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Before the
FEDERAL COMMUNICATIONS COMMISSION FCC 94-285
Washington, D.C. 20554

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

FIFTH MEMORANDUM OPINION AND ORDER

Adopted: November 10, 1994 **Released:** November 23, 1994

By the Commission: Chairman Hundt and Commissioners Barrett and Ness issuing separate statements.

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I. INTRODUCTION

1. By this action, we resolve petitions for reconsideration or clarification of our rules governing competitive bidding for "entrepreneurs' block" licenses in the 2 GHz band Personal Communications Service (broadband PCS).[1] Twenty-six petitions were received, as well as 17 oppositions and 8 replies.[2] Specifically, in this *Fifth Memorandum Opinion and Order*, we resolve issues associated with our entrepreneurs' block rules, as well as other provisions we established to ensure that small businesses, rural telephone companies and businesses owned by minorities and women (collectively termed "designated entities") have meaningful opportunities to participate in the provision of broadband PCS. Our goal in this proceeding is to ensure that designated entities have the opportunity to obtain licenses at auction as well as the opportunity to have meaningful involvement in the management and building of our nation's broadband PCS infrastructure. Thus, as we describe below, we make certain modifications to our rules so that they will better serve these goals.

2. When the new broadband PCS auction rules were adopted in the *Fifth Report and Order*, the Commission declared its intent to meet fully the statutory objective set forth by Congress in Section 309(j) of the Communications Act.[3] In particular, we observed that it was the mandate of Congress that the Commission should "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given an opportunity to participate in the provision of spectrum-based services."[4] We also noted that Congress has directed us to "promote economic opportunity and competition and ensure 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."[5] With these congressional directives in mind, we established the entrepreneurs' blocks and designated entity provisions contained in the *Fifth Report and Order,* which are now under reconsideration.

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[1] The Commission designated frequency blocks C (1895-1910/1975-1990 MHz) and F (1890-1895/1970-1975 MHz) as "entrepreneurs' blocks". *See Fifth Report and Order* in PP Docket No. 93-253, FCC 94-178 (released July 15, 1994), *reprinted at* 59 Fed. Reg. 37,566 (July 22, 1994)(*Fifth Report and Order*). We also address herein petitions for reconsideration or clarification filed in response to the Commission's *Order on Reconsideration*, FCC 94-217 (released August 15, 1994), *summarized*, 59 Fed. Reg. 43,062 (August 22, 1994).

[2] A list of parties filing petitions for reconsideration, oppositions, replies and *ex parte* submissions is contained in Appendix A.

[3] *See* 47 U.S.C. § 309(j).

[4] *See Fifth Report and Order*, FCC 94-178, at ¶ 12. *See also* 47 U.S.C. § 309(j)(4)(D).

[5] *See Fifth Report and Order*, FCC 94-178, at ¶ 9. *See also* 47 U.S.C. § 309(j)(3)(B).

3. Although we wish to "fine-tune" some aspects of our rules, we generally conclude that the "entrepreneurs' block" concept and the special provisions for designated entities adopted in the *Fifth Report and Order* are the most efficient and effective means to fulfill our statutory mandate to provide for a diverse and competitive broadband PCS marketplace. In particular, we have adopted measures to ensure opportunities for meaningful participation by minority and women-owned businesses in the emerging broadband PCS marketplace by providing that such entities are eligible for bidding credits, installment payments, and the benefits of tax certificates, and by adopting eligibility rules that accommodate noncontrolling equity investment.

4. On reconsideration of the *Fifth Report and Order*, we weigh the recommendations of those who have asked us to modify our rules. While we conclude that for the most part our rules will remain unchanged, we find that some rule modifications are necessary to further empower businesses owned by women and minorities and designated entities generally to participate in broadband PCS. Also, our rules need to be clarified in some instances to provide entities wishing to participate in the entrepreneurs' blocks with greater certainty and a better understanding of what is expected of them. In general, our rule changes will grant designated entities, particularly minority and women-owned applicants, additional flexibility in how they raise capital and structure their businesses. Minority-owned applicants, for example, should be able to draw more readily upon the financial resources and expertise of other successful minority business enterprises. Our revised rules seek to accommodate the many existing minority and women-owned firms that want to enter the PCS market, but whose existing corporate structures do not meet the criteria for entry prescribed in the *Fifth Report and Order*. Thus, experienced minority and women entrepreneurs, who are likely to succeed in the broadband PCS marketplace, are not inadvertently barred from participating in the entrepreneurs' block under our new rules. In sum, our revised rules permit entrepreneurs' block applicants to structure themselves in a way that better reflects the realities of raising capital in today's markets, and to obtain the necessary management and technical expertise for their PCS businesses.

5. As we indicated above, a primary objective on reconsideration is to ensure that our rules promote diversity and competition in the PCS marketplace of the future. In this regard, we believe a special effort must be made to enable minority and women-owned enterprises to enter, compete and ultimately succeed in the broadband PCS market. These designated entities face the most formidable barriers to entry, foremost of which is lack of access to capital. In our effort to provide opportunities for minorities and women to participate in PCS via the auctions process, we strive for a careful balance. On one hand, our rules must provide applicants with the flexibility they need to raise capital and structure their businesses to compete once they win licenses. On the other hand, our rules must ensure that control of the broadband PCS applicant, both as a practical and legal matter, as well as a meaningful measure of economic benefit, remain with the designated entities our regulations are intended to benefit.

6. After reviewing the record, we amend or clarify our entrepreneurs' block rules in

several respects.[6] We emphasize that these changes constitute a refinement of our original entrepreneurs' block rules adopted in the *Fifth Report and Order* that will further advance our objectives of promoting competition and diversity in the broadband PCS marketplace. In summary, we have decided to:

- Modify the rules to allow certain noncontrolling investors who do not qualify for the entrepreneurs' block or as small businesses to be investors in an applicant's control group. Allow entities that are controlled by minorities and/or women, but that have investors that are neither minorities nor women, to be part of the control group.

- Retain the requirement that a designated entity's control group own at least 25 percent of the applicant's total equity, but require that only 15 percent be held by controlling members of the control group that are minorities, women or small/entrepreneurial business principals. The composition of the principals of the control group determines whether the applicant qualifies for bidding credits, installment payments and reduced upfront payments. The minimum 15 percent may be held unconditionally, or in the form of options, provided these options are exercisable at any time, solely at the holder's discretion, and at an exercise price less than or equal to the current market valuation of the underlying shares at the time of filing FCC Form 175 (short-form). The remaining 10 percent of the applicant's equity may be held in the form of either stock options or shares, and we will allow certain investors that are not women, minorities or small business/entrepreneurial principals to hold interests in such shares or options that are part of the control group's equity. Thus, the 10 percent portion may be any combination of the following: (1) stock options or shares held by investors in the control group that are women, minorities, small businesses, or entrepreneurs; (2) management stock options or shares held by individuals who are members of an applicant's management team (which could include individuals who are not minorities or women or who have affiliates that exceed the entrepreneurs' blocks or small business size standards); (3) shares or stock options held by existing investors of businesses in the control group that have been operating and earning revenues for two years prior to December 31, 1994; or (4) shares or stock options held by noncontrolling institutional investors. Three years after the date of license grant, the 25 percent minimum equity requirement would be reduced so that the principals in the control group would be required to retain voting control and at least a 10 percent equity interest in the licensee.

- Modify the alternative equity option available to applicants controlled by women and/or minorities (*viz.*, a 50.1 percent equity investment in the applicant with other non-attributable investor(s) holding no more than a 49.9 percent interest) to provide

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[6] Our rule amendments are attached as Appendix B. We delegate to the appropriate Bureau the authority to revise and create forms as needed to ensure that PCS applicants comply with our rules. *See* 47 C.F.R. §§ 0.201-0.204. *See also* 47 U.S.C. § 155(c).

that 30 percent of the applicant's equity must be held by principals of the control group that are minorities or women, and may also be in the form of options as described above. The remaining 20.1 percent may be made up of shares and/or options held by investors that are not minorities or women under the same criteria described above. After three years from the date of license grant, the women and/or minority principals of the control group must hold at least 20 percent of the total equity in the licensee and voting control.

- Amend our rules to provide that when the sole member of the control group is a firm or corporation that was operating and earning revenues for at least two years prior to December 31, 1994, qualifying principals will only be required to own a 10 percent equity interest in the applicant from the outset (or 20 percent if the 49.9 percent investor option available to women and/or minorities is used).

- Exempt applicants that are small, publicly-traded corporations with widely dispersed voting stock ownership from the control group requirement if the company is not controlled by any entity or group of shareholders holding a controlling interest in the company's voting stock. As the applicant, such a company therefore must own all the equity and voting stock to qualify for the exemption. Amend our rule to define a small, publicly-traded corporation with widely dispersed voting power as a business entity in which no person (as defined by the Federal securities laws) (1) owns more than 15 percent of the equity; or (2) has the power to control the election of more than 15 percent of the members of the board of directors.

- Simplify our rules by eliminating (a) the $100 million personal net worth cap for all attributable investors investing in applicants for entrepreneurs' block licenses, and (b) the $40 million dollar personal net worth cap for all attributable investors in an applicant seeking to qualify as a small business.

- Create a limited exception to our affiliation rules that would exclude the gross revenues and assets of affiliates controlled by minority investors or enterprises that are members of the applicant's control group from our financial caps that are the entry criteria for the entrepreneurs' block and are utilized to qualify as a small business. Exempt applicants affiliated with Alaska Native Corporations and Indian tribes from the same financial caps, except create a rebuttable presumption that revenues derived from gaming, pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.*, will be included in determining whether such an applicant qualifies as an "entrepreneur" and as a "small business."

- Clarify that persons or entities that are affiliates of one another or that have an "identity of interests" will be treated as though they were one person or entity and their ownership interests aggregated for purposes of determining compliance with our equity requirements. Thus, for example, if two entities have formed a joint venture or a consortium to apply for PCS licenses in the A and B frequency blocks, they will

be treated as a single entity and their separate interests will be aggregated when investing in the same entrepreneurs' block applicant.

- Define control of the applicant for purposes of entrepreneurs' block licenses by looking at traditional standards for determining *de facto* and *de jure* control and, in addition, provide guidelines for establishing and maintaining *de facto* control.

- Clarify the scope of permissible management agreements between noncontrolling investors (or others) and entrepreneurs' block applicants.

- Clarify that rights of first refusal, supermajority voting rights and other such "standard terms" used to protect investments of noncontrolling shareholders do not individually trigger transfers of control. The Commission will review such provisions in the aggregate, in light of the totality of the circumstances, to determine whether they will be deemed to confer and/or relinquish control. A critical factor in such analysis will be whether the provisions involved vary from the recognized standard under our case law. Under no circumstances may such provisions operate to force the designated entity to transfer its equity or control.

- Amend the attribution rules by raising the amount of voting interest that qualifies as nonattributable from 15 percent to 25 percent. This change allows existing companies with established financial structures the opportunity to compete in the entrepreneurs' blocks, and does not sacrifice the objective of retaining control in the control group (which must still retain at least a 50.1 percent voting interest). Clarify that under our amended rule, the maximum permissible nonattributable ownership interest that a noncontrolling investor may hold is equal to, but no greater than, 25 percent of the total equity of the applicant (which may include no more than 25 percent of the applicant's voting stock).

- Clarify that rights of first refusal will not be considered on a fully-diluted basis for purposes of calculating the ownership levels held by investors in an applicant. Also, stock "puts" exercisable after the expiration of the license holding period are generally not attributable to shareholders holding such options until their exercise date. Stock "calls" held by investors, on the other hand, are immediately attributable holdings.

- Maintain bidding credits at current levels.

- Offer installment payments for all entrepreneurs' blocks licensees, regardless of applicant or BTA size. For companies that are not minority or women-owned and have revenues between $75 million and $125 million, create a new class of installment payments, with slightly less generous terms.

- Extend the period in which small businesses owned by minorities and/or women are

allowed to make interest-only payments from five to six years.

- Clarify that we will permit entrepreneurs' block licensees to transfer entrepreneurs' block licenses after their third year of ownership, to other entrepreneurs' block licensees even if the licensee has grown beyond our size limitations to qualify as an entrepreneur or small business. In years four and five, and subject to applicable unjust enrichment provisions, entrepreneurs' block licensees may transfer licenses to any entity that either holds other entrepreneurs' block licenses or that satisfies the eligibility criteria at the time of transfer.

- Retain the rule that limits the number of entrepreneurs' block licenses any single entity may purchase at 10 percent of the total entrepreneurs' block licenses.

- Clarify the definition of "members of minority groups" to be consistent with the definition of minority used in other contexts.

- Provide guidance on issues associated with an entrepreneurs' block licensee's financial insolvency or in the event of default on installment payments to the Commission.

II. BACKGROUND

7. On August 10, 1993, the Omnibus Budget Reconciliation Act of 1993 (the Budget Act) added Section 309(j) to the Communications Act of 1934, as amended, 47 U.S.C. § 309(j).[7] This section gives the Commission express authority to employ competitive bidding procedures to select among mutually exclusive applications for certain initial licenses. In the *Second Report and Order* in this proceeding, the Commission exercised its authority by determining that broadband PCS licenses should be awarded through competitive bidding and prescribed a broad menu of competitive bidding rules and procedures to be used for all auctionable services.[8] We re-examined certain aspects of these general rules and procedures in the *Second Memorandum Opinion and Order* (released August 15, 1994).[9]

8. In the *Fifth Report and Order*, we established specific competitive bidding rules

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[7] *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002 (a), 107 Stat. 388 (1993).

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

[9] *Second Memorandum Opinion and Order* in PP Docket No. 93-253, FCC 94-215 (released Aug. 15, 1994) (*Second Memorandum Opinion and Order*).

for broadband PCS.[10] We also decided in the *Fifth Report and Order* to conduct three separate auctions for broadband PCS licenses: the first for the 99 available broadband PCS licenses in MTA blocks A and B; the second for the 986 broadband PCS licenses in BTA blocks C and F (the "entrepreneurs' blocks"); and, the third for the remaining 986 broadband PCS licenses in BTA blocks D and E.[11] The rules adopted in the *Fifth Report and Order* address auction methodology, application and payment procedures, and other regulatory safeguards.[12] In addition, we established the entrepreneurs' block licenses to insulate smaller applicants from bidding against very large, well-financed entities.[13] We also supplemented our entrepreneurs' block regulations with other special provisions designed to offer meaningful opportunities for designated entity participation in broadband PCS. In particular, we made bidding credits and installment payment options available to those entrepreneurs and designated entities that, according to the record of this proceeding, have demonstrated historic difficulties accessing capital.[14] Additionally, we extended the benefits of our tax certificate policies to broadband PCS minority and women applicants to promote participation by these designated entities in the service.[15] We also adopted attribution rules that

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[10] The *Third Report and Order* in this docket established competitive bidding rules for narrowband PCS. *See Third Report and Order* in PP Docket No. 93-253, 9 FCC Rcd 2941 (1993), *recon. Third Memorandum Opinion and Order and Further Notice of Proposed Rule Making*, FCC 94-219 (released Aug. 17, 1994). Also, in a recent *Order*, we reconsidered on our own motion several aspects of our narrowband PCS competitive bidding rules. *See Order on Reconsideration* in PP Docket No. 93-253, FCC 94-240 (released Sept. 22, 1994) (*Order on Reconsideration*). The *Fourth Report and Order* in this docket established competitive bidding rules for the Interactive Video and Data Service (IVDS). *See Fourth Report and Order*, 9 FCC Rcd 2330 (1994).

[11] *See Fifth Report and Order*, FCC 94-178, at ¶ 37. When we crafted our broadband PCS licensing rules in Gen. Docket 90-314, we divided the licensed broadband PCS spectrum into three 30 MHz blocks (A, B, and C) and three 10 MHz blocks (D, E, and F). We also designated two different service areas: 493 Basic Trading Areas (BTAs) and 51 Major Trading Areas (MTAs). The 493 BTAs and 51 MTAs used in our broadband PCS licensing rules have been adapted from the Rand McNally 1992 Commercial Atlas and Marketing Guide, 123rd Edition, at 38-39. *See Second Report and Order* in Gen. Docket No. 90-314, 8 FCC Rcd 7700 (1993), *recon. Memorandum Opinion and Order*, 9 FCC Rcd 4957 (1994), *Order on Reconsideration*, 9 FCC Rcd 4441 (1994), *on further recon. Third Memorandum Opinion and Order*, FCC 94-265 (released Oct. 19, 1994).

[12] *Fifth Report and Order*, FCC 94-178, at ¶¶ 24-91.

[13] *Id.* at ¶¶ 113-118.

[14] *Id.* at ¶¶ 130-141.

[15] *Id.* at ¶¶ 142-145.

accommodate passive equity investment in designated entities, but ensure that control of the applicant resides in the intended beneficiaries of the special provisions.[16] Furthermore, we reduced the upfront payment required of bidders in the entrepreneurs' block.[17] Finally, we established partitioning rules to allow rural telephone companies to expedite the availability of offerings in rural areas.[18]

9. After the release of the *Fifth Report and Order*, we adopted on our own motion an *Order on Reconsideration*, which made two changes to our competitive bidding rules for broadband PCS concerning our attribution and affiliation requirements.[19] Specifically, we exempted from entrepreneurs' block affiliation rules, entities owned and controlled by Indian tribes or Alaska Regional or Village Corporations. We also decided to permit nonattributable investors in a corporate applicant to own up to 15 percent of the corporation's voting stock, provided that the applicant's control group retains at least 25 percent of the equity and 50.1 percent of the voting stock. We applied this change to investors in both publicly-traded corporate applicants and applicants that are not publicly-traded. Most recently, however, we adopted a *Fourth Memorandum Opinion and Order* in this docket, in which we addressed issues raised in petitions for reconsideration of the *Fifth Report and Order* that involve our broadband PCS competitive bidding rules governing auction methodology, application and payment procedures, and regulatory safeguards to prevent anticompetitive practices among bidders.[20] In the instant *Fifth Memorandum Opinion and Order*, we resolve remaining matters in the petitions for reconsideration concerning our entrepreneurs' block rules, including our provisions for designated entities.

III. DISCUSSION

A. Concept of Entrepreneurs' Blocks

1. Authority and Amount of Spectrum

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[16] *Id.* at ¶¶ 158-168.

[17] *Id.* at ¶¶ 154-155.

[18] *Id.* at ¶¶ 158-153.

[19] *See Order on Reconsideration*, PP Docket No. 93-253, FCC 94-217 (released Aug. 15, 1994).

[20] *See Fourth Memorandum Opinion and Order* in PP Docket 93-253, FCC 94-246 (released Oct. 19, 1994). On November 17, 1994, we released an*Order*, which modified certain aspects of our stopping and anti-collusion rules, and preserved the right to change the timing of the entrepreneurs' block auctions. *See Memorandum Opinion and Order* in PP Docket No 93-253, FCC 94-295 (released Nov. 17, 1994).

10. Background. In the *Fifth Report and Order*, the Commission designated a portion of the broadband PCS spectrum available at auction for qualified entrepreneurs.[21] Eligible entrepreneurs can bid on BTA licenses in the C (30 MHz) and F (10 MHz) blocks.[22] In addition, entrepreneurs who fall within one of the four statutory "designated entity" categories (*i.e.*, small businesses, rural telephone companies, and businesses owned by members of minority groups and/or women) are eligible for additional benefits to enable them to acquire broadband PCS licenses.[23]

11. Petitions. The Association of Independent Designated Entities (AIDE) contends that the Commission exceeded its statutory authority in establishing the entrepreneurs' blocks because they potentially benefit entities that fall outside of the four designated entity groups enumerated by Congress.[24] AIDE maintains that the entrepreneurs' blocks reduce meaningful opportunities for smaller designated entities to participate in PCS by forcing them to bid against "entrepreneurs" that may not qualify as designated entities. AIDE further argues that the Commission impermissibly restricted the availability of financial incentives to designated entities for use only in Blocks C and F.[25] Instead, AIDE requests that the Commission make its financial incentives for designated entities available for every auctionable broadband PCS license.[26] The United States Interactive & Microwave Television Association and the United States Independent Personal Communication Association (USIMTA/USIPCA) (filing jointly) support the entrepreneurs' block concept, but encourage the Commission to provide additional broadband PCS spectrum exclusively for designated entities.[27] Citing Congress' concern about the historical impediments that small, minority and women-owned businesses have encountered, USIMTA/USIPCA maintain that "it would not be unreasonable" to set

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[21] *Fifth Report and Order*, FCC 94-178 at ¶¶ 118-129. An applicant's eligibility to participate in the entrepreneurs' blocks is based on its size as measured by specified financial caps. *See* discussion *infra* at ¶¶ 17-45.

[22] *Id.* at ¶¶ 121, 127.

[23] *Id.* at ¶¶ 130-155. *See* discussion *infra* at ¶¶ 97-113.

[24] AIDE Petition for Reconsideration (AIDE Petition), filed Aug. 22, 1994, at 13-15. AIDE maintains that small business consortia, passive investors, and entrepreneurs that meet the eligibility restrictions would improperly benefit under the Commission's entrepreneur block scheme.

[25] *Id.* at 16-17.

[26] *Id.* at 17.

[27] United States Interactive & Microwave Television Association and United States Independent Personal Communication Association Petition for Reconsideration (USIMTA/USIPCA Petition), filed Aug. 22, 1994, at 3.

aside up to one-half of the available PCS spectrum.[28] Finally, GTE Service Corporation (GTE) requests the Commission eliminate the entrepreneurs' blocks and instead allow designated entities to "partner" with major investors and be eligible for more generous bidding credits.[29] Additionally, GTE contends that our entrepreneurs' block scheme unduly restricts the ability of cellular carriers to participate in the provision of PCS.[30] Specifically, GTE contends that this scheme, combined with the PCS-cellular crossownership restrictions, will effectively limit eligibility for many cellular operators to 20 MHz of spectrum on the D and E blocks.[31]

12. Decision. Contrary to AIDE's contention, it is within our statutory authority to establish the entrepreneurs' blocks, for which parties other than designated entities are eligible to apply for or invest in, and we believe that this scheme will provide meaningful opportunities for designated entities to participate in the provision of broadband PCS. Accordingly, we will retain the entrepreneurs' block structure set forth in the *Fifth Report and Order*. In establishing a competitive bidding process for the provision of spectrum-based services, Congress gave the Commission broad authority to adopt bidding procedures and policies, so long as certain objectives are fulfilled. Specifically, Congress mandated that the Commission "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."[32] Thus, the language of the statute allows us to consider other entities in order to ensure that licenses are widely dispersed among a variety of licensees,[33] so long as we also, among other statutory objectives, ensure that designated entities are given

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[28] *Id.* at 3-4.

[29] GTE Service Corporation Petition for Reconsideration (GTE Petition), filed Aug. 22, 1994, at 10-11. (Under GTE's proposal, designated entities would be eligible for a sliding scale of bidding credits that corresponds to the level of outside investment in the applicant.)

[30] GTE Petition at 2.

[31] GTE Petition at 4.

[32] *See* 47 U.S.C. § 309(j)(3)(B).

[33] We believe the term "including" used in Section 309(j)(3)(B) of the Communications Act is a term of enlargement, not limitation, intended to convey that other entities are includable together with, rather than excluded from the categories of designated entities so long as legislative intent is satisfied. *See* 2A Sutherland, Statutory Construction § 47.23 (4th ed. 1984).

the opportunity to participate in the provision of broadband PCS.[34]

13. The entrepreneurs' blocks approach adopted in our *Fifth Report and Order* achieves the statute's objectives by creating significant opportunities for designated entities and other entrepreneurs to ensure that licenses are widely disbursed to entities that can rapidly deploy broadband PCS services. As discussed more fully *infra*, we are making additional changes to our rules (including eliminating the personal net worth cap and liberalizing our affiliation rules for individual minority investors) to help designated entities overcome particularly intractable historic difficulties in accessing capital. To satisfy Congress' directive, we established the entrepreneurs' blocks in conjunction with a package of benefits that are narrowly tailored to provide significant opportunities to designated entities and those entrepreneurs that lack access to capital.

14. We disagree with USIMTA/USIPCA who requests that the Commission provide additional spectrum for entrepreneurs' blocks.[35] Our existing allotment, which comprises one-third of the total amount of licensed broadband PCS spectrum, is sufficient to ensure that designated entities and other entrepreneurs have significant opportunities to participate in the PCS marketplace. We therefore deny petitioners' various requests for modification to our entrepreneurs' block provisions.

15. We also reject AIDE's proposal to make bidding credits and other special provisions available to all designated entities bidding on all of the broadband PCS frequency blocks (not just the C and F blocks).[36] Our existing approach of limiting these special provisions to the entrepreneurs' blocks, coupled with changes we are making today are narrowly tailored to meet Congress' objective of ensuring that designated entities have the opportunity to participate in broadband PCS. The record does not support broadening this relief to include additional frequency blocks, nor is there substantial support for broadening the availability of special provisions generally.

16. Similarly, we do not accept GTE's argument that we should do away with the entrepreneurs' blocks and instead offer bidding credits as well as other special provisions across all broadband PCS frequency blocks. As we already explained in the *Fifth Report and Order*, in our judgment we do not anticipate designated entities to realize meaningful opportunities for participation in broadband PCS unless we supplement bidding credits and other special provisions with a limitation on the size of the entities designated entities will

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[34] 47 U.S.C. § 309(j)(4)(D).

[35] USIMTA/USIPCA petition at 3-4.

[36] *See* Omnipoint Communications Inc. Opposition, filed Sept. 9, 1994, at 7-12; Columbia PCS Opposition, filed Sept. 9, 1994, at 2-3; Black Entertainment Television Holdings, Inc. Opposition, filed Sept. 9, 1994, at 7 (opposing GTE's proposal to eliminate entrepreneurs' blocks).

bid against. Without the insulation of the entrepreneurs' block, the record strongly supports the conclusion that measures such as bidding credits will prove ineffective for broadband PCS. We also disagree with GTE's contention that our entrepreneurs' block plan unduly restricts the ability of cellular carriers to provide PCS. We believe that the public interest benefits of establishing an entrepreneurs' block outweigh the need to provide additional opportunities for cellular operators as GTE describes. Moreover, our rules do allow cellular operators such as GTE to take noncontrolling interests in designated entities and gain opportunities in the entrepreneurs' block. We have recently relaxed the cellular-PCS crossownership rules to facilitate such opportunities.[37]

2. Gross Revenues and Other Financial Caps

a. Gross Revenues and Total Assets

17. Background. In the *Fifth Report and Order*, the Commission established eligibility rules for the entrepreneurs' blocks based, in part, on an applicant's gross revenues. To bid in the entrepreneurs' blocks, the applicant, its attributable investors (*i.e.*, members of its control group and investors holding 25 percent or more of the applicant's total equity), and their respective affiliates must cumulatively have gross revenues of less than $125 million in each of the last two years and total assets of less than $500 million at the time the applicant files its Form 175 ("short-form" application).[38] We pointed out in the *Fifth Report and Order* that the $125 million gross revenues limit corresponds roughly to the Commission's definition of a "Tier 2," or medium-sized local exchange carrier (LEC) and would include virtually all of the independently-owned rural telephone companies.[39] Additionally, to qualify for the special provisions accorded small businesses, the applicant (including attributable investors and affiliates), must cumulatively have less than $40 million in gross revenues averaged over the last three years.

18. Petitions. MasTec, Inc. (MasTec) argues that the Commission's gross revenues test is misleading when applied across the board to all applicants because the gross revenues of investors operating in different industries will not convey the same information about size or the ability to attract capital.[40] The Telephone Electronics Corporation (TEC) notes that the discontinuity between gross revenues and the ability to attract capital is particularly acute

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[37] *See Third Memorandum Opinion and Order* in Gen. Docket 90-314, FCC 94-265 (released Oct. 19, 1994), at ¶¶ 33-34.

[38] *Fifth Report and Order*, FCC 94-178 at ¶ 121. *See also* 47 C.F.R. § 24.709(a)(1).

[39] *Fifth Report and Order*, FCC 94-178 at ¶ 123 n. 99. *See also* 47 C.F.R. §§ 32.11 (a), (e) (Tier 2 definition).

[40] MasTec, Incorporated Petition for Reconsideration (MasTec Petition), filed Aug. 22, 1994, at ¶ 7.

where the entity in question is involved in a volume-intensive business with high operating costs and small profit margins (such as TEC's interexchange resale carriers).[41] Accordingly, TEC argues that the Commission's gross revenue criteria are not rationally related to their stated purpose and should be eliminated.[42]

19. Several petitioners request that the Commission modify its gross revenues test, but disagree whether the limits should be liberalized or made more restrictive. For example, MasTec encourages the Commission to modify its designated entity criteria to include those minority businesses which are too small to compete outside of the entrepreneur blocks, but too large to qualify for the entrepreneurs' blocks.[43] The National Paging and Personal Communications Association (NPPCA) and USIMTA/USIPCA urge the Commission to reduce the gross revenues cap.[44] Specifically, NPPCA requests that the Commission reduce the gross revenues limit to $75 million and the total assets limit to $250 million.[45] NPPCA maintains that these modifications are needed because the present size standards encourage mid-sized companies to refrain from bidding in competitively unrestricted auctions and to compete, instead, against designated entities in the entrepreneurs' block auctions.[46]

20. As an alternative to increasing the gross revenues cap, Omnipoint Communications, Inc. (Omnipoint) and the National Association of Black Owned Broadcasters, Inc. (NABOB) argue that the "aggregation rule," under which the Commission will aggregate the gross revenues and total assets of the applicant, attributable investors and all affiliates in order to determine whether the applicant complies with the financial caps,[47] should be eliminated.[48] Omnipoint contends that a "multiplier approach," employed in other areas of Commission practice, should be used to determine compliance with the financial

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[41] Telephone Electronics Corporation Petition for Reconsideration (TEC Petition), filed Aug. 22, 1994, at 18-23.

[42] *Id.*

[43] MasTec Petition at ¶ 6.

[44] National Paging & Personal Communications Association Petition for Reconsideration (NPPCA Petition), filed Aug. 22, 1994, at 6-7; USIMTA/USIPCA Petition at 5-6.

[45] NPPCA Petition at 7.

[46] *Id.*

[47] *Fifth Report and Order*, FCC 94-178 at ¶ 121; *see also id.* at ¶¶ 158-168 (discussing attribution rules for the entrepreneurs' blocks).

[48] NABOB Petition for Reconsideration (NABOB Petition), filed Aug. 15, 1994, at 4-5; Omnipoint Petition for Reconsideration (Omnipoint Petition), filed Aug. 22, 1994, at 6-8.

caps.[49] Under this approach, the revenues and assets attributed to an applicant would be based on the revenues and assets of each attributable investor, multiplied by the percentage ownership interest in the applicant held by that investor.

21. Cellular Telecommunications Industry Association (CTIA) requests that the Commission prescribe specific dates for measuring the financial thresholds to determine entrepreneurs' block eligibility.[50] Specifically, CTIA requests clarification that gross revenues will be measured from the two years preceding September 23, 1993.[51] CTIA maintains that our current rules, referring only to the "last two calendar years," are ambiguous.[52]

22. Black Entertainment Television Holdings, Inc. (BET), Roland A. Hernandez (Hernandez), Columbia PCS, Inc. (Columbia PCS), and Omnipoint all request that we clarify our rules governing growth by entrepreneurs' block licensees and their attributable investors during the five-year holding period.[53] Our rule, promulgated in the *Fifth Report and Order*, states that "[a]ny licensee . . . shall maintain its eligibility [for the entrepreneurs' blocks] until at least five years from the date of initial license grant, except that increased gross revenues, increased total assets or personal net worth due to non-attributable equity investments . . . , debt financing, revenue from operations, business development or expanded service shall not be considered."[54] Petitioners ask us to clarify whether the following types of growth in assets, revenues, or personal net worth would result in a licensee's forfeiture of eligibility: (1) growth of applicant beyond the size limits by means of mergers or takeovers; (2) any control group member's growth beyond the size limits by means of appreciation of attributable investments or growth of attributable businesses; and (3)

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[49] Omnipoint Petition at 7-8.

[50] Cellular Telecommunications Industry Association Petition for Reconsideration (CTIA Petition), filed Aug. 22, 1994, at 10-11.

[51] *Id.* at 6. September 23, 1993 is the date the Commission adopted its broadband PCS service rules order. *See Second Report and Order* in Gen. Docket No. 90-314, 8 FCC Rcd 7700 (1993).

[52] CTIA Petition at 6. *See* 47 C.F.R. § 24.709(a)(1); *Fifth Report and Order*, FCC 94-178 at ¶ 156.

[53] BET Petition for Reconsideration, filed Aug. 22, 1994, at 17 (BET Petition); Hernandez Petition for Reconsideration, filed Aug. 22, 1994, at 4 (Hernandez Petition); Columbia, PCS Petition for Reconsideration, filed Aug. 22, 1994, at 4 (Columbia PCS Petition) (We note that Columbia PCS has changed its corporate name to "GO Communications, Inc."); Omnipoint Petition at 3.

[54] *See* 47 C.F.R. § 24.709(a)(3).

affiliates' or attributable investors' growth beyond the size limits, by means of mergers or takeovers.

23. Decision. We will retain a single gross revenues size standard, which is an established method for determining size eligibility for various kinds of federal programs that aid smaller businesses.[55] We anticipate that applicants will, in many instances, have several investors and that these investors will be drawn from various segments of the economy rather than from a single industry group such as telecommunications. The financial characteristics of these industry groups will vary widely,[56] and keying the size standard to each investor entity in question is thus administratively unworkable. A gross revenues test is a clear measure for determining the size of a business, and will produce the most equitable result for entrepreneurs' block applicants as a whole.

24. We will also retain the existing gross revenues and total assets limits for the entrepreneurs' blocks and for small business size status. We find the arguments of those who oppose any reduction in the gross revenues limit most persuasive.[57] BET, for example, supports the balance it perceives the Commission has struck between small and mid-sized firms by adopting a $125 million gross revenues test. We agree with BET that a decrease in the gross revenue limit would eliminate many mid-sized firms from entrepreneurs' block participation while not substantially raising the level of competition in the blocks. Conversely, an increase in the gross revenue limit would not necessarily provide for greater capital access for applicants. We believe our $125 million gross revenues test represents an appropriate benchmark for entry into the entrepreneurs' block, given our interest in including firms that, while not large in comparison to other telecommunications companies, are likely to have the financial resources to compete against larger competitors on the MTA blocks.

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[55] All federal agencies base eligibility of small businesses (or minority small businesses) to bid on a government contract set aside on the (single) size standard set forth in the solicitation. *See, e.g.,* 13 C.F.R. § 121.902. Eligibility for financial assistance from Small Business Investment Companies sponsored by the Small Business Administration is determined by a single size standard applicable across the board to all applicants or by the size standard applicable to the applicant's primary business activity. *See* 13 C.F.R. § 121.802. Size status for receiving surety guarantees or assistance under SBA's Small Business Innovation Research Program is also determined by a single, applicant-wide size standard. *See* 13 C.F.R. § 121.802(a)(3) and 121.1202, respectively.

[56] The *Standard Industrial Classification Manual*, upon which the Small Business Administration bases its industry size standards, identifies over 800 industry groups to which specific Standard Industrial Classification Codes are assigned. *Standard Industrial Classification Code Manual*, Office of Management and Budget, Executive Office of the President, 1987 ed.

[57] Omnipoint Petition at 6-8; BET Opposition at 17-18.

25. In addition, we will retain the aggregation methodology to assess the size of an applicant, with certain exceptions discussed *infra*. We reject NABOB's proposal to eliminate our aggregation rule and we cannot adopt Omnipoint's proposal to determine entrepreneurs' block eligibility and small business size status by separately evaluating the assets and revenues of each attributable investor. Aggregating the gross revenues and total assets of all attributable investors in and affiliates of the applicant is central to an accurate size determination, and consistent with the Small Business Administration's (SBA's) approach to similar determinations.[58] Viewing gross revenues and assets of each investor in isolation could result in very large entities bidding for these licenses. We reject Omnipoint's suggestion that a multiplier approach be used to make these size determinations. A multiplier is appropriate to arrive at an accurate determination of ownership interest in an applicant or licensee.[59] In this context, however, we are not concerned with ownership, but instead seek to make a financially-based size determination in order to assess whether an applicant is eligible for significant governmental benefits.

26. We agree with CTIA that clarification is required concerning the two-year period in order to provide applicants with a uniform way to measure gross revenues for purposes of qualifying for the entrepreneurs' blocks.[60] For the initial entrepreneurs' block auctions involving broadband PCS, companies should use audited financial statements for each of the two calendar years ending December 31, 1993 or, if audited financial statements are not prepared on a calendar-year basis, data from audited financial statements for their two most recently completed fiscal years. Therefore, if applicants and their investors do not have audited statements ending on December 31, 1993, they will have to use one annual statement ending at a later date (sometime in 1994). This approach will enable the Commission to obtain timely financial data while providing applicants with some degree of flexibility in their financial reporting practices. For subsequent entrepreneurs' block auctions (*i.e.,* license re-auctioning), we will require applicants to use their last two annual audited financial statements to determine compliance with the financial caps. Newly-formed companies should use the audited financial statements of their predecessors in interests, or financial statements current as of the time their short-form application is filed that are certified by the applicant as accurate.

27. Clarification is also needed with respect to the issue of growth and takeovers of an entrepreneurs' block licensee or its investors. We clarify our rules to the extent necessary to indicate what types of growth will jeopardize an applicant's continued eligibility as an entrepreneurs' block licensee during the holding period. A licensee could not maintain its eligibility if a member of its control group were itself taken over, effecting a transfer of control of the licensee during the license holding period. However, an attributable investor

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[58] *Fifth Report and Order*, FCC 94-178, ¶¶ 158, 201-207.

[59] *See, e.g.,* ¶ 71 *infra*.

[60] CTIA Petition at 10. *See also* MasTec Opposition at 16.

would not affect the licensee's continuing eligibility for the entrepreneurs' block if another of the investor's affiliates grew or its investments appreciated during the holding period. Our rules consider such growth either to be revenue from the investor's operations or to be normal business development and, in either case, fully permissible. If an attributable investor is taken over or purchased by another entity, the other entity steps into the shoes of the original investor and its assets and revenues will be considered under the continued eligibility rule. However, if an affiliate of the applicant is taken over by (or sold to) another entity, the other entity's assets and revenues would not be considered, so long as no new affiliation arrangement between the applicant and the other entity is created by the takeover or sale. That is, in most cases, the affiliation with the applicant would be severed by such a takeover and the gain from the sale of the affiliates' assets would have already been taken into account by the initial consideration of such assets at the time of application.[61] We emphasize that we have a strong interest in seeing entrepreneurs grow and succeed in the PCS marketplace. Thus, normal projected growth of gross revenues and assets, or growth such as would occur as a result of a control group member's attributable investments appreciating, or as a result of a licensee acquiring additional licenses (*see* discussion *infra* at paragraph 126 on holding period) would not generally jeopardize continued eligibility as an entrepreneurs' block licensee.

b. Personal Net Worth

28. Background. In addition to the gross revenues and assets caps, the *Fifth Report and Order* also established a personal net worth limit to determine eligibility for bidding in the entrepreneurs' blocks.[62] The current rules require that persons that are applicants, attributable investors in the applicant and all of their respective affiliates who are themselves individuals each have less than $100 million in personal net worth. Additionally, the rules require that if the applicant seeks to qualify as a small business each individual in the control group, attributable investors and all affiliates who are individuals, must have less than $40 million in personal net worth.[63]

29. Petitions. BET requests the Commission relax the personal net worth limits applicable to attributable investors in minority-owned firms.[64] BET argues that eliminating

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[61] Thus, for example, if Applicant A is affiliated with Corporation B and that corporation sells its business to Corporation C, the income derived from the sale would not affect Applicant A's continued eligibility, unless a new affiliation arrangement arises between Applicant A and Corporation C.

[62] See *Fifth Report and Order*, FCC 94-178 at ¶¶ 115; 47 C.F.R. § 24.709(a)(2).

[63] *Id. See also* 47 C.F.R. § 24.720 (defining "small business" for purposes of bidding on the entrepreneurs' blocks).

[64] BET Petition at 16-17.

the personal net worth standard would help ensure participation by minority and women-owned businesses by allowing successful individuals to bring their experience to bear in the PCS marketplace.[65] At the same time, BET argues that this measure would ensure that relatively small, minority and women-owned enterprises have a meaningful opportunity to participate in the provision of PCS.[66] TEC also requests the Commission liberalize its personal net worth standard to permit an attributable individual investor to hold up to $125 million in personal net worth.[67] MasTec claims that net worth/net revenue definitions are overly restrictive and will exclude those minority businesses that can best survive and succeed in the competitive PCS market.[68]

30. Decision. We will eliminate the personal net worth limits (both for the entrepreneurs' blocks and for small business size status) for all applicants, attributable investors, and affiliates. The obstacles faced by minorities and minority-controlled businesses in raising capital are well-documented in this proceeding and are not necessarily confined to minorities with limited personal net worth.[69] Therefore, we agree with the view that the personal net worth requirements should be eliminated in the case of minority-controlled applicants seeking to qualify for entrepreneurs' block licenses. However, rather than eliminate the personal net worth limits for minorities only, we will eliminate the requirement for all applicants because personal net worth limits are difficult to apply and enforce and may be easily manipulated. We do not believe that eliminating the personal net worth limits will facilitate significant encroachment by "deep pockets" that can be accessed by wealthy individuals through affiliated entities because, in those instances where access to such resources would create an unfair advantage, the affiliation rules, discussed *infra*, will continue to apply and require that such an entity's assets and revenues be included in determining an applicant's size. Thus, we emphasize that we believe the affiliation rules make the personal net worth rules largely unnecessary since most wealthy individuals are likely to have their wealth closely tied to ownership of another business.

c. Treatment of Affiliates

31. Background. The *Fifth Report and Order* sets forth specific affiliation rules for identifying all individuals and entities whose gross revenues and assets must be aggregated with those of the applicant in determining whether the applicant exceeds the financial caps

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[65] *See id.*; *see also* BET *ex parte* comments, filed Nov. 3, 1994, at 4.

[66] BET *ex parte* comments, filed Nov. 3, 1994, at 4.

[67] TEC Petition at 23-25.

[68] MasTec Petition at 2.

[69] *See, e.g., Fifth Report and Order,* FCC 94-178 at ¶ 100.

for the entrepreneurs' blocks (or for small business size status).[70] The affiliation rules were adapted from those used by the SBA for purposes of assessing size status and consequent eligibility to participate in SBA's loan, procurement and minority enterprise programs.

32. Specifically, our rules identify which individuals or entities will be found to control or be controlled by the applicant or an attributable investor by specifying which ownership interests or other criteria will give rise to a finding of control and consequent affiliation. In the August 15, 1994 *Order on Reconsideration* (discussed *supra* at paragraph nine), we exempted Indian tribes and Alaska Regional and Village Corporations (hereafter "Indian tribes") from the affiliation rules for purposes of determining eligibility to participate in bidding on the entrepreneurs' blocks.[71]

33. Petitions. BET and others argue that we did not provide adequate notice or opportunity to comment on the possibility of the Commission adopting affiliation rules for all entrepreneurs' block participants (specifically, minorities and women).[72] BET argues that we have thus violated the notice and comment requirements of the Administrative Procedure Act (APA), and that the Commission is required to issue a *Further Notice* prior to adopting the affiliation rules.[73] BET also contends that the affiliation rules add unnecessary complexity to the broadband auction rules and that they make it very difficult, if not impossible, for potential bidders to tailor their pre-existing business relationships and ownership structures to our eligibility requirements.

34. Several parties have filed petitions for reconsideration of our *Order on Reconsideration.*[74] On reconsideration of the *Fifth Report and Order,* several petitioners also

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[70] *Fifth Report and Order*, FCC 94-178 at ¶¶ 201-207.

[71] *Order on Reconsideration*, FCC 94-217 at ¶¶ 3-7. As we indicated in our *Order on Reconsideration,* we apply the term "Indian tribe" as it is statutorily defined in 25 U.S.C. § 450b(e) to include "any Indian tribe, band nation, or other organized groups or community, including any Alaska Native Village or regional corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act, which is recognized as eligible for special programs and services provided by the United States to Indians because of their status as Indians." *Id.* at ¶¶ 4 and n.7.

[72] BET Petition at 19-22. *See also* AIDE Petition at 19-22; Minnesota Equal Access Network Services, Inc. and South Dakota Network, Inc., Comments and Partial Opposition (MEANS/SDN Opposition), filed Sept. 9, 1994, at 10-11.

[73] BET Petition at 20.

[74] *See* BET Petition for Reconsideration of *Order* (filed Sept. 21, 1994); Cook Inlet Region, Inc., Petition for Clarification (Cook Inlet Petition)(filed Aug. 22, 1994). *See also* AIDE Petition for Reconsideration (filed Sept. 21, 1994) (seeking reconsideration of voting

challenge the limited exemption granted to Indian tribes or request that generic exemptions be granted for other applicants.[75] BET and MasTec oppose any special treatment for a particular minority group, arguing that the exemption accorded Indian tribes creates an imbalance of bidding power in favor of tribally-owned entities and will skew the broadband PCS auction results. Cook Inlet Region, Inc. (Cook Inlet) argues that the exemption for Indian tribes should be expanded to encompass eligibility for treatment as a small business for purposes of bidding credits and installment payments because: (1) Indian tribes are congressionally recognized as particularly disadvantaged; (2) such an exemption applies when determining size status for SBA's programs; and, (3) substantial legal constraints with respect to tribal property and businesses preclude their use to raise capital or to cross-subsidize other tribally-owned entities.[76]

35. More specifically, Cook Inlet asserts that Indian tribes and Native corporations deserve special treatment because they face legal constraints that differ from other minority-owned businesses.[77] According to Cook Inlet, Federal law prohibits Native corporations from pledging their stock as collateral for loans, issuing new stock to raise funds in traditional capital markets, or utilizing the majority of the revenues from their land holdings to invest in new enterprises.[78] Thus, Cook Inlet contends that Indian tribes and Native corporations should be exempt from both the affiliation rules and the small business test because Native corporations cannot utilize their assets or revenues to fund new business ventures in the same way other corporations can.[79] In reply, BET asserts that Alaska Regional Corporations still enjoy significantly greater access to capital than other minority-owned entities participating in the bidding for the entrepreneurs' block licenses despite any restrictions they might have on their assets.[80]

36. TEC seeks an exemption from the affiliation rules for rural telephone companies, arguing that regulatory and corporate barriers prohibit small telephone companies like TEC from shifting broadband PCS costs to their affiliated resellers and that courts have found

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equity change in *Order on Reconsideration*); AMP Opposition to Petition for Reconsideration (filed Oct. 17, 1994) (same).

[75] BET Petition at 5-6; MasTec Petition at 7-12.

[76] *See* Cook Inlet Petition at 1-2.

[77] Cook Inlet Opposition to Petition for Reconsideration (Cook Inlet Opposition), filed Oct. 14, 1994, at 1.

[78] *Id.*

[79] *Id.* at 1-2. *See also* Cook Inlet *ex parte* comments, filed Oct. 26, 1994, at 2.

[80] *Id.*

questions of affiliation to be irrelevant where such barriers to cross-subsidization exist.[81] MEANS/SDN suggests a more narrowly tailored exception that would exempt centralized equal access providers (*i.e.*, a consortia of rural telephone companies that provide centralized equal access and other sophisticated information services) from the Commission's affiliation rules.[82] MEANS/SDN argues that this modification would allow the consortia to bring their considerable expertise and efficiencies to bear in the deployment of broadband PCS.[83]

37. Decision. After considering petitioners' various concerns, we will not eliminate the affiliation rules. As explained fully below, however, we create a limited exception to our affiliation rules that will apply when an attributable minority investor or enterprise in an applicant or an applicant's control group has controlling interests in other concerns. We also revise our treatment of Indian tribes under our affiliation rules to more narrowly tailor our application of these rules to the unique status of these minority groups.

38. As an initial matter, we do not believe that promulgation of the affiliation rules violated the notice and comment requirements of the Administrative Procedures Act. Our *Notice of Proposed Rule Making* in this docket[84] alerted petitioners to the fact that the Commission was considering SBA's size standards which, by their terms (as set forth in the *Notice*), incorporate the concept of affiliation in determining a firm's small business size status.[85] The question of affiliation is integral to the concept of size status, by whatever means size status is assessed. Without affiliation rules, large firms may unfairly avail themselves of the preferences intended for small businesses and other designated entities since they have an incentive to create subsidiaries (that would have access to the parent's substantial resources) to compete against *bona fide* applicants in the entrepreneurs' blocks. Adoption of affiliation rules similar to those used by the SBA is a logical outgrowth of the Commission's decision to impose a gross revenues test for small businesses and to consider SBA's size standards in establishing that test.[86] It was reasonable for petitioners to conclude

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[81] TEC Petition at 14-15.

[82] MEANS/SDN Opposition at 5-11.

[83] *Id.*

[84] *See Notice of Proposed Rule Making* in PP Docket No. 93-253, 8 FCC Rcd 7635, 7647 at ¶ 77 and n. 51, 78 (1993) (*Notice*).

[85] *See* 13 C.F.R. 121.802 (a)(2). *See also* 13 C.F.R. § 121.401 (a) (which provides that " . . . size determinations shall include the applicant concern and all its domestic and foreign affiliates). *See also* Cook Inlet Petition at 2.

[86] Rules adopted as a "logical outgrowth" of a *Notice of Proposed Rule Making* satisfy our APA notice requirements. *See Public Service Commission of the District of Columbia v. FCC*, 906 F.2d 713, 717 (D.C. Cir. 1990); *Small Refiner Lead Phase-Down Task Force v.*

that such rules would be applied in assessing eligibility for the entrepreneurs' blocks and for small business size status. Thus, sufficient opportunity to comment was provided on the affiliation rules since they play an integral role in any determination of size status. Moreover, we see no advantage in seeking additional comment on the affiliation rules since petitioners, such as BET, had a full and fair opportunity to suggest modifications to our affiliation rules, some of which we adopt on reconsideration. A *Further Notice* could also substantially delay the auction of entrepreneurs' block licenses.

39. Furthermore, we decline to adopt the suggestion that we eliminate the affiliation rules on the grounds that these rules are unduly complex or overburdensome.[87] Affiliation rules are an established and essential element in determining an applicant's compliance with a gross revenues (or other) size standard. Their use ensures that all financial and other resources available to a company will be considered in assessing its size status. The Commission's affiliation rules, in conjunction with its attribution rules, are intended to include in this calculation: (1) all individuals and entities that directly or indirectly control the applicant, any member of its control group, or any other investor having an attributable interest in the applicant; (2) any other entities also controlled by such individual or entity; (3) all entities over which the applicant has direct control or indirect control through an intermediary; and (4) all other entities over which a member of its control group or any other attributable investor has direct or indirect control. Elimination of the affiliation rules would result in an underassessment of an applicant's size and would present an unrealistic picture of the applicant's need for bidding credits, reduced upfront payments and installment payments.

40. We are persuaded, however, that a limited exception to our affiliation rules is appropriate for minority-owned applicants and applicants owned by a combination of minorities and women.[88] The exception will apply to affiliates controlled by investors who are members of minority groups who are attributable members of an applicant's control group. Under the exception, the gross revenues and assets of affiliates that the minority investor controls will not be counted in determining the applicant's compliance with the financial caps, both for purposes of the entry into the entrepreneurs' block and for purposes of the applicant qualifying as a small business.

41. This exception will permit minority investors that control other concerns to be

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EPA, 705 F.2d 506, 547 (D.C. Cir. 1983). An agency must be free to adopt a final rule not described exactly in the *Notice*, where the difference involved is "sufficiently minor," otherwise, agencies could not change a rule in response to valid comments without beginning the rulemaking anew. *See National Cable Television Assoc., Inc. v. FCC*, 747 F.2d 1503, 1507 (D.C. Cir. 1984).

[87] Omnipoint Petition at 17; BET Petition at 21; Mankato Citizens Telephone Company Opposition (Mankato Opposition), 2-3.

[88] MasTec Petition at 7; BET Petition at 5-6.

members of an applicant's control group and to bring their management skills and financial resources to bear in its operation without the assets and revenues of those other concerns being counted as part of the applicant's total assets and revenues. By making such an exception, we further our goal of addressing traditional problems minorities have of accessing capital. As we documented in the *Fifth Report & Order*, minorities have faced and continue to face unique barriers to capital from traditional, non-minority sources.[89] To raise capital for a new business venture, therefore, minorities need the ability to draw upon the financial strength and business experience of successful minorities and minority-owned businesses within their own communities; they may not have access to any other source of funds on which to draw.[90] Moreover, this exception permits minority applicants to pool their resources with other minority-owned businesses and draw on the expertise of those who have faced similar barriers to raising capital in the past.[91] We therefore conclude that further tailoring of our affiliation rules to the specific capital formation problems of minorities is necessary to avoid eliminating a traditional source of capital for minority businesses -- the

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[89] *Fifth Report and Order*, FCC 94-178 at ¶¶ 98 - 100.

[90] *Id.* at ¶ 100 ("African American business borrowers have difficulty raising capital mainly because they have less equity to invest, they receive fewer loan dollars per dollar of equity investment, and they are less likely to have alternate loan sources . . .")(citing Testimony of Dr. Timothy Bates, Visiting Fellow, The Woodrow Wilson Center, before the U.S. House of Representatives, Committee on Small Business, Subcommittee on Minority Enterprise, Finance, and Urban Development, May 20, 1994).

[91] *See, e.g.*, Ellis, B., "Black Community Needs to Focus on Capital Formation," *The Philadelphia Tribune*, May 20, 1994, at 6A ("[R]ecent immigrants (in the African-American community) have utilized family and friends as a means of pooling their savings, -- *i.e.*, to form capital); Lee, E., "Korean American Grocers All Over the Country Hit Hard By Recession and Crime," *AsianWeek*, Dec. 17, 1993, Vol. 15, No. 17 at 1 ("[F]amily members often employed [in Korean-owned businesses] and informal Korean credit organizations give many business owners their starts . . . ."); Lesly, E., and Mallory, M., "Inside the Black Business Network," *Business Week*, Nov. 29, 1993, at 70 ("African Americans are forming pools of capital and new opportunities that are helping to overcome traditional barriers to success."); Miller, Y., "Improvements Seen in Minority Business Loans," *Bay State Banner*, Nov. 21, 1993, Vol. 29, No. 14, at 1 ("Many entrepreneurs in the minority community have their business cash flow tied up in their personal assets and expenses . . . ."); Stone, S., "Why Can't We All Get Along? Many Blacks, Koreans Find Understanding," *The Philadelphia Tribune*, Nov. 23, 1993, Vol. 110, No. 100 at 1a ("Koreans don't usually go to banks....What they have done is form their own [credit] pools . . . . Chinese-Americans also have lending pools; many Jamaicans have the same thing."); Wynter, L., "Understanding Capital is Key to Getting It," *Emerge*, Aug. 31, 1993, Vol. 9, No. 4, at 22 (minority venture capital firm finances several black-owned firms including Essence Communications and Earl G. Graves, Ltd).

minority community itself. We note that this exception applies only to affiliates controlled by minority investors in the applicant or members of the applicant's control group. The exception does not apply to affiliates of such investors or businesses that control the applicant or that have an attributable interest in the applicant. Thus, a minority-owned firm that exceeds the financial caps would not be able to create a subsidiary to participate in a PCS applicant's control group.[92]

42. As we established in our *Order on Reconsideration*, we treat Indian tribes differently under our affiliation rules for purposes of our entrepreneurs' block financial caps because of their unique legal status.[93] Specifically, we exclude the gross revenues and total assets of Indian tribes in our calculations for purposes of determining whether an affiliated applicant satisfies our entrepreneurs' block financial caps.[94] After considering the arguments of petitioners, we also will exclude generally the revenues of Indian tribes in our calculations for purposes of determining small business eligibility.[95]

43. In response to MasTec's and BET's concerns about special treatment for a particular minority group, we clarify that we exempt Indian tribes generally from our affiliation rules because Congress has imposed unique legal constraints on the way they can utilize their revenues and assets.[96] Cook Inlet contends that, while other minority-owned businesses can issue debt and equity securities and pledge their assets and securities to raise capital, the real and personal property interests held by Alaska Native Corporations are subject to a number of constraints -- both legal and cultural -- that affect their ability to manage and dispose of property.[97] For example, under the Alaska Native Claims Settlement Act, 43 U.C.S § 1601 *et seq.*, the stock held by Native corporations is subject to strict

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[92] For example, if M, an attributable minority investor in the applicant, controls Corporation C with assets of $500 million, but Corporation C does not control applicant A and is not an attributable investor in Applicant A, the assets and revenues of Corporation C will not be counted in assessing A's compliance with the financial caps for either the entrepreneurs' blocks or small business size status. On the other hand, if M Corporation, a minority-owned company with an attributable interest in Applicant A, is controlled by Corporation C in the above example, or is under common control with Corporation C, the assets and revenues of M Corporation's affiliates are attributable.

[93] *Order on Reconsideration*, FCC 94-217 at ¶ 1.

[94] *Id.*

[95] Cook Inlet Petition at 1-3; BET Opposition at 5-6.

[96] *See* MasTec Petition at 7-12; BET Petition at 5-6; BET Petition for Reconsideration of *Order* at 3-4.

[97] Cook Inlet Opposition at 1-2.