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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	)	PP Docket No. 93-253
	)	
Amendment of the Commission's Cellular PCS Cross-Ownership Rule	)	GN Docket No. 90-314
	)	
Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services	)	GN Docket No. 93-252
	)	

FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: June 23, 1995 **Released:** June 23, 1995

Comment Date: July 7, 1995

By the Commission: Commissioner Barrett issuing a statement later.

Introduction

1. In this *Further Notice of Proposed Rule Making*, we propose measures to address legal uncertainties raised by the Supreme Court's recent decision in *Adarand Constructors, Inc. v. Peña*.[1] In proposing these measures, we are mindful of the Commission's obligation and commitment to ensure that the designated entities[2] are afforded opportunities to participate in the provision of spectrum-based services. We are committed to this goal.

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[1]63 U.S.L.W. 4523 (U.S. June 12, 1995).

[2]The term "designated entities," as used herein refers to small business, rural telephone companies, and businesses owned by minorities or women. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(a), 107 Stat. 312, 388 (1993) (Budget Act).

Based on the unique circumstances of the auction for licenses in the "C block"[3] of Personal Communications Services in the 2 GHz band ("broadband PCS"), particularly the timing of the Supreme Court's decision in *Adarand*,[4] we believe that our proposal to avoid further delay and legal uncertainty concerning the C block auction is the best means of providing opportunities for businesses owned by minorities[5] and women, many of whom have made preparations to bid in the C block auction. We emphasize, however, that our proposal is limited to the rules governing eligibility to participate in the C block auction.[6] We also emphasize that our tentative conclusion to eliminate race- and gender-based measures does not indicate that we have concluded that race- or gender-based measures are inappropriate for future spectrum auctions.

2. For purposes of the C block auction only, we propose to eliminate all race- and gender-based provisions contained in our competitive bidding rules applicable to such licenses in order to avoid delay caused by the legal challenges to our existing rules that would likely result from the Supreme Court's ruling in *Adarand*. It is our belief that such delay will significantly impede the C block auction and the expeditious dissemination of broadband PCS licenses to entrepreneurs,[7] including businesses owned by minorities and women. In addition, we propose to treat women and minorities similarly in light of the stay granted Telephone Electronics Corp. (TEC), which implicated both gender and minority provisions in our rules. We are concerned that gender-based provisions could similarly result in legal challenges and delays to the C block auction. As described below, we intend to make rule changes that are the least disruptive to bidders who were in an advanced stage

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[3]The Commission allocated six broadband PCS frequency blocks for auctioning. Specifically, these are designated as the A and B blocks (consisting of 102 30 MHz Major Trading Area (MTA) licenses); the C and F blocks (consisting of 493 30 MHz Basic Trading Area (BTA) licenses and 493 10 MHz BTA licenses); and the D and E blocks (consisting of 986 10 MHz BTA licenses). The Commission recently completed its auction of the 99 A and B block licenses. *See* Public Notice, "Announcing the Winning Bidders in the FCC's Auction of 99 Licenses to Provide Broadband PCS in Major Trading Areas; Down Payments Due March 20, 1995," March 13, 1995. The auctioning of the 493 C block licenses as announced in a public notice released in tandem with this *Further Notice of Proposed Rule Making* is scheduled to begin August 29, 1995. *See* Public Notice, "FCC Sets August 29th Auction Date for 493 BTA Licenses Located in the C Block for Personal Communications Services in the 2 GHz Band, June 23, 1995."

[4]Notably, the *Adarand* decision was announced on June 12, 1995, three days before the filing deadline for short-form applications (Form 175) for the C block auctions.

[5]Under our C block competitive bidding rules, the term "minorities" includes Blacks, Hispanics, American Indians, Alaskan Natives, Asians, and Pacific Islanders. *See* 47 CFR 24.720(i).

[6]Aside from the C block auction, we anticipate that parties interested in other spectrum auctions will have additional opportunities to comment at a future date.

[7]The term "entrepreneurs," as used herein, refers to applicants in the C block that 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 FCC Form 175 is filed. *See* 47 CFR 24.709(a).

of planning to participate in the C block auction at the time the *Adarand* decision was handed down. We intend to make such changes swiftly, in order to minimize the effect of the modified rules on existing business relationships formed in anticipation of the C block auction.[8] Moreover, in order to facilitate swift action on our rule changes, comments are due July 7, 1995, and we are not requesting reply comments.

3. Accordingly, we tentatively conclude that our broadband PCS rules for the C block auction should be modified as follows:

- Amend Section 24.709 of the Commission's Rules to make the 50.1/49.9 percent "control group" equity structure available to all entrepreneurs' block applicants, and not solely businesses owned by women or minorities.

- Amend Section 24.720 of the Commission's Rules to eliminate the exception to the affiliation rules that excludes the gross revenues and total assets of affiliates controlled by minority investors who are members of an applicant's control group.

- Amend Section 24.711 of the Commission's Rules to provide for three installment payment plans for entrepreneurs' block applicants that are based solely on financial size. In particular, the small business installment payment plan would reflect the terms previously available to minority- or women-owned small businesses.

- Amend Section 24.712 of the Commission's Rules to provide for a 25 percent bidding credit for small businesses only.

- Amend Section 24.204 of the Commission's Rules to make the 40 percent cellular attribution threshold applicable only to ownership interests held by small businesses and rural telephone companies, or to ownership interests held by investors in broadband PCS applicants/licensees that are small businesses.

- Amend Section 20.6 of the Commission's Rules to make the 40 percent attribution threshold applicable only to ownership interests held by small businesses and rural

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[8]The Commission has received numerous letters urging it to go forward with the C block auction as expeditiously as possible. *See, e.g.*, Letter from Sandra Goeken Martis, Wireless Works, Inc., to Cathy Sandoval, Office of Communications Business Opportunities, Federal Communications Commission (FCC) (June 16, 1995); Letter from Michael Walker, Executive Director, National Paging and Personal Communications Association, to Reed Hundt, Chairman, FCC (June 16, 1995); Letter from Jonathan Chambers, Director, Public Policy, Sprint Telecommunications Venture, to Reed E. Hundt, Chairman, FCC (June 19, 1995); Letter from Roy M. Huhndorf, President, Cook Inlet Region, Inc. to Reed E. Hundt, Chairman, FCC (June 14, 1995); Letter from Eliot J. Greenwald and Howard C. Griboff, attorneys with Fisher, Wayland, Cooper, Leader & Zaragoza L.L.P, representing Central Alabama Partnership L.P. 132 and Mobile Tri-States L.P. 130, to William F. Caton, Acting Secretary, FCC (June 16, 1995).

telephone companies.[9]

Background

4. In the Omnibus Budget Reconciliation Act of 1993,[10] Congress authorized the FCC to award licenses by competitive bidding for certain spectrum-based services.[11] In authorizing the use of auctions, Congress directed the Commission to "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women [collectively known as "designated entities"] are given the opportunity to participate in the provision of spectrum-based services."[12] In response to many comments recommending how we should implement Congress's mandate and providing data explaining special problems faced by the designated entities, we adopted several rules designed to encourage the participation of designated entities, including women and minorities, in broadband PCS by addressing the difficulties these groups experience in accessing capital.[13] We determined that these special provisions for minorities and women are constitutional under the "intermediate scrutiny" standard of review articulated in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 564-565 (1990).[14] In conjunction with these special provisions, we also established "entrepreneurs' blocks" (the C and F frequency Blocks allocated for broadband PCS) which require bidders to satisfy a financial cap to be eligible to bid on licenses in these blocks.[15]

5. On March 15, 1995, in response to a request filed by TEC alleging that our rules violated equal protection principles under the Constitution, the U.S. Court of Appeals for the

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[9]The proposed rule changes are attached as Appendix A.

[10]Budget Act, Pub. L. No. 103-66, Title VI, § 6002(b), 107 Stat. 312 (1993).

[11]Budget Act, Pub. L. 103-66, Title VI, § 6002(a), 107 Stat. at 388.

[12]47 U.S.C. § 309(j)(4)(D).

[13]*See Fifth Report and Order*, PP Docket 93-253, 9 FCC Rcd 5532 (1994) (*Fifth R&O*), *recon. Fifth Memorandum Opinion and Order*, 10 FCC Rcd 403 (1994) (*Fifth MO&O*).

[14]*See Fifth R&O*, 9 FCC Rcd 5532, 5537 at ¶ 9. In *Metro Broadcasting*, the Supreme Court ruled that the Commission's minority preference program for mutually exclusive applications for licenses for new radio or television broadcast stations and its distress sale program did not violate the equal protection component of the Fifth Amendment. The Court held that Congressionally mandated minority programs (even if not remedial in the sense of being designed to compensate victims of past governmental or societal discrimination) "are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives." *Metro Broadcasting v. FCC*, 497 U.S. at 565.

[15]47 CFR § 24.709(a).

District of Columbia Circuit issued an *Order* stating that "those portions" of the Commission's *Order* "establishing minority and gender preferences, the C block auction employing those preferences, and the application process for that auction shall be stayed pending completion of judicial review."[16] The court explained that TEC had "demonstrated the requisite likelihood of success on the merits."[17] The stay, however, was subsequently lifted on May 1, 1995, on TEC's motion, after TEC decided to withdraw its lawsuit.[18] On June 12, 1995, the Supreme Court decided in *Adarand* to overrule *Metro Broadcasting* "to the extent that *Metro Broadcasting* is inconsistent with" *Adarand*'s holding that "all racial classifications . . . must be analyzed by a reviewing court under strict scrutiny."[19] The Court ruled that any federal program that makes distinctions on the basis of race must serve a compelling governmental interest and must be narrowly tailored to serve that interest.[20]

6. The holding in *Adarand* potentially affects four race- or gender-based measures in our C block auction rules.[21] The purpose of these provisions was to address the lack of access to capital problem that our record showed women and minorities face.[22] The first such provision enables businesses owned by women or minorities to hold 50.1 percent of an applicant's equity while another investor holds 49.9 percent of the equity.[23] Second, under an exception to our affiliation rules, the gross revenues and total assets of firms controlled by minority investors in the applicant are not included for purposes of determining eligibility for the C block.[24] Third, small businesses and companies owned by minorities or women receive the most favorable installment payment options available to entrepreneurs' block applicants.[25] Finally, businesses owned by minorities or women and small businesses owned

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[16]*Telephone Electronics Corp. v. FCC*, No. 95-1015 (D.C. Cir. Mar. 15, 1995) (order granting stay).

[17]*Id.* at 2.

[18]*Telephone Electronics Corp. v. FCC*, No. 95-1015 (D.C. Cir. May 1, 1995) (order granting dismissal of petition for review).

[19]*Adarand*, 63 U.S.L.W. at 4530.

[20]*Id.* at 4533.

[21]In the *Fifth R&O*, we also adopted a tax certificate program for minority and women-owned businesses under 26 U.S.C. § 1071. 9 FCC Rcd at 5580, ¶ 113. Congress subsequently repealed Section 1071. H.R. 831, 104th Cong. 1st Sess. § 2. As a result of this action by Congress, we are compelled to eliminate the specific tax certificate provision in our broadband PCS rules, 47 CFR § 24.713, as indicated in Appendix A.

[22]*See Fifth R&O*, 9 FCC Rcd at 5537-5538, 5580, ¶¶ 10-13, 113.

[23]47 CFR § 24.709(b)(6).

[24]47 CFR § 24.720(l)(11)(ii).

[25]47 CFR § 24.711.

by minorities or women receive larger bidding credits under our rules.[26] The *Adarand* holding also potentially affects our commercial mobile radio service (CMRS) spectrum aggregation limit and cellular PCS cross-ownership rules under which ownership interests held by businesses owned by minorities and women, as well as small businesses and rural telephone companies, are subject to a higher attribution threshold.[27] In addition, under our cellular PCS cross-ownership rule, entities that invest in broadband PCS licensees that are minority- or women-owned can benefit from a higher attribution threshold.

Overview

7. While we stress our continued commitment to the goal of ensuring broad participation in PCS by minority- and women-owned businesses, *Adarand* requires that we reevaluate our method for accomplishing this compelling objective. *Adarand*, which was issued just three days before applications were due for participation in the C block, imposes a strict scrutiny standard, the highest, most searching level of judicial review, for evaluating the provisions to encourage minority participation in PCS. That standard requires us to show a "compelling governmental interest" for taking race into account.[28] Under *Adarand*, the agency must show that it considered "race-neutral alternatives" and that the program is "narrowly tailored" to meet the compelling governmental interest established by the record and findings.[29]

8. While we believe that our current record for the C block auction is strong, we tentatively conclude that additional evidence would be required to meet the strict scrutiny standard. The time required for further fact-finding would necessitate a delay in holding the C block auction. We tentatively conclude that such a delay would put the C block winners at a greater competitive disadvantage vis-a-vis existing wireless carriers such as cellular and enhanced SMR carriers, who have a substantial head start in the market.[30] Additionally, we believe there is a high likelihood that before the auction, legal challenges would be filed to question whether we have met the strict scrutiny standard. Given the D.C. Circuit's

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[26]47 CFR § 24.712.

[27]47 CFR §§ 20.6 and 24.204.

[28]*Adarand*, 63 U.S.L.W. at 4530.

[29]*Id.*

[30]Cellular operators, for example, have been in the wireless market for over a decade, and after a very slow rise through the 1980's and into the 1990's, sales have risen very quickly and cellular operators are currently enrolling about 28,000 new customers per day. *See* United States Department of Commerce, National Telecommunications and Information Administration, May 30, 1995 at 2.

willingness to stay the auctions under an "intermediate scrutiny standard,"[31] there is a high likelihood that the court might impose another stay under the strict scrutiny standard of review. A stay would prevent the auction from going forward during litigation and cause lengthy delays in licensing and time to market for the eventual winners. Even if the auction were not stayed beforehand, there is a high likelihood that minority applicants and possibly female applicants who elected the bidding credits and other provisions available to members of those groups, would be subject to petitions to deny their licenses, legal challenges and possible injunctions on the issuance of their licenses. This would again greatly delay their entry into the market, and diminish their ability to compete.

9. Based on the letters we have received from potential bidders, many of whom have made extensive preparations to bid in the C block auction, we conclude that at this time, minority and women bidders, as well as other bidders, will have a better chance of becoming successful PCS providers if we eliminate the race- and gender-based provisions from the C block and adopt provisions based on economic size only. The likely delays in market entry from doing otherwise would thwart Congress's directive to disseminate PCS licenses quickly so competitive service to the public can begin forthwith. Because of the urgent situation posed by the need to auction these licenses in a speedy fashion so the businesses can get to market, we reluctantly conclude that we must drop the race- and gender-based provisions and adopt standards based solely on economic size.

10. We propose to eliminate the race- and gender-based provisions in our rules in a manner that is the least disruptive to bidders preparing to bid in the C block auction. We recognize that many of the C block applicants, including minority- and women-owned businesses, as well as small businesses, have already attracted capital and formed business relationships in anticipation of the C block auction. We further understand that these relationships are more likely to survive if the auction is not significantly delayed, and our rule changes are minimally disruptive to existing business plans. We have received numerous informal comments expressing this point of view.[32] We believe, therefore, it is in the best interests of furthering competition and ownership diversity in the marketplace, that we eliminate as much legal uncertainty as possible and proceed rapidly to auction the C block licenses.

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[31] *Telephone Electronics Corp. v. FCC*, No. 95-1015 (order granting stay).

[32] *See, e.g.*, Letter from Eliot J. Greenwald and Howard C. Griboff, attorneys with Fisher, Wayland, Cooper, Leader & Zaragoza L.L.P, representing Central Alabama Partnership L.P. 132 and Mobile Tri-States L.P. 130, to William F. Caton, Acting Secretary, FCC (June 16, 1995); Letter from Michael Walker, Executive Director, National Paging and Personal Communications Association, to Reed Hundt, Chairman, FCC (June 16, 1995); Letter from Sandra Goeken Martis, Wireless Works, Inc., to Cathy Sandoval, Office of Communications Business Opportunities, FCC (June 16, 1995); Letter from Jonathan Chambers, Director, Public Policy, Sprint Telecommunications Venture, to Reed E. Hundt, Chairman, FCC (June 19, 1995); Letter from Roy M. Huhndorf, President, Cook Inlet Region, Inc. to Reed E. Hundt, Chairman, FCC (June 14, 1995).

11. We want to emphasize that our tentative conclusion to eliminate race- and gender-based measures from the C block auction rules does not indicate that we have concluded that race- or gender-based measures are inappropriate for any of the other spectrum auctions we will hold in the future. Moreover, we do not concede that our C block auction rules themselves are unconstitutional in the wake of *Adarand*. We simply believe that our program must now be evaluated under a stricter constitutional standard than it was before. With regard to the C block auction, we tentatively conclude that we are better served moving forward quickly than by attempting to develop an extensive supplemental record for these rules that could take a significant amount of time.[33] We seek comment on this tentative conclusion, and in particular, request information on the time needed to develop a study to support race-based measures and the scope of such a supplemental record. We conclude that our proposal to eliminate the race- and gender-based measures from the C block auction rules is consistent with our duty to implement the Budget Act.[34] We also seek comment on whether there are other ways to modify the rules to comply with the strict scrutiny standard without significantly delaying the C block auction.[35]

12. Finally, we note that nothing in the TEC stay order or the *Adarand* decision calls into question the concept of an entrepreneurs' block. The D.C. Circuit singled out "those portions" of the Commission's Orders "establishing minority and gender preferences," not our rules designed to promote participation by small businesses.[36] Similarly, in *Adarand* the Court held that a strict scrutiny standard of review applies to preferences based on race, not size.[37] Thus, attempts to ensure that small businesses have the opportunity to compete with larger businesses are still judged under the deferential rational basis standard. Indeed, the entrepreneurs' block concept is bolstered by *Adarand* insofar as that decision requires the consideration of race-neutral measures to promote equal opportunity.[38] Our record in the competitive bidding proceeding suggests that many minority and women bidders will qualify

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[33]With respect to other auctions, however, we may develop a supplemental record as part of our evaluation to meet the strict scrutiny standard of *Adarand*.

[34]*See, e.g., Second Report and Order and Second Further Notice of Proposed Rule Making*, PR Docket No. 89-553, 60 Fed. Reg. 21987 (1995) (*900 MHz SMR Second R&O/Second FNPRM*).

[35]*See eg.*, Letter from Thomas A. Hart, Jr. National Paging and Personal Communications Assoc., et. al. to William E. Kennard, General Counsel, FCC (June 22, 1995); Letter from David Honig, Executive Director, Minority Media and Telecommunications Council to William E. Kennard, General Counsel, FCC (June 21, 1995); Letter from James L. Winston, Executive Director and General Counsel, National Association of Black Owned Broadcasters, and Lois E. Wright, Vice President and Corporate Counsel Inner City Broadcasting Corp., to Reed E. Hundt, Chairman, FCC (June 15, 1995).

[36]*Telephone Electronics Corp. v. FCC*, No. 95-1015 (order granting stay).

[37]*Adarand*, 63 U.S.L.W. at 4526.

[38]*See Adarand, Id.* at 4533, quoting *Croson*, 488 U.S. at 507 (under strict scrutiny, courts ask "whether there was 'any consideration of the use of race-neutral means to increase minority business participation.'")

as small businesses under our rules,[39] and, hence, be entitled to a small business bidding credit and favorable installment payment terms.[40] In any event, very few businesses owned by minorities and women are excluded from the entrepreneurs' block under our $125 million gross revenue and $500 million total asset caps.

Proposed Rule Changes

A. Control Group Equity Structures

13. Background. Our current rules permit broadband PCS applicants for licenses in the C block to utilize one of two equity structures so that the gross revenues and total assets of persons or entities holding non-attributable interests in such applicants will not be considered.[41] Use of either of these equity structures, however, requires applicants to form a "control group."[42] Under the first equity structure option, the *Control Group Minimum 25 Percent Equity Option* (which is available to all applicants), the control group must hold at least 25 percent of the applicant's total equity and members of the control group must have *de facto* control of the control group and of the applicant, and hold at least 50.1 percent of the voting stock and all general partnership interests within the control group.[43] Of that 25 percent equity, at least 15 percent must be held by "qualifying investors."[44] The remaining ten percent may be held by qualifying investors, certain institutional investors, non-controlling existing investors in any preexisting entity that is a member of the control

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[39]*See, e.g., 900 MHz SMR Second R&O/Second FNPRM*, 60 Fed. Reg. 21987 (indicating that "U.S. Census Data shows that approximately 99% of all women-owned businesses and 99% of all minority-owned businesses generated net receipts of $1 million or less", citing *Women-Owned Business*, WB 87-1, 1987 Economic Census, p. 144, Table8; *Survey of Minority-Owned Business Enterprises*, MB 87-4, 1987 Economic Census, pp. 81-82, Table 8).

[40]47 CFR §§ 24.712 and 24.711.

[41]*See* 47 CFR § 24.709(b)(5) and (b)(6).

[42]Under the control group mechanism, the gross revenues and total assets of certain investors are not attributed provided the applicant has a control group consisting of one or more individuals or entities that are in *de jure* and *de facto* control of the applicant. The gross revenues and total assets of each member of the control group are counted toward the financial caps applicable to the entrepreneurs' block licenses. *See* 47 CFR § 24.720(k).

[43]47 CFR §24.709(b)(5)(i).

[44]*Id.* Under our rules, "qualifying investors" are defined as members of or holders of an interest in members of the applicant's or licensee's control group whose gross revenues and total assets, when aggregated with those of all other attributable investors and affiliates, do not exceed the gross revenues and total assets restrictions specified in our rules with regard to eligibility for entrepreneurs' block licenses. 47 CFR § 24.720(n)(1).

group, or individuals that are members of the applicant's management team.[45] Outside of the control group, the remaining 75 percent of the applicant's equity may be held by other non-controlling investors; but, no investor in the applicant can hold more than 25 percent of the equity and remain non-attributable.[46]

14. Under the second equity structure option, the *Control Group Minimum 50.1 Percent Equity Option* (which is currently available only to minority or women applicants), the control group must own at least 50.1 percent of the applicant's total equity, with members of the control group holding 50.1 percent of the voting stock and all general partnership interests within the control group, and having *de facto* control of both the control group and the applicant.[47] Of that 50.1 percent equity, at least 30 percent must be held by qualifying investors who are minority or women.[48] The remaining 20.1 percent may be held by qualifying investors, certain institutional investors, non-controlling existing investors in any preexisting entity that is a member of the control group, or individuals that are members of the applicant's management team.[49] Outside of the control group, the remaining 49.9 percent of the applicant's equity may be held by a single non-controlling investor who is considered non-attributable.[50]

15. Discussion. We propose to modify our rules to permit all C block applicants to avail themselves of the 50.1/49.9 percent equity structure. When we adopted the *Control Group Minimum 50.1 Percent Equity Option* in the *Fifth R&O*, we determined that making such a mechanism available to minority- or women-owned businesses would better enable them to attract adequate financing. We have previously noted that the primary impediment to participation by businesses owned by women and minorities in broadband PCS is a lack of access to capital.[51] In light of the Supreme Court's holding in *Adarand*, however, we propose to make the *Control Group Minimum 50.1 Percent Equity Option* available to small businesses[52] and entrepreneurs rather than limiting it to minority- or women-owned businesses. We tentatively conclude that this proposed rule change would cause the least

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[45]47 CFR § 24.709(b)(5)(i)(C).

[46]47 CFR § 24.709(b)(3).

[47]47 CFR § 24.709(b)(6)(i).

[48]47 CFR § 24.709(b)(6)(i)(A).

[49]47 CFR § 24.709(b)(6)(i)(C).

[50]47 CFR § 24.709(b)(4).

[51]*Fifth R&O*, 9 FCC Rcd at 5537, ¶ 10.

[52]Under our rules, a "small business" is defined as an entity that, together with its affiliates and persons or entities that hold interest in such entity and their affiliates, has average gross revenues that are not more than $40 million for the preceding three years. 47 CFR § 24.720(b)(1).

disruption to existing business relationships formed in anticipation of the C block auction that were premised on the use of this particular equity structure. Our proposed rule change enables minority- or women-owned businesses to retain their 50.1/49.9 percent equity structures while extending this control group option to other applicants in the entrepreneurs' block as well. We also expect that this proposed rule change would mitigate the likely legal challenges that could result if we moved forward with this rule in its current form. Consequently, the proposed rule change would facilitate the expeditious dissemination of the licenses. We seek comment on this proposed rule change and on our tentative conclusions.

16. We also recognize that, as a result of the proposed rule change, all C block applicants would be able to take advantage of the 50.1/49.9 percent equity structure, including small businesses and entrepreneurs. Nevertheless, we view this as the best approach to preserve many of the existing business relationships that have been formed, including those of women and minorities. We think this approach would be the least disruptive and would allow many minority or women applicants -- both entrepreneurs and small businesses -- to proceed. We seek comment on this analysis.

17. Although we propose to eliminate the race- and gender-based measures currently provided in our rules for the C block licenses, we, nonetheless, intend to continue to request bidder information on the short-form filings as to minority- or women-owned status. We tentatively conclude that such information will assist us in analyzing the applicant pool and the auction results to determine whether we have accomplished substantial participation by minorities and women through the broad provisions available to small businesses as directed by Congress. This information will assist us in preparing our report to Congress on the participation of designated entities in the auctions and in the provision of spectrum-based services.[53] In addition, such information will be relevant in developing a supplemental record should we find that special provisions solely for small businesses prove unsuccessful in encouraging dissemination of licenses to a wide variety of applicants, including businesses owned by members of minority groups and women. In this regard, we retain discretion to tailor our approach for future auctions. We seek comment on this monitoring proposal.

B. Affiliation Rules

18. Background. In the *Fifth R&O,* we adopted 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 for the entrepreneurs' blocks or for small business size status.[54] Our affiliation rules identify which individuals or entities will be found to control or be controlled by the applicant or an attributable investor in the applicant by specifying which ownership interests or other criteria will give rise to a finding of control and consequent affiliation. We have adopted two

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[53]*See* 47 U.S.C. § 309(j)(12)(D).

[54]*Fifth R&O*, 9 FCC Rcd at 5620, 5625.

narrowly tailored exceptions to our affiliation rules in the broadband PCS context. Under one exception, applicants affiliated with Indian tribes and Alaska Regional or Village Corporations organized pursuant to the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 *et seq.*, are generally exempted from the affiliation rules for purposes of determining eligibility to participate in bidding on C block licenses and to qualify as a small business with 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 the applicants eligibility determination.[55] Under the second exception, the gross revenues and assets of affiliates controlled by minority investors who are members of the applicant's control group are not attributed to the applicant for purposes of determining compliance with the eligibility standards for entry into the entrepreneurs' block.[56]

19. Discussion. We propose to eliminate the exception to our affiliation rules pertaining to minority investors. In crafting this exception, we anticipated that it would permit minority investors who control other concerns to be 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.[57] We further anticipated that such an exception would permit 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.[58] Consequently, we tentatively conclude that it would be imprudent to extend such exception to all entrepreneurs because to do so would frustrate the Commission's goals in establishing the entrepreneurs' block -- namely, to ensure that broadband PCS will be disseminated among a wide variety of applicants and to exclude many large telecommunications companies from bidding on such blocks.[59]

20. Although this proposed rule change may significantly affect certain existing business relationships formed in anticipation of the C block auction, we must balance our concern about minimizing the adverse impact on a limited number of existing business relationships with our desire to mitigate the legal challenges that are likely to result from the Court's *Adarand* decision in the absence of such rule change. In this context, we tentatively conclude that such rule change will affect a limited number of existing business relationships. By contrast, without such rule change, award of all entrepreneurs' block licenses could potentially be subject to substantial delay as a result of legal challenges to this race-based exception to the affiliation rules (regardless of the fact that such exception is limited in

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[55]47 CFR § 24.720(l)(11)(i).

[56]47 CFR § 24.720(l)(11)(ii).

[57]*Fifth MO&O*, 10 FCC Rcd at 425-426, ¶ 41.

[58]*Id.*

[59]*See Fifth R&O*, 9 FCC Rcd at 5538, ¶ 12.

scope). We tentatively conclude that such outcome would be inconsistent with both the spirit and mandate of the Budget Act.[60] We also tentatively conclude that the proposed rule change not only complies with the Budget Act but also benefits the general public, since it would facilitate rapid deployment of broadband PCS in a manner most likely to avoid judicial delay. We seek comment on this proposed rule change and these tentative conclusions. We also do not propose to eliminate the affiliation exception for Indian tribes and Alaska Regional or Village Corporations. We tentatively conclude that the "Indian Commerce Clause" of the United States Constitution provides an independent basis for this exception that is not questioned by the *Adarand* decision.[61]

C. Installment Payments

21. Background. Entrepreneurs' block licensees are eligible for installment payment plans that afford them the opportunity to pay for their licenses over a period of time, and under certain financial terms. Five different installment payment plans are currently available to C block applicants under Section 24.711 of the Commission's Rules.[62] The first installment payment plan is available to applicants with gross revenues in excess of $75 million. This plan provides for the payment of interest based on the 10-year U.S. Treasury rate, plus 3.5 percent with payment of principal and interest amortized over the term of license.[63]

22. The second installment payment plan is available to those applicants with gross revenues between $40 and $75 million.[64] This plan provides for the payment of interest equal to the 10-year U.S. Treasury rate plus 2.5 percent. The applicants eligible for this plan may pay interest only for one year with the principal and interest amortized over the remaining nine years of the license term. The third installment payment plan is available only to applicants that qualify as a small business or consortium of small businesses.[65] This plan provides for the payment of interest at the rate of the 10-year U.S. Treasury rate plus 2.5 percent; however, the applicants eligible for this plan may pay interest only for two years

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[60]The Budget Act instructs the Commission to provide for the "rapid deployment of new technologies . . . without administrative or judicial delays." 47 U.S.C. 309(j)(3)(A).

[61]*Order on Reconsideration*, FCC 94-217 (released Aug. 15, 1994); *Fifth MO&O*, 9 FCC Rcd at 5548-4449, ¶¶ 42-43. *See also Oklahoma Tax Commission v. Chickasaw Nation*, 63 U.S.L.W. 4594, 4596 (Supreme Court upheld applicability of a categorical immunity from certain State taxation to Indian tribes and their members and not to "non-Indians.")

[62]47 CFR § 24.711.

[63]47 CFR § 24.711(b)(1).

[64]47 CFR § 711(b)(2).

[65]47 CFR § 24.711(b)(3).

with principal and interest amortized over the remaining eight years of the license term.

23. The remaining installment payment plans are available only to minorities or women. Specifically, the fourth plan provides interest-only payments for three years and payments of principal and interest over the remaining seven years of the license term and is only available to businesses owned by members of minority groups or women. The final and most favorable installment payment plan provides interest-only payments for six years and payments of principal and interest amortized over the remaining four years of the license term. This plan is only available to small businesses owned by members of minority groups or women. Previously, the Commission has determined that there is a basis for differentiating installment plans by size.[66]

24. Discussion. We propose to modify this rule to eliminate the special provisions that are tied to an applicant's status as a minority- or women-owned business, and to provide for three installment payment plans that are based solely on financial size. In this regard, we propose to modify only installment payment plans available to small businesses with gross revenues under $40 million.[67] We propose to extend the most favorable installment payment plan previously available only to small minority- or women-owned firms to all small businesses. Thus, we propose that all small businesses be permitted to pay for their licenses in installments at the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted and that payments include interest only for the first six years with payments of principal and interest amortized over the remaining four years of the license term. In effect, we are proposing the deletion of our current Section 24.711(b)(3) and (4) and the re-numbering of Section 24.711(b)(5) as Section 24.711(b)(3) after the modification.

25. This rule change will grant small businesses the same installment plan available now to minority- or women-owned small businesses. We believe this approach will prove to be the least disruptive to the existing agreements between prospective bidders and the financial community and will provide the most favorable plan to the smallest companies. We seek comment on this proposal which will enable all small business applicants to benefit from the most favorable installment payment plan that was previously only available to minority- or women-owned small businesses.

D. Bidding Credits

26. Background. Our current rules provide for three tiers of bidding credits ranging between 10 percent and 25 percent. The bidding credit acts as a discount on the winning bid amount that a licensee actually has to pay for the license. A small business is granted a 10 percent bidding credit. A business that is owned by members of minority groups or women

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[66]*See Fifth R&O*, 9 FCC Rcd at 5593, ¶¶ 139-140; *Fifth MO&O*, 10 FCC Rcd at 458, ¶ 101.

[67]The first and second payment plans for eligible bidders with gross revenues exceeding $75 million and with gross revenues between $40 and $75 million will remain the same. 47 CFR § 24.711(b)(1) and (2).

is granted a 15 percent bidding credit. A small business owned by members of minority groups or women is allowed to aggregate the bidding credits for a 25 percent bidding credit.

27. Discussion. We propose to increase the bidding credit for small businesses from 10 percent to 25 percent. We further propose to eliminate the remaining bidding credits. This rule change eliminates the race- and gender-based bidding credits and extends the 25 percent bidding credit to all small businesses. We seek comment on this proposal. At the same time, this proposal will enhance the competitiveness of all small businesses which will receive an increase of 15 percent in their bidding credits. The positions of minority- or women-owned small businesses will remain the same because they will be eligible for a 25 percent bidding credit. Consequently, this proposal should be the least disruptive to the current business arrangements and financial agreements.

28. This proposal will allow the Commission and prospective bidders to avoid litigation, allow the auction to proceed as close to its original schedule as possible and permit prospective bidders to maintain previously negotiated business arrangements and financial agreements. Thus, we recommend amending Section 24.712(a) to raise the bidding credit from 10 percent to 25 percent. We further recommend deleting Section 24.712(b) and (c) and re-numbering Section 24.712(d) as Section 24.712(b). We seek comment on this outcome.

E. Cellular PCS Cross-Ownership and CMRS Spectrum Aggregation Limit

29. Background. Our cellular PCS cross-ownership rule currently provides for a higher cellular ownership attribution threshold for small businesses, rural telephone companies and businesses owned by minorities or women than for other entities.[68] Generally, our rules provide that partnership and other ownership interests, and any stock interest amounting to 20 percent or more of the equity, or outstanding stock, or outstanding voting stock of a cellular licensee shall be attributable for purposes of the cellular PCS cross-ownership restrictions.[69] If cellular ownership interests are held by small businesses, rural telephone companies or businesses owned by minorities or women, however, such interests are only attributable at the 40 percent or more level. In addition, cellular ownership interests held by entities with non-controlling interests in a broadband PCS applicant licensee are subject to a 40 percent attribution threshold for purposes of Section 24.204. Similarly, our CMRS spectrum aggregation limit provides that partnership and other ownership interests, and any stock interest amounting to 20 percent or more of the equity, or outstanding stock, or outstanding voting stock of a cellular licensee shall be attributable for purposes of the cellular PCS cross-ownership restrictions, except that those interests held by small businesses, rural telephone companies or businesses owned by minorities or women, are only

[68] 47 CFR 24.204(d)(2)(ii).

[69] *Id.*

attributable at the 40 percent or more level.[70]

30. Discussion. We propose to modify the cellular PCS cross-ownership and CMRS spectrum aggregation limit rules to remove the provisions which increase the cellular attribution threshold to 40 percent on the basis of the race or gender of the holder of the ownership interest or of the broadband PCS applicant in which such holder is an investor. Accordingly, we propose to modify Section 24.204(d)(2)(ii) of our rules to provide that the 40 percent cellular attribution threshold will continue to apply if the ownership interest is held by a small business or a rural telephone company or if the ownership interest is held by an entity with a non-controlling equity interest in a broadband PCS licensee or applicant that is a small business. Similarly, we propose to modify Section 20.6(d)(2) of our rules to provide that the 40 percent cellular attribution threshold will continue to apply if the ownership interest is held by a small business or a rural telephone company (including those owned by minorities or women). Although this change could result in a lower cellular attribution threshold for businesses owned by minorities and women as well as for non-controlling investors in broadband PCS applicants or licensees that are owned by minorities or women (with respect to our cellular PCS cross-ownership rule), we believe that this modification is necessary to ensure that our rules are insulated from legal challenge. Moreover, the proposed rule change to our cellular PCS cross-ownership rule may result in additional investment in broadband PCS applicants that are small businesses, because this rule change would extend the 40 percent cellular attribution threshold to such investors in broadband PCS applicants that are small businesses. We seek comment on this proposal. In addition, we recognize that both the cellular PCS cross-ownership rule and the CMRS spectrum aggregation limit apply to more than just the C block. We propose to limit our specific rule changes to affect only the C block.

Procedural Matters

A. Regulatory Flexibility Act

As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. The IRFA is set forth in Appendix B. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Further Notice of Proposed Rule Making, but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Secretary shall send a copy of this Further Notice of Proposed Rule Making, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94

[70] 47 CFR § 20.6(d)(2).

Stat. 1164, 5 U.S.C. § 601 *et seq.* (1981).

B. Ex Parte Rules -- Non-Restricted Proceeding

This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 CFR §§ 1.1202, 1.1203, and 1.1206(a).

C. Comment Dates

Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 CFR §§ 1.415 and 1.419, interested parties may file comments on or before July 7, 1995. Notwithstanding Section 1.415(c) of the Commission's Rules, 47 CFR § 1.415(c), we are not inviting reply comments. To file formally in this proceeding you must file an original and four copies of all comments and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send your comments to Office of the Secretary, Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554. Comments will be available for public inspection during regular business hours in the Reference Center of the Federal Communications Commission, 1919 M Street, N.W., Room 239, Washington, D.C. 20554.

D. Ordering Clause

Authority for issuance of this Further Notice of Proposed Rule Making is contained in Sections 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r) and 309(j).

E. Contact Persons

For further information concerning this proceeding, contact Kathleen O'Brien Ham at 418-0660 (Auctions Division, Wireless Telecommunications Bureau), Ramona Melson or D'wana Speight at (202) 418-0620 (Legal Branch, Commercial Wireless Division, Wireless Telecommunications Bureau), or Peter Tenhula at 418-1720 (Office of General Counsel).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton

William F. Caton
Acting Secretary

APPENDIX A

PROPOSED RULES

Parts 20 and 24 of Chapter I of Title 47 of the Code of Federal Regulations are amended as follows:

PART 20 - COMMERCIAL MOBILE RADIO SERVICES

1. The authority citation for Part 20 continues to read as follows:

AUTHORITY: Secs 4, 303, and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. §§ 154, 303, and 332, unless otherwise noted.

2. Section 20.6 is amended by revising paragraph (d)(2) to read as follows:

§ 20.6 CMRS spectrum aggregation limit.

* * * * *

(d)* * *
(2) Partnership and other ownership interests and any stock interest amounting to 20 percent or more of the equity, or outstanding stock, or outstanding voting stock of a cellular licensee will be attributable, except that ownership will not be attributed unless the partnership and other ownership interests and any stock interest amount to 40 percent or more of the equity, or outstanding stock, or outstanding voting stock of a cellular licensee if the ownership interest is held by a small business or a rural telephone company or a business owned by minorities or women, as these terms are defined in § 1.2110 of this chapter or other provisions of the Commission's Rules. For purposes of broadband PCS licenses for frequency block C, the 40 percent attribution level shall only apply to interests held by a small business or a rural telephone company.

* * * * *

PART 24 - PERSONAL COMMUNICATIONS SERVICES

1. The authority citation for Part 24 continues to read as follows:

AUTHORITY: Secs. 4, 301, 302, 303, 309 and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. §§ 154, 301, 302, 303, 309 and 332, unless otherwise noted.

2. Section 24.204 is amended by revising paragraph (d)(2)(ii) to read as follows:

§ 24.204 Cellular eligibility.

* * * * *

(d)* * *
(2)* * *

(ii) Partnership and other ownership interests and any stock interest amounting to 20 percent or more of the equity, or outstanding stock, or outstanding voting stock of a cellular licensee will be attributable, except that ownership will not be attributed unless the partnership and other ownership interests and any stock interest amount to 40 percent or more of the equity, or outstanding stock, or outstanding voting stock of a cellular licensee if the ownership interest is held by a small business, a rural telephone company, or a business owned by minorities and/or women, as these terms are defined in § 1.2110 of this chapter, or if the ownership interest is held by an entity with a non-controlling equity interest in a broadband PCS licensee or applicant that is a small business owned by minorities and/or women as defined in § 24.720. For purposes of broadband PCS licenses for frequency block C, the 40 percent attribution level shall only apply to interests held by a small business or rural telephone company, or if interests are held by an entity with a non-controlling equity interest in a licensee or applicant that is a small business as defined in § 24.720.

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3. Section 24.709 is amended by revising the heading and paragraphs (a), (b)(6), (c)(1)(ii)(B), (c)(2), (c)(2)(ii) and (e) to read as follows:

§ 24.709 Eligibility for licenses for frequency Block C.

(a) *General Rule.*
(1) No application is acceptable for filing and no license shall be granted for frequency block C, unless the applicant, together with its *affiliates* and persons or entities that hold interests in the applicant and their *affiliates*, 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's short-form application (Form 175) is filed.
(2) The *gross revenues* and *total assets* of the applicant (or licensee), and its *affiliates*, and (except as provided in paragraph (b) of this section) of persons or entities that hold interests in the applicant (or licensee), and their *affiliates*, shall be attributed to the applicant and considered on a cumulative basis and aggregated for purposes of determining whether the applicant (or licensee) is eligible for a licensee for frequency block C under this section.
(3) Any licensee awarded a license pursuant to this section (or pursuant to § 24.839(d)(2)) shall maintain its eligibility until at least five years from the date of initial license grant, except that a licensee's (or other attributable entity's) increased *gross revenues* or increased *total assets* due to *nonattributable equity* investments (i.e., from sources whose *gross revenues*, and *total assets* are not considered under paragraph (b) of this section), debt financing, revenue from operations or other investments, business development or expanded service shall not be considered.

(b)* * *

(6) *Control Group Minimum 50.1 Percent Equity Requirement.* In order to be eligible to exclude *gross revenues* and *total assets* of persons or entities identified in paragraph (b)(4) of this section, an applicant (or licensee) must comply with the following requirements:

(i) Except for an applicant (or licensee) whose sole control group member is a *preexisting entity*, as provided in paragraph (b)(6)(ii) of this section, at the time the applicant's short-form application (Form 175) is filed and until at least three years following the date of initial license grant, the applicant's (or licensee's) *control group* must own at least 50.1 percent of the applicant's (or licensee's) total equity as follows:

(A) at least 30 percent of the applicant's (or licensee's) total equity must be held by *qualifying investors*, either unconditionally or in the form of options, exercisable at the option of the holder, at any time and at any exercise price equal to or less than the market value at the time the applicant files its short-form application (Form 175);

(B) Such *qualifying investors* must hold 50.1 percent of the voting stock and all general partnership interests within the control group and must have *de facto* control of the control group and of the applicant;

(C) The remaining 20.1 percent of the applicant's (or licensee's) total equity may be owned by *qualifying investors*, either unconditionally or in the form of stock options not subject to the restrictions of paragraph (b)(6)(i)(A) of this section, or by any of the following entities which may not comply with § 24.720(n)(1):

(1) *Institutional investors*, either unconditionally or in the form of stock options;

(2) Noncontrolling *existing investors* in any *preexisting entity* that is a member of the *control group*, either unconditionally or in the form of stock options; or

(3) Individuals that are members of the applicant's (or licensee's) management, either unconditionally or in the form of stock options.

(D) Following termination of the three-year period specified in paragraph (b)(6)(i) of this section, *qualifying investors* must continue to own at least 20 percent of the applicant's (or licensee's) total equity, either unconditionally or in the form of stock options subject to the restrictions in paragraph (b)(6)(i)(A) of this section. The restrictions specified in paragraph (b)(6)(i)(C)(1) through (4) of this section no longer apply to the remaining equity after termination of such three-year period.

(ii) At the election of an applicant (or licensee) whose *control group's* sole member is a *preexisting entity*, the 50.1 percent minimum equity requirements set forth in paragraph (b)(6)(i) of this section shall apply, except that only 20 percent of the applicant's (or licensee's) total equity must be held by *qualifying investors*, and that the remaining 30.1 percent of the applicant's (or licensee's) total equity may be held by *qualifying investors*, or noncontrolling *existing investors* in such *control group* member or individuals that are members of the applicant's (or licensee's) management. These restrictions on the identity of the holder(s) of the remaining 30.1 percent of the licensee's total equity no longer apply after termination of the three-year period specified in paragraph (b)(6)(i) of this section.

* * * * *

(c)* * *

(1) *Short-form Application. In addition to certifications and disclosures required by Part 1, subpart Q* of this Chapter and § 24.813, each applicant for a license for frequency Block C shall certify on its short-form application (Form 175) that it is eligible to bid on and obtain such license(s), and (if applicable) that it is eligible for designated entity status pursuant to this section and § 24.720, and shall append the following information as an exhibit to its Form 175:

* * * * *

(ii)* * *

(B) The citizenship and the gender or minority group classification for each member of the applicant's *control group* if the applicant is a *business owned by members of minority groups and/or women*;

* * * * *

(2) *Long-form Application.* In addition to the requirements in subpart I of this part and other applicable rules (e.g., §§ 24.204(f), 20.6(e) of this chapter, and 20.9 (b of this chapter), each applicant submitting a long-form application for a license(s) for frequency block C shall, in an exhibit to its long-form application:

* * * * *

(ii) List and summarize all agreements or other instruments (with appropriate references to specific provisions in the text of such agreements and instruments) that support the applicant's eligibility for a license(s) for frequency Block C and its eligibility under §§ 24.711, 24.712 and 24.720, including the establishment of *de facto* and *de jure* control; such agreements and instruments include articles of incorporation and bylaws, shareholder agreements, voting or other trust agreements, partnership agreements, management agreements, joint marketing agreements, franchise agreements, and any other relevant agreements (including letters of intent), oral or written; and

* * * * *

(e) *Definitions.* The terms *affiliate, business owned by members of minority groups and women, consortium of small businesses, control group, existing investor, gross revenues, institutional investor, members of minority groups, nonattributable equity, preexisting equity, publicly traded corporation with widely dispersed voting power, qualifying investor, small business and total assets* used in this section are defined in § 24.720.

4. Section 24.711 is amended by revising the heading and paragraphs (a) introductory text, (a)(1), (b) introductory text and (b)(3) to read as follows:

§ 24.711 Upfront payments, down payments and installment payments for licenses for frequency Block C.

(a) *Upfront Payments and Down Payments.*

(1) Each eligible bidder for licenses on frequency Block C subject to auction shall pay an upfront payment of $0.015 per MHz per pop for the maximum number of licenses (in terms of MHz-pops) on which it intends to bid pursuant to § 1.2106 of this Chapter and procedures specified by Public Notice.

* * * * *

(b) *Installment Payments.* Each eligible licensee of frequency Block C may pay the remaining 90 percent of the net auction price for the license in installment payments pursuant to § 1.2110(e) of this Chapter and under the following terms:

* * * * *

(3) For an eligible licensee that qualifies as a small business or as a consortium of small businesses, interest shall be imposed based on the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted; payments shall include interest only for the first six years and payments of interest and principal amortized over the remaining four years of the license term.

* * * * *

5. Section 24.712 is amended by revising the heading and paragraph (a), removing paragraphs (b) and (c), and redesignating paragraph (d) as paragraph (b) to read as follows:

§ 24.712 Bidding credits for licenses for frequency Block C.

(a) A wining bidder that qualifies as a small business or a consortium of small businesses may use a bidding credit of twenty-five percent to lower the cost of its winning bid.

* * * * *

6. Section 24.713 is removed and reserved.

7. A new Section 24.715 is added to Subpart H to read as follows:

§ 24.715 Eligibility for licenses for frequency Block F.

(a) *General Rule.*

(1) No application is acceptable for filing and no license shall be granted for frequency block F, unless the applicant, together with its *affiliates* and persons or entities that hold interests in the applicant and their *affiliates*, 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's short-form application (Form 175) is filed.

(2) The *gross revenues* and *total assets* of the applicant (or licensee), and its *affiliates*, and (except as provided in paragraph (b) of this section) of persons or entities that hold interests in the applicant (or licensee), and their *affiliates*, shall be attributed to the applicant and

considered on a cumulative basis and aggregated for purposes of determining whether the applicant (or licensee) is eligible for a license for frequency block F under this section.

(3) Any licensee awarded a license pursuant to this section (or pursuant to § 24.839(d)(2)) shall maintain its eligibility until at least five years from the date of initial license grant, except that a licensee's (or other attributable entity's) increased *gross revenues* or increased *total assets* due to *nonattributable equity* investments (i.e., from sources whose *gross revenues*, and *total assets* are not considered under paragraph (b) of this section), debt financing, revenue from operations or other investments, business development or expanded service shall not be considered.

(b) *Exceptions to General Rule.*

(1) *Small Business Consortia.* Where an applicant (or licensee) is a *consortium of small businesses*, the *gross revenues* and *total assets* of each small business shall not be aggregated.

(2) *Publicly-Traded Corporations.* Where an applicant (or licensee) is a *publicly traded corporation with widely dispersed voting power*, the *gross revenues* and *total assets* of a person or entity that holds an interest in the applicant (or licensee), and its *affiliates,* shall not be considered.

(3) *25 Percent Equity Exception.* The *gross revenues* and *total assets* of a person or entity that holds an interest in the applicant (or licensee), and its *affiliates*, shall not be considered so long as:

(i) Such person or entity, together with its *affiliates*, holds only *nonattributable equity* equaling no more than 25 percent of the applicant's (or licensee's) total equity;

(ii) Except as provided in paragraph (b)(5) of this section, such person or entity is not a member of the applicant's (or licensee's) *control group*; and

(iii) The applicant (or licensee) has a *control group* that complies with the minimum equity requirements of paragraph (b)(5) of this section, and, if the applicant (or licensee) is a corporation, owns at least 50.1 percent of the applicant's (or licensee's) voting interests, and, if the applicant (or licensee) is a partnership, holds all of its general partnership interests.

(4) *49.9 Percent Equity Exception.* The *gross revenues* and *total assets* of a person or entity that holds an interest in the applicant (or licensee), and its *affiliates*, shall not be considered so long as:

(i) Such person or entity, together with its *affiliates*, holds only *nonattributable equity* equaling no more than 49.9 percent of the applicant's (or licensee's) total equity;

(ii) Except as provided in paragraph (b)(6) of this section, such person or entity is not a member of the applicant's (or licensee's) control group; and

(iii) The applicant (or licensee) has a *control group* that complies with the minimum equity requirements of paragraph (b)(6) of this section and, if the applicant (or licensee) is a corporation, owns at least 50.1 percent of the applicant's (or licensee's) voting interests, and, if the applicant (or licensee) is a partnership, holds all of its general partnership interests.

(5) *Control Group Minimum 25 Percent Equity Requirement.* In order to be eligible to exclude *gross revenues* and *total assets* of persons or entities identified in paragraph (b)(3) of this section, and applicant (or licensee) must comply with the following requirements:

(i) Except for an applicant (or licensee) whose sole control group member is a *preexisting entity*, as provided in paragraph (b)(5)(ii) of this section, at the time the applicant's short-form application (Form 175) is filed and until at least three years following the date of

initial license grant, the applicant's (or licensee's) *control group* must own at least 25 percent of the applicant's (or licensee's) total equity as follows:

(A) At least 15 percent of the applicant's (or licensee's) total equity must be held by qualifying investors, either unconditionally or in the form of options exercisable, at the option of the holder, at any time and at any exercise price equal to or less than the market value at the time the applicant files its short-form application (Form 175);

(B) Such *qualifying investors* must hold 50.1 percent of the voting stock and all general partnership interests within the control group, and must have de facto control of the control group and of the applicant;

(C) The remaining 10 percent of the applicant's (or licensee's) total equity may be owned by *qualifying investors*, either unconditionally or in the form of stock options not subject to the restrictions of paragraph (b)(5)(i)(A) of this section, or by any of the following entities, which may not comply with section 24.720(n)(1):

(1) *Institutional investors*, either unconditionally or in the form of stock options;

(2) Noncontrolling *existing investors* in any *preexisting entity* that is a member of the *control group*, either unconditionally or in the form of stock options; or

(3) Individuals that are members of the applicant's (or licensee's) management, either unconditionally or in the form of stock options.

(D) Following termination of the three-year period specified in paragraph (b)(5)(i) of this section, *qualifying investors* must continue to own at least 10 percent of the applicant's (or licensee's) total equity, either unconditionally or in the form of stock options subject to the restrictions in paragraph (b)(5)(i)(A) of this section. The restrictions specified in paragraph (b)(5)(i)(C)(1) through (4) of this section no longer apply to the remaining equity after termination of such three-year period.

(ii) At the election of an applicant (or licensee) whose *control group's* sole member is a *preexisting entity*, the 25 percent minimum equity requirements set forth in paragraph (b)(5)(i) of this section shall apply, except that only 10 percent of the applicant's (or licensee's) total equity must be held by *qualifying investors* and that the remaining 15 percent of the applicant's (or licensee's) total equity may be held by *qualifying investors* or noncontrolling *existing investors* in such *control group* member or individuals that are members of the applicant's (or licensee's) management. These restrictions on the identity of the holder(s) of the remaining 15 percent of the licensee's total equity no longer apply after termination of the three-year period specified in paragraph (b)(5)(i) of this section.

(6) *Control Group Minimum 50.1 Percent Equity Requirement*. In order to be eligible to exclude *gross revenues* and total assets of persons or entities identified in paragraph (b)(4) of this section, an applicant (or licensee) must comply with the following requirements:

(i) Except for an applicant (or licensee) whose sole control group member is a *preexisting entity*, as provided in paragraph (b)(6)(ii) of this section, at the time the applicant's short-form application (Form 175) is filed and until at least three years following the date of initial license grant, the applicant's (or licensee's) *control group* must own at least 50.1 percent of the applicant's (or licensee's) total equity as follows:

(A) at least 30 percent of the applicant's (or licensee's) total equity must be held by *qualifying minority and/or women investors*, either unconditionally or in the form of options exercisable, at the option of the holder, at any time and at any exercise price equal to or less

than the market value at the time the applicant files its short-form application (Form 175);

(B) Such *qualifying minority and/or women investors* must hold 50.1 percent of the voting stock and all general partnership interests within the control group and must have *de facto* control of the control group and of the applicant;

(C) The remaining 20.1 percent of the applicant's (or licensee's) total equity may be owned by *qualifying investors*, either unconditionally or in the form of stock options not subject to the restrictions of paragraph (b)(5)(i)(A) of this section, or by any of the following entities, which may not comply with section 24.720(n)(1):

(1) *Institutional investors*, either unconditionally or in the form of stock options;

(2) Noncontrolling *existing investors* in any *preexisting entity* that is a member of the *control group*, either unconditionally or in the form of stock options; or

(3) Individuals that are members of the applicant's (or licensee's) management, either unconditionally or in the form of stock options.

(D) Following termination of the three-year period specified in paragraph (b)(6)(i) of this section, *qualifying minority and/or women investors* must continue to own at least 20 percent of the applicant's (or licensee's) total equity, either unconditionally or in the form of stock options subject to the restrictions in paragraph (b)(6)(i)(A) of this section. The restrictions specified in paragraph (b)(6)(i)(C)(1) through (4) of this section no longer apply to the remaining equity after termination of such three-year period.

(ii) At the election of an applicant (or licensee) whose control *group's* sole member is a *preexisting entity*, the 50.1 percent minimum equity requirements set forth in paragraph (b)(6)(i) of this section shall apply, except that only 20 percent of the applicant's (or licensee's) total equity must be held by *qualifying minority and/or women investors*, and that the remaining 30.1 percent of the applicant's (or licensee's) total equity may be held by *qualifying minority and/or women investors*, or noncontrolling *existing investors* in such *control group* member or individuals that are members of the applicant's (or licensee's) management. These restrictions on the identity of the holder(s) of the remaining 30.1 percent of the licensee's total equity no longer apply after termination of the three-year period specified in paragraph (b)(6)(i) of this section.

(7) *Calculation of Certain Interests*. Except as provided in paragraphs (b)(5) and (b)(6) of this section, ownership interests shall be calculated on a fully diluted basis; all agreements such as warrants, stock options and convertible debentures will generally be treated as if the rights thereunder already have been fully exercised, except that such agreements may not be used to appear to terminate or divest ownership interests before they actually do so, in order to comply with the *nonattributable equity* requirements in paragraphs (b)(3)(i) and (b)(4)(i) of this section.

(8) *Aggregation of Affiliate Interests*. Persons or entities that hold interest in an applicant (or licensee) that are *affiliates* of each other or have an identify of interests identified in § 24.720(1)(3) will be treated as though they were one person or entity and their ownership interests aggregated for purposes of determining an applicant's (or licensee's) compliance with the *nonattributable equity* requirements in paragraphs (b)(3)(i) and (b)(4)(i) of this section.

Example 1 for paragraph (b)(8). ABC Corp. is owned by individuals, A, B, and C, each having an equal one-third voting interest in ABC Corp. A and B together, with two-thirds of