¶ 165. In fact, 29 applicants are eligible to bid for nationwide narrowband PCS licenses; at least 24 applicants are eligible to bid on each of the ten licenses. Thus, mutual exclusivity exists for all nationwide narrowband licenses, and Phase One's petition is moot on this point.

[40] In this regard we also note that since we find that advertising auctions is in the public interest, no conflict of interest exists between Tradewinds' interests and the Commission's.

F. Application-Processing Rules

21. In the NPRM in this proceeding, the Commission stated:

> In order to avoid needless duplication, we propose that the following general filing and processing rules apply to all PCS: Sections 22.3-22.45 and 22.917(f), and 22.918-22.945, 47 C.F.R §§ 22.3-22.45, 22.917(f), and 22.918-22.945. For those PCS applicants who file on Form 574, we believe that Sections 90.113-90.159 of our rules, 47 C.F.R. §§ 90.113-90.159, could be used to process those applications with appropriate modifications.[41]

22. Petition. AIDE asserts in its petition for reconsideration of the Second Report and Order that the Commission acted improperly in proposing substantive PCS application-processing rules in the NPRM because, it argues, such rules are outside the scope of this rulemaking, which is limited to implementation of the competitive bidding requirements of §309(j) of the Communications Act.[42] AIDE argues that the Commission's proposal of application-processing rules is legally insufficient to constitute a valid notice of proposed rules, and that some of the rules cited have no immediate applicability to PCS service. AIDE asserts that in the Second Report and Order the Commission failed to respond to the merits of the arguments concerning filing and processing rules in AIDE's comments on the NPRM. AIDE concludes that the Commission needs to issue a supplemental Notice of Proposed Rulemaking to adopt license-processing rules for PCS. PacBell states, however, that the Administrative Procedure Act does not prohibit the Commission from issuing more than one order based on a notice and comment period.[43] PacBell also states that there is an exception to the Administrative Procedure Act's notice and comment requirements "when the agency for good cause finds (and incorporates the finding. . .in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."[44]

23. Discussion. The Commission adopted few filing or processing rules in the Second Report and Order. Those rules that the Commission did adopt pertaining to the filing and processing of applications and certifications were clearly proposed in the NPRM.[45] In the Second Memorandum Opinion and Order we stated that we would address AIDE's concerns in the reconsiderations of the service-specific Orders in which the application processing rules were adopted. In the Third Report and Order, we adopted the service-specific narrowband

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[41] NPRM at ¶128.

[42] AIDE Petition at 20-21.

[43] PacBell Opposition at 10.

[44] Id. at 11, citing 5 U.S.C. § 553(c).

[45] See Second Report and Order at ¶¶ 164-168, NPRM at ¶¶ 96-101.

PCS application processing rules to which AIDE's petition refers and thus, we address the substance of AIDE's arguments below.

24. The competitive bidding process is a means of assigning licenses, and rules and procedures for processing of license applications are an integral and necessary part of that process. By citing in the NPRM the specific Part 22 and Part 90 application processing rules that we would use as the basis for adopting PCS rules, we provided commenters with exceptionally clear notice and an opportunity to comment on the rules we contemplated adopting for narrowband PCS. The few changes that we made from the proposed rules were necessary to adapt them to auctioning narrowband PCS licenses. For example, we adopted certain technical requirements such as restrictions on station antenna structures.[46] We also deleted any procedures that were related to grants by random selection.[47] The resulting rules are clearly a logical outgrowth of the rules proposed in the NPRM, applied in the context of the use of competitive bidding to assign narrowband PCS licenses. Rules adopted as a logical outgrowth comply with all Administrative Procedure Act requirements.[48]

III. RULES PROHIBITING SETTLEMENTS AND COLLUSION

25. Petitions and Oppositions. The collusion rules adopted in the Third Report and Order prevent bidders for narrowband PCS licenses from entering into settlement agreements after applications are filed. AIDE asserts that narrowband bidders should be allowed to enter into settlement agreements, as encouraged by Section 24.429(b), and asserts that the Commission's decision to avoid post-filing settlements was impermissibly based on consideration of potential revenues. Quentin L. Breen (Breen) urges us to act on AIDE's petition to liberalize treatment of full market settlements. Breen states that the Budget Act does not relieve the Commission of its obligation in the public interest to continue to use means such as negotiation to avoid mutual exclusivity, nor does the Act oblige us to adopt anti-collusion regulations. Instead of permitting applicants to avoid the uncertainties and inefficiencies of the auction process, Breen states that the rules effectively mandate that parties will go to end of auction without being able to consider settlement.[49] PageNet, conversely, urges the Commission to prohibit any settlement negotiations during the competitive bidding process.[50] According to PageNet, there is no way for mutually exclusive

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[46] 47 C.F.R. § 24.416.

[47] 47 C.F.R. § 22.33.

[48] Public Service Commission of the District of Columbia v. FCC, 906 F.2nd 713, 717 (D.C. Cir. 1990).

[49] Breen Opposition at 1-4.

[50] PageNet Opposition at 20-26.

applicants to come to an agreement on settlement without exchanging the same kinds of information that would be exchanged for the formation of collusive strategies in auction bidding. Accordingly, PageNet asserts that settlement discussions should be prohibited prior to selection of a winner from among the Form 175 applicants[51] Furthermore, PageNet contends, that there is little likelihood of an all-market settlement in any given market, because if any one applicant declines to settle, the settlement is defeated.[52]

26. Discussion. As stated in our reconsideration of the Second Report and Order, we have decided to retain the existing collusion rules, to the extent that they prevent settlements after applications are filed.[53] These rules were designed to avoid formation of anticompetitive agreements among bidders, although we intend to continue reliance on the antitrust laws as our primary method of avoiding bidder collusion.[54] As we indicated in the Second Report and Order, we believe that our rules prohibiting collusion will serve the objectives of the Budget Act by preventing applicants, especially the largest companies, from entering into agreements to use bidding strategies that divide the market to the disadvantage of other bidders.[55] We also seek to ensure that entities will not file applications solely for the purpose of demanding payment from other bidders in exchange for settlement or withdrawal of their applications.

27. Accordingly, to ensure that the bidding process is competitive and to encourage formation of a competitive post-auction market structure, we are retaining the collusion rules in the narrowband PCS context.[56] Furthermore, to make clear that we recognize that these rules effectively prohibit post-filing settlements, we are amending our rules to eliminate Section 24.429(b). We believe that this is the most straightforward approach, given our strong concerns that collusion could have an extremely harmful impact upon competition.

28. However, in order to provide bidders sufficient time and greater flexibility to attract capital, we make several modifications to our collusion rules adopted in the Third Report and Order. First, in the Second Memorandum Opinion and Order, we clarified the applicability of the collusion rules to cases where an applicant has a common ownership

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[51] Id. at 22 & n.11.

[52] Id. at 24.

[53] See Second Memorandum Opinion and Order at ¶ 54.

[54] See Second Report and Order, ¶¶ 221-224.

[55] Id.

[56] See id., ¶ 223.

interest with another applicant.[57] In that item we stated that, unless the second applicant is expressly identified as an entity with whom the first applicant has an agreement concerning bidding, we will prohibit these parties from communicating concerning their bidding strategies. This prohibition will hold even if the other bidder is identified on the applicant's short-form application as having a common ownership interest with the applicant.

29. Furthermore, where common non-controlling ownership exists between two or more bidders, those bidders may win more licenses cumulatively than a single entity is entitled to hold. In such cases we will permit divestiture of non-controlling interests to bring the entities into compliance with the license aggregation limits provided such divestiture is completed within 90 days of grant of the license. Such post-auction divestiture will enable investors to finance more than one bidder without risking default penalties if both bidders win licenses which in combination exceed our aggregation limits.

30. In addition, we wish to modify our rules regarding amendments to short-form applications. Section 24.413 of the Commission's rules requires all applicants to list certain ownership information including all partners, subsidiaries, affiliates and all persons holding five percent or more of the stock, warrants, options or debt securities of the applicant. Section 24.422 (b) currently prohibits amendments to the short-form application to make ownership changes or changes in the parties to bidding consortia after the application filing deadline has passed. As a result of our experience in the nationwide narrowband PCS auction we believe that it is necessary to allow applicants to amend their FCC Form 175 applications to make ownership changes after the filing deadline has passed, provided such changes do not result in a change in control of the applicant and provided that discussions leading up to such changes do not violate our anti-collusion rules. Such amendments must be made within two business days of any such change. Permitting such amendments will provide bidders with flexibility to seek additional capital after applications have been filed, while ensuring that the real party in interest does not change. Accordingly, we will modify rule 24.422 (b) to permit applicants to amend their FCC Form 175 applications to reflect ownership changes that do not result in a change in control of the applicant. Such changes shall not be regarded as major amendments to an application, provided they do not result in a transfer of control of the applicant.

31. In addition, we are modifying our collusion rules, which currently prohibit bidders from communicating with one another after short form applications have been filed regarding the substance of their bids or bidding strategies and which also prohibit bidders from entering into consortia arrangements or joint bidding agreements of any kind after the deadline for short form applications has passed. In order to permit bidders to respond to higher than expected license prices by combining their resources during an auction, we will now permit bidders who have not filed Form 175 applications for any of the same licenses to engage in discussions and enter into bidding consortia or joint bidding arrangements during the course of

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[57] Second Memorandum Opinion and Order at ¶ 55.

an auction. We conclude that where bidders have not applied for any of the same licenses there is little risk of anticompetitive conduct with respect to a single license and therefore we believe that it is appropriate to relax our collusion rules to permit bidders in this context to have greater flexibility to increase their competitiveness in the auction by combining their resources, provided that no change of control of any applicant takes place.

IV. PAGING RESPONSE CHANNEL ELIGIBILITY

32. Mercury submitted a request for clarification that non-incumbent paging licensees will be permitted to apply for only those narrowband paging response channel licenses that remain available after the initial response channel auctions. Eligibility requirements for these channels were adopted in GEN Docket No. 90-314, and therefore we will address this issue as part of the further reconsideration of the narrowband PCS service rules in that docket and in ET Docket No. 92-100.

V. DESIGNATED ENTITY PROVISIONS

33. Background. In the 1993 Omnibus Budget Reconciliation Act, Congress amended the Communications Act to require the Commission to ensure that small businesses, rural telephone companies, and businesses owned by women and minority group members (designated entities) would have an opportunity to obtain licenses and participate in offering spectrum-based services.[58] We considered numerous alternatives that might ensure opportunities for these designated entities, including installment payment plans, bidding credits, spectrum set-asides, tax certificates, royalty payments, innovator's preferences, and distress sales to designated entities.[59] After considering the characteristics of the narrowband PCS service, we ultimately adopted installment payments for small businesses acquiring certain regional, MTA or BTA licenses.[60] We also provided that a 25 percent bidding credit would be available to businesses owned by minorities and/or women on certain nationwide, regional, MTA and BTA licenses.[61] Both installment payments and bidding credits were made available to small businesses owned by minorities and/or women. In addition, we provided that tax certificates would be made available to encourage investment in women- and

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[58] See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(a), 107 Stat. 312, 387-389 (1993) (Budget Act) (adopting 47 U.S.C. §§ 309(j)(3)(B), 309(j)(4)(D)).

[59] See Second Report and Order, ¶¶ 231-257, See Infra ¶¶64-68 for discussion on why provisions are necessary.

[60] See Third Report and Order, ¶¶ 68, 86-89.

[61] Id., ¶ 72.

minority-owned businesses.[62] Our rules, however, did not permit rural telephone companies to obtain bidding credits or installment payments unless they also qualified as small businesses or businesses owned by minorities and/or women.[63]

34. Petitions. Three petitioners assert that provisions made available for various designated entities, such as bidding credits, installment payments and tax certificates, should also be made available to all designated entity groups, and for all narrowband PCS licenses. The Association of Independent Designated Entities (AIDE) suggests that bidding credits, currently available for all businesses owned by minorities and/or women, should be granted to all small businesses and rural telephone companies, for all narrowband PCS licenses.[64] AIDE reasons that even if bidding credits are not appropriate for small businesses applying for nationwide licenses (because small businesses can not afford to construct nationwide narrowband PCS systems), the Commission should nevertheless permit small businesses to obtain bidding credits for the smaller, geographically limited narrowband licenses.[65] AIDE also states that the decision to limit installment payments to certain licenses was impermissibly based on maximizing auction revenues.[66]

35. U.S. Intelco Networks, Inc. (USIN) and the Rural Cellular Association (RCA) assert that the failure to provide any narrowband provisions for rural telephone companies violates the Budget Act[67] and ensures that narrowband PCS will be unavailable in rural

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[62] Id., ¶¶ 68, 70, 72-85.

[63] As discussed further infra, these rules were based on the rationale that rural telephone companies do not face special barriers to entry into this service, nor are special accommodations necessary to ensure service in rural areas. See Third Report and Order, ¶¶ 71, 76. We concluded in the Third Report and Order that, given the relatively modest construction costs for narrowband PCS, even new entrants may choose to provide service to rural areas, and special provisions are not necessary to ensure that rural telephone companies will have the opportunity to participate in provision of service to rural areas. Id., ¶ 71. We noted that women, minorities, and small businesses, in contrast, may face particular financing obstacles that require additional provisions to ensure that they have an opportunity to participate in providing narrowband PCS. Id., ¶¶ 72, 76.

[64] AIDE Petition at 14-18.

[65] AIDE Petition at 16-17.

[66] Id. at 18-19.

[67] The Budget Act names rural telephone companies as one of the groups whose opportunity to participate in auctioned services must be ensured by our auction procedures. See Budget Act, § 6002, 107 Stat. 388 (adopting 47 U.S.C. § 309(j)(3)(B) and 309(j)(4)(D)).

areas.[68] RCA states that rural telephone companies should receive bidding credits and tax certificates.[69] RCA bases this assertion on the rationale that providing special bidding provisions for rural telephone companies would increase the likelihood that narrowband PCS licenses will be awarded to entities that will provide service to rural areas.[70] RCA also notes that the Budget Act directs that the auction procedures must ensure that licenses for new technologies are awarded in a manner that promotes their rapid deployment "for the benefit of the public, including those residing in rural areas."[71]

36. Oppositions. PageNet states that no additional measures should be taken with respect to participation of rural telephone companies or small businesses in narrowband PCS auctions.[72] As to the availability of provisions for women and minority-owned businesses for only one license per channel grouping, PageNet notes that licenses with bidding credits comprise 37 percent of regional licenses and almost 45 percent of the available narrowband spectrum, thus earmarking a good deal of spectrum for designated entities.[73] PageNet states that small businesses have always had ample opportunities in paging, and thus there is no reason to grant them special consideration.[74] We also request comment on a proposal to redesignate the BTA licenses as regional licenses.

37. Decision. We have decided, in response to petitions and to our experience with the nationwide narrowband auction, to expand the provisions for designated entities in future narrowband auctions. First, we will modify the definition of small business to expand eligibility. Second, for the upcoming regional narrowband auctions we will increase the bidding credit for women- and minority-owned businesses. Finally, as described in Section VI below, we propose, and request comment on, additional designated entity provisions for the MTA and BTA auctions.[75]

38. Congress mandated that the Commission "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are

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[68] See USIN Petition at 1-8, RCA Petition at 2-9.

[69] RCA Petition at 9.

[70] RCA Petition at 2

[71] Id. (quoting 47 U.S.C. § 309(j)(3)(A)).

[72] PageNet Opposition at 12-15.

[73] Id. at 14.

[74] Id. at 14-15.

[75] See ¶¶64 infra.

given the opportunity to participate in the provision of spectrum-based services."[76] To achieve this goal, the statute requires the Commission to "consider the use of tax certificates, bidding preferences, and other procedures." Thus, while providing that we may charge for licenses, Congress has ordered that the Commission design its auction procedures to ensure that designated entities have opportunities to obtain licenses and provide service. For that purpose, the law does not mandate the use of any particular procedure, but it specifically approves the use of "tax certificates, bidding preferences, and other procedures." The use of any such procedure is, in our view, mandated where necessary to achieve Congress's objective of ensuring that designated entities have the opportunity to participate in narrowband PCS.

39. In addition to this mandate, the statute sets forth various congressional objectives. For example, it provides that in establishing eligibility criteria and bidding methodologies the Commission shall "promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women."[77] Further, Section 309(j)(4)(A) provides that to promote the statute's objectives the Commission shall "consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, or other schedules or methods . . . and combinations of such schedules and methods."

40. To satisfy these statutory mandates and objectives, we established in the Second Report and Order eligibility criteria and general rules to govern the special measures for small businesses, and businesses owned by members of minority groups and women. In the Third Report and Order, we employed several measures, including installment payments, bidding credits and tax certificates, to enhance opportunities for designated entities bidding on certain narrowband PCS licenses. We stated that we believed that narrowband PCS would provide significant opportunities for all designated entities to provide a wide variety of new services including advanced paging and messaging services. In adopting the particular measures for designated entities, however, we assumed that narrowband PCS would involve relatively low

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[76] 47 U.S.C. § 309(j)(4)(D).

[77] 47 U.S.C. § 309(j)(3)(B); see also id. § 309(j)(4)(C) (requiring the Commission when prescribing area designations and bandwidth assignments, to promote "economic opportunity for a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women). As noted in the Second Report and Order, the statute also requires the Commission to promote the purposes specified in Section 1 of the Communications Act, which include, among other things, "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." 47 U.S.C. § 151; Second Report and Order at n.3.

capital entry requirements, and would therefore be well-suited to small entities, which lack access to large amounts of capital.[78] Accordingly, we found that the measures we selected for narrowband PCS auctions were appropriately tailored to the unique characteristics of narrowband PCS and would therefore "create meaningful incentives for small businesses and businesses owned by minorities and/or women to both bid successfully for available licenses and provide innovative and expeditious service to the public."[79] In this regard we indicated that installment payments would provide a significant means for small businesses to overcome their main barrier to entry: lack of access to financing. And, a 25 percent bidding credit for minority and women-owned businesses together with a tax certificate program would address the additional obstacles faced by those designated entities. We noted, however, that we would continue to assess the effectiveness of the measures adopted for narrowband PCS, and would apply any knowledge gained to subsequent auctions.

41. Our goal in the narrowband personal communications service is to meet fully the statutory mandate of Section 309(j)(4)(D), as well as the objectives of promoting economic opportunity and competition, of avoiding excessive concentration of licenses, and of ensuring access to new and innovative technologies by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women. As explained more fully below, we believe that it is necessary in some respects to do more to ensure that small businesses and businesses owned by members of minority groups and women have a meaningful opportunity to participate in the provision of narrowband PCS. As a result of our experience in the nationwide narrowband PCS auction, we are concerned that a 25 percent bidding credit and installment payments may not be sufficient to ensure the opportunity of these businesses to compete against the larger, deep pocketed incumbent firms. Therefore, we have decided to expand the provisions for designated entities as described below.

A. Definition of Small Business

42. In the Third Report and Order we adopted a definition for small businesses based on the standard definition used by the Small Business Administration (SBA). This definition permits an applicant to qualify for installment payments based on a net worth not in excess of $6 million with average net income after Federal income taxes for the two preceding years not in excess of $2 million. 13 C.F.R. § 121.802(a)(2).[80] In the Second Memorandum

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[78] Third Report and Order at ¶ 69.

[79] Id. at ¶ 70.

[80] The SBA has recently changed its net worth/net income standard as it applies to its Small Business Investment Company (SBIC) Program. See 59 Fed. Reg. 16953, 16956 (April 8, 1994). The new standard for determining eligibility for small business concerns applying for financial and/or management assistance under the SBIC program was increased to $18 million net worth and $6 million after-tax net income. 13 C.F.R. § 121.802(a)(3)(i). The

Opinion and Order, we removed our generic "small business" definition, which was based on the original SBA size standard and indicated that we would establish a definition for "small businesses" on a service-specific basis.

43. Many commenters, including the Chief Counsel for Advocacy of the SBA, argue that the SBA net worth/net revenue definition is too restrictive and will exclude businesses of sufficient size to survive, much less succeed, in the competitive PCS marketplace. The SBA's Chief Counsel for Advocacy and the Suite 12 Group advocate adoption of a gross revenue test, arguing that a net worth test could be misleading as some very large companies have low net worth. The SBA's Chief Counsel for Advocacy recommends that the revenue standard be raised to include firms that (together with affiliates) have less than $40 million in gross revenues. Similarly, Suite 12 suggests a $75 million in annual sales threshold. As another option, the SBA's Chief Counsel for Advocacy suggests that the Commission consider a higher revenue ceiling or adopt different size standards for different telecommunications markets.[81]

44. We now realize that the cost of acquiring a narrowband PCS license will be significant and bidders may be required to expend millions of dollars to acquire a license and construct a system in PCS markets. Thus, we believe that our current narrowband PCS small business definition is overly restrictive because it would exclude most businesses possessing the financial resources to compete successfully in the provision of narrowband PCS services. Accordingly, we modify our small business definition for narrowband PCS auctions to ensure the participation of small businesses with the financial resources to compete effectively in an auction and in the provision of narrowband PCS services.

45. There is substantial support in the record for a $40 million gross revenue standard. For example, the SBA recommends that for PCS, a small business be defined as

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change in this size standard was attributable to an adjustment for inflation and changes in the SBIC program "designed to strengthen and expand the capabilities of SBICs to finance small businesses so that they can increase their contribution to economic growth and job creation." 59 Fed. Reg. at 16955.

[81] Some parties recommend using the SBA's alternative 1500 employee standard. See, e.g., comments of SBA Associate Administrator for Procurement Assistance at 2, CFW Communications at 2, and Iowa Network at 17. A number of other commenters, including the SBA's Chief Counsel for Advocacy, argue, however, that adoption of this alternative SBA definition would open up a huge loophole in the designated entity eligibility criteria. Specifically, they contend that telecommunications is a capital, rather than labor, intensive industry, and that an entity with 1,500 employees is likely to be extremely well capitalized and have no need for the special treatment mandated by Congress in the Budget Act. See, e.g., comments of SBA Chief Counsel for Advocacy at 8, LuxCel Group, Inc. at 4, Suite 12 Group at 10-11.

one whose average annual gross revenues for its past three years do not exceed $40 million.[82] It states that this definition isolates those companies that have significantly greater difficulty in obtaining capital than larger enterprises. At the same time, the SBA contends that a company with $40 million in revenue is sufficiently large that it could survive in a competitive wireless communications market.[83] Similarly, the SBA Chief Counsel for Advocacy asserts that a $40 million threshold will allow participation by firms "of sufficient size to meet demands in almost all small markets and some medium-size markets without significant outside financial assistance."[84]

46. For purposes of narrowband PCS, we shall therefore define a small business as any firm, together with affiliates and certain large investors, with average gross revenues for the three preceding years of less than $40 million.[85] In addition, an applicant will not qualify as a small business if any one attributable investor in, or affiliate of, the entity has $40 million or more in personal net worth.[86] To ensure that only bona fide small businesses in need of government financing are eligible, we will consider the gross revenues of the applicant, its affiliates, as well as those of "attributable" investors on a cumulative basis. The text that follows discusses what interests are attributable for these purposes. In addition, it sets forth exceptions to these attribution rules for minority and women-owned applicants.

47. Qualified "Small Businesses". As a general rule, the gross revenues of all investors in, and affiliates of, an applicant are counted on a cumulative, fully-diluted basis for

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[82] Ex parte filing of U.S. Small Business Administration, June 24, 1994.

[83] Id.

[84] Comments of SBA Office of Advocacy at 10. Cf. comments of Iowa Network and Telephone Electronics Corporation (advocating a $40 million annual revenue criterion for telephone companies) and reply comments of North American Interactive Partners and Kingwood Associates (advocating $40 million gross-revenue criterion for applicants for the fifty most-populous BTAs, based on estimated average build-out cost).

[85] The establishment of small business size standards is generally governed by Section 3 of the Small Business Act of 1953, as amended, 15 U.S.C. § 642 (a). Recent amendments to that statute provide that small business size standards developed by Federal agencies must be based on the average annual gross revenues of such business over a period of not less than three years. See Pub. L. No. 102-366, Title II, § 222 (a), 106 Stat. 999 (1992); 15 U.S.C. § 632 (a) (2) (B) (ii).

[86] Unlike our proposed eligibility criteria to bid in the entrepreneurs' blocks, described below, the small business definition does not include a total assets standard. We believe that the $40 million gross revenue cap for small businesses should be sufficient to ensure that only bona fide small businesses are able to take advantage of the measures intended for them.

purposes of determining whether the $40 million gross revenue threshold has been exceeded, and on an individual basis regarding the $40 million personal net worth standard.[87] There are two exceptions to this rule, however. First, applicants that meet the definition of a small business may, as discussed below, form consortia of small businesses that, on a aggregate basis, exceed the gross revenue cap. Second, the gross revenues, personal net worth, and affiliations of any investor in the applicant are not considered so long as the investor holds 25 percent or less of the applicant's passive equity. For corporations, we shall use the term passive equity investors to mean investors who hold only non-voting stock or voting stock that includes no more than 15 percent of the voting interests. Where different classes of stock are held, however, the total amount of equity must still be no more than 25 percent to meet this requirement. For partnerships, the term means limited partnership interests that do not have the power to exercise control of the entity.[88] The passive investor exception will be available, however, only so long as the applicant remains under the control of one or more entities or individuals (defined as the "control group") and the control group holds at least 25 percent of the applicant's equity and, in the case of corporate applicants, at least 50.1 percent of the voting stock.[89] In the case of partnership applicants, the control group must hold all the general partnership interests. Winning bidders are required to identify on their long-form applications the identity of the members of this control group and the means of ensuring control (such as a voting trust agreement). The gross revenues of each member of the control group and each member's affiliates will be counted toward the $40 million gross revenues threshold and applicants shall certify that each control group member meets the individual $40 million personal net worth standard, regardless of the size of the member's total interest in the applicant.

48. The attribution levels we have selected here are intended to balance the competing considerations that apply in this particular context and may differ from those we have used in other circumstances. As a general matter, the 25 percent limitation on equity investment interests will serve as a safeguard that the very large entities who are excluded from bidding in these blocks do not, through their investments in qualified firms, circumvent the gross revenue cap. At the same time, it will afford qualified bidders a reasonable measure of

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[87] By "fully-diluted," we mean that agreements such as stock options, warrants and convertible debentures will generally be considered to have a present effect and will be treated as if the rights thereunder already have been fully exercised.

[88] Applicants must be prepared to demonstrate that the limited partners do not have influence over the affairs of the applicant that is inconsistent with their roles as passive investors. For purposes of our rules, we presume that any general partner has the power to control a partnership. Therefore, each general partner in a partnership will be considered part of the partnership's control group.

[89] So long as the applicant remains under the de jure and de facto control of the control group, we shall not bar passive investors from entering into management agreements with applicants.

flexibility in obtaining needed financing from other entities, while ensuring that such entities do not acquire controlling interests in the eligible bidders. Similarly, the 15 percent threshold for attributing revenues of investors with voting stock in corporate applicants is designed to keep ineligible parties from exerting undue influence over eligible firms. For all of these reasons, we also will attribute the gross revenues of entities, or the personal net worth of individuals, that otherwise constitute "affiliates" of the applicant.[90]

49. Qualified Woman and Minority-Owned Small Businesses. The record demonstrates that women and minorities have especially acute problems in obtaining financing, due in part to discriminatory lending practices by private financial institutions. To address these special problems and to afford women and minority-owned small businesses more flexibility in attracting financing, it is necessary to provide these entities with an alternative, somewhat more relaxed option regarding the attribution of revenues of passive investors. Under this alternative standard, we will not attribute to the applicant the gross revenues or net worth of any single investor in a minority or woman-owned small business applicant unless it holds more than 49.9 percent of the passive equity (which is defined to include as much as 15 percent of a corporation's voting stock). To guard against abuses, however, the control group of applicants choosing this option would have to own at least 50.1 percent of the applicant's equity, as well as retain control and hold at least 50.1 percent of the voting stock.[91] Winning bidders must identify on their long-form applications a control group (this time consisting entirely of minorities and/or women or entities 100 percent owned and controlled by minorities and/or women) and the gross revenues and net worth of each member of the control group and each member's affiliates will be counted toward the $40 million gross revenue threshold or the individual $40 million personal net worth limitation, regardless of the size of the member's total interest in the applicant.

50. Relaxing the attribution standard somewhat in determining the eligibility of women and minority-owned companies to bid as small businesses directly addresses what most commenters have stated to be the biggest obstacle to entry for these designated entities: obtaining adequate financing. By this measure, women and minorities who are eligible to bid as small businesses (i.e., who otherwise meet the $40 million gross revenue standard) will be required to maintain control of their companies and, at the same time, will have flexibility to attract significant infusions of capital from a single investor. The requirement that the minority and women principals hold 50.1 percent of the company's equity mitigates substantially the danger that a well-capitalized investor with a substantial ownership stake will be able to assume de facto control of the applicant.

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[90] The definition of an "affiliate" is set forth in subsection 118, infra.

[91] As noted previously, the control group of a partnership applicant must hold all of the general partnership interests.

51. Of course, women and minority-owned firms, like any other small business applicant, may sell a larger portion of their companies' equity, provided that they also abide by the general eligibility requirements for small businesses. Specifically, the gross revenues and net worth of all investors holding more than 25 percent of the company's passive equity (as defined to include 15 percent or more of the voting stock) will be attributed toward the $40 million cap and the $40 million personal net worth standard. In this event, the control group will be required to hold at least 25 percent of the company's equity and 50.1 percent of its voting stock.

52. De Facto Control Issues. We shall codify in our rules a provision explaining more explicitly the term "control," so that applicants will have clear guidance concerning the requirement that a control group maintains de facto as well as de jure control of the firms that are eligible for special treatment under the rules for narrowband PCS. For this purpose, we shall borrow from certain SBA rules that are used to determine when a firm should be deemed an affiliate of a small business. These SBA rules, which are codified in 13 C.F.R. § 121.401, provide several specific examples of instances in which an entity might have control of a firm even though the entity has less than 50 percent of the voting stock of a concern, and thus provide a useful model for our rules. Through reference to circumstances such as those described in the SBA rules, our rules will expressly alert designated entities that control of the applicant through ownership of 50.1 percent of the firm's voting interests may be insufficient to ensure de facto control of the applicant if, for example, the voting stock of the eligible control group is widely dispersed. In those and other circumstances, ownership of 50.1 percent of the voting stock may be insufficient to assure control of the applicant. Of course, apart from these structural issues relative to control, eligible entities must not, during the license term, abandon control of their licenses through any other mechanism. As we stated in the Second Report and Order, designated entities must be prepared to demonstrate that they are in control of the enterprise.[92]

53. In the Second Memorandum Opinion and Order, we concluded that designated entities might be permitted to receive benefits based on their participation in consortium on a service specific basis, but believed generally that such a consortium should not be entitled to qualify for measures designed specifically for designated entities. As a general matter, we shall continue to adhere to that principle. We think, however, that in the narrowband PCS service, allowing small businesses to pool their resources in this manner is necessary to help them overcome capital formation problems and thereby ensure their opportunity to participate in auctions and to become strong narrowband PCS competitors. Because of the exceptionally large capital requirements associated with acquiring a license in this service, we agree with the SBA Chief Counsel for Advocacy that, so long as individual members of the consortium satisfy the definition of a small business, the congressional objective of ensuring opportunities for small businesses will be fully met. Individual small entities that join to form consortia, as

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[92] Second Report and Order at ¶ 278, citing Intermountain Microwave, 24 Rad. Reg. 983, 984 (1963).