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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

SIXTH REPORT AND ORDER

Adopted: July 18, 1995 **Released:** July 18, 1995

By the Commission:

I. INTRODUCTION

1. In this *Sixth Report and Order*, we modify our competitive bidding rules for the "C block"[1] of Personal Communications Services in the 2 GHz band (broadband PCS) to eliminate race- and gender-based provisions that we believe raise legal uncertainties in the aftermath of the Supreme Court's decision in *Adarand Constructors, Inc. v. Peña*.[2] We take this action to accomplish three goals: (1) promotion of rapid delivery of additional competition to the wireless marketplace by C block licensees; (2) reduction of the risk of legal challenge; and (3) minimal disruption to the plans of as many applicants as possible

[1]The "C block" consists of 493 30 MHz Basic Trading Area (BTA) licenses allocated to the broadband Personal Communications Service (PCS) covering frequencies 1895-1910 MHz paired with 1975-1990 MHz. The Commission allocated a total of six broadband PCS frequency blocks for auctioning. The remaining broadband PCS frequency blocks are the A and B blocks (consisting of 102 30 MHz Major Trading Area (MTA) licenses) and the D, E and F blocks (each consisting of 493 10 MHz BTA licenses).

[2]115 S.Ct. 2097 (1995).

who were in advanced stages of planning to participate in the C block auction when *Adarand* was announced.[3] While taking action to ensure that the auction commences quickly, we also want the maximum number of existing business relationships formed under our prior rules and in anticipation of the C block auction -- including those of women and minority applicants -- to remain viable.[4] We emphasize that our action today does not indicate that race- and gender-based provisions at issue here could not be sustained without further development of the record. Nor do we believe that such measures generally are inappropriate for future auctions of spectrum-based services.[5] We are considering the means we should take to develop a supplemental record that will support use of such provisions in other spectrum auctions held post-*Adarand*.[6]

II. BACKGROUND

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[3]*See Further Notice* at ¶ 10, n.32. *See also* Michigan Telecommunications Comments at 1 (indicating that additional delays and legal uncertainty would effectively deny designated entities, especially small businesses and minority- and women-owned businesses, a meaningful opportunity to participate in C block); CIRI Comments at 23-24 (stating that existing business relationships are likely to survive absent significant delay of C block auction); U.S. Airwaves Comments at 3 (encouraging acceleration of C block auction); Chase Telecommunications Comments at 1 (believes that better course of action for the Commission post-*Adarand* is to move forward quickly); Airlink Comments at 3-4 (contends that each delay increases competitive disadvantage experienced by successful C block bidders). *See eg.* Letter from Sandra Goeken Martis, Wireless Works, Inc. to Cathy Sandoval, Office of Communications Business Opportunities, FCC (June 16, 1995); Letter from Curtis White, President, Allied to Regina M. Keeney, Chief, Wireless Telecommunications Bureau, FCC (June 20, 1995; Letter from C. Steven Lucero, President, United Americas Network to Regina M. Keeney, Chief, Wireless Telecommunications Bureau, FCC and Kathleen O. Ham, Chief, Auctions Division (FCC) (June 20, 1995. *See* Appendix C for a list of comments filed in response to the *Further Notice* in PP Docket No. 93-253 and the acronyms used to cite commenters.

[4]*See e.g.*, Letter from Sherrie Marshall, United Wireless LLC to Reed Hundt, Chairman, FCC (June 15, 1995); CIRI Comments at 23-24 (stating that existing business relationships are likely to survive absent significant delay of C block auction).

[5]*See* Public Notice, "Request for Comments in 900 MHz SMR Proceeding," June 30, 1995 (seeking comment on *Adarand*'s impact on the designated entity provisions contained in the proposed 900 MHz SMR competitive bidding rules).

[6]Some commenters suggest ways in which the Commission could develop a supplemental record. *See e.g.*, Allied Comments at 4 (suggests conducting comprehensive formal study or assessment considering existing and future spectrum-based services and the capital demands associated with them); Minority Business Enterprise Comments at 3-5 (suggests performing a disparity study); Chase Telecommunications Comments at 2-3 (suggests a full examination into how past discrimination denies minorities access to the capital and technology infrastructure necessary for spectrum-based services such as PCS); General Wireless Comments at 3 (discusses utilizing hearings, studies or other similar methods to develop a supplemental record); Letter from James A. Casey representing, Indian Tribes to Reed Hundt, Chairman, FCC (June 15, 1995). *But see*, NABOB Comments at 9-11 (stating that present Commission record for C block auction rules would support race- and gender-based preferences even under a strict scrutiny standard of review)

2. Legislation and Commission Action. In the Omnibus Budget Reconciliation Act of 1993,[7] Congress authorized the competitive bidding of spectrum-based services and mandated that small businesses, rural telephone companies, and businesses owned by members of minority groups and women (collectively known as "designated entities") be ensured the opportunity to participate in the provision of such services.[8] In the *Fifth Report and Order*, in PP Docket No. 93-253, we adopted competitive bidding rules designed to encourage designated entity participation in broadband PCS.[9] Specifically, we established "entrepreneurs' blocks" (the C and F frequency blocks allocated for broadband PCS) for which eligibility is limited to individuals and entities under a certain financial size.[10] We also adopted special provisions for businesses owned by members of minority groups or women and we analyzed their constitutionality utilizing the "intermediate scrutiny" standard of review articulated in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 564-565 (1990).[11] We made subsequent changes to the entrepreneurs' block rules and special provisions for designated entities in the *Fifth MO&O*.[12]

3. Litigation and Auction Schedule. On March 15, 1995, in response to a request filed by Telephone Electronic Corp. (TEC) alleging that our broadband PCS competitive bidding rules violated equal protection principles under the Constitution, the U.S. Court of Appeals for the 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."[13] As a result, the C block auction, then scheduled to

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

[8]47 U.S.C. § 309(j)(4)(D); *see also id.* § 309(j)(3)(B).

[9]*Fifth Report and Order*, PP Docket No. 93-253, 9 FCC Rcd 5532 (1994) (*Fifth R&O*), *recon. Fifth Memorandum Opinion and Order*, 10 FCC Rcd 403 (*Fifth MO&O*), *erratum*, 60 Fed. Reg. 5333 (1995).

[10]47 CFR § 24.709(a).

[11]*See Fifth R&O*, 9 FCC Rcd 5532, 5537; *see also, Second Report and Order*, 9 FCC Rcd 2348, 2398-99 (1994). In *Metro Broadcasting*, the Supreme Court held 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 (although not remedial in the sense of being designed to compensate victims of past governmental or societal discrimination) were constitutional "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*, 497 U.S. at 565.

[12]*See Fifth MO&O*, 10 FCC Rcd at 418-433, 438-446, *erratum*, 60 Fed. Reg. at 5334-5336.

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

commence 75 days after the March 13, 1995 close of the A and B block auction,[14] was postponed.[15] The court's stay was subsequently lifted on May 1, 1995, pursuant to TEC's motion, after TEC decided to withdraw its appeal.[16] The Commission established August 2, 1995 as the new auction date.[17]

4. On June 12, 1995, three days before initial short form applications (FCC Form 175) for the August 2nd C block auction were due, the Supreme Court decided *Adarand*. The Supreme court decided 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."[18] As a result of the *Adarand* decision, the constitutionality of 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.[19] By Public Notice released June 13, 1995, the Commission postponed the C block auction again in order to give interested bidders and the Commission time to evaluate the impact of *Adarand*.[20] We later established an August 29, 1995 date for the auction.[21]

5. Further Notice of Proposed Rule Making. On June 23, 1995, we adopted a *Further Notice of Proposed Rule Making*, in which we identified four race- and gender-based measures in our C block auction rules and two similar provisions in our commercial mobile radio service (CMRS) and broadband PCS rules that were affected by the Court's ruling in

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[14]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.

[15]Public Notice, "FCC Announces Changes in Short Form and Auction Dates for 493 BTA Licenses Located in the C Block for Personal Communications Services in the 2 GHz Band," April 26, 1995.

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

[17]Public Notice, "Auction Dates for 493 BTA Licenses Located in the C Block for Personal Communication Services in the 2 GHz Band," May 1, 1995.

[18]*Adarand*, 115 S.Ct. at 2113.

[19]*Id.*

[20]Public Notice, "FCC Postpones Short-Form Filing Date For 493 BTA Licenses Located in the C Block for Personal Communications Services in the 2 GHz Band," June 13, 1995.

[21]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," DA 95-1420, June 23, 1995.

Adarand.[22] In the *Further Notice*, we proposed to eliminate these race- and gender-based provisions and instead modify such measures to be race- and gender-neutral. We, at the same time, stated that we remain committed to the mandates and objectives of the Budget Act.[23]

6. In the *Further Notice*, we set forth our specific proposals and our rationale for these C block auction rule changes. While we stressed our commitment to the goal of ensuring broad participation in PCS by designated entities, particularly minority- and women-owned businesses, we indicated that *Adarand* required us to reevaluate our method for accomplishing this Congressional objective. Although we stated in the *Further Notice* that our current record concerning adoption of the race- and gender-based measures contained in our C block auction rules is strong, we tentatively concluded that additional evidence may be necessary to meet the strict scrutiny standard of review required by *Adarand*.[24] We cautioned that development of such a supplemental record would further delay the C block auction, putting the C block winners at a greater competitive disadvantage in the CMRS market vis-a-vis existing wireless carriers such as the A and B block winners, cellular and Specialized Mobile Radio (SMR) carriers.[25]

7. Additionally, we indicated that without changes to our race- and gender-based rules, there was a substantial likelihood that the C block auction would be the subject of legal challenge based on the holding in *Adarand*. We stated that a stay would delay both the auctioning and licensing of the C block, and that such a result might harm competition overall in the CMRS marketplace. Also, we recognized that even if the C block auction were not stayed beforehand, there is a high likelihood that minority applicants and possibly female applicants (who utilize bidding credits and other provisions available solely to members of those groups) would be subject to license challenges (*i.e.*, in the form of petitions to deny and judicial appeals). Such challenges could potentially delay their entry into the market and postpone competition.[26]

8. In addition, we recognized that many of the C block applicants have already attracted capital and formed business relationships in anticipation of the C block auction. We observed 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

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[22] *Further Notice of Proposed Rule Making*, PP Docket No. 93-253, GN Docket No. 90-314, GN Docket No. 93-252, FCC 95-263, released June 23, 1995, ¶¶ 2-3 (*Further Notice*).

[23] *Id.* at ¶ 11.

[24] *Id.* at ¶¶ 7-8.

[25] *See Further Notice* at ¶ 8, n. 30 (noting cellular industry's growth and development in the wireless market over the last decade).

[26] *Id.* at ¶ 8.

suggested that by eliminating race- and gender-based provisions from our C block auction rules, we would not only reduce the legal uncertainty associated with C block licensing, but we would also further competition and ownership diversity by adopting provisions based on economic size only. By virtue of such rule changes, potential C block bidders, including minority and women bidders, would have a better chance of becoming successful PCS providers.[27] We also indicated that elimination of the race- and gender-based measures from the C block auction rules would be consistent with our duty to implement the Budget Act,[28] since we believe that many designated entities would qualify as small businesses under our rules.[29] Furthermore, as small businesses, such entities would be entitled to a small business bidding credit and favorable installment payment terms.[30]

9. Accordingly, we sought comment on amending six rule provisions as follows:[31]

- 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.

- 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 investors who are members of a minority-owned 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.

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

- Amend Section 24.204 of the Commission's Rules to make the 40 percent

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[27] *Id.* at ¶ 10.

[28] *See, e.g., Second Report and Order and Second Further Notice of Proposed Rule Making*, PR Docket No. 89-553, 60 Fed. Reg. 22023 (1995) (*900 MHz SMR Second R&O/Second FNPRM*).

[29] *See e.g., 900 MHz SMR Second R&O/Second FNPRM* (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, Table 8; *Survey of Minority-Owned Business Enterprises*, MB 87-4. 1987 Economic Census, pp. 81-82, Table 8).

[30] 47 CFR §§ 24.712 and 24.711. *See eg. Further Notice* at ¶ 10.

[31] The final rule changes are attached as Appendix A.

cellular attribution threshold applicable to ownership interests held by small businesses and rural telephone companies, and to non-controlling 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 for the CMRS "Spectrum Cap" applicable to ownership interests held by small businesses and rural telephone companies.

We received 41 timely-filed comments in response to the *Further Notice*. In addition, after announcement of the *Adarand* decision and prior to release of the *Further Notice*, we received 42 informal comments addressing various issues regarding our C block competitive bidding rules, the impact of *Adarand*, and the need for the C block auctions to proceed expeditiously.[32]

III. DISCUSSION

A. Rationale for Rule Changes

10. The overwhelming majority of commenters support the proposed rule changes set forth in the *Further Notice*. A few commenters, however, generally oppose our proposals on the basis that *Adarand* does not require us to change the race- and gender-based provisions contained in our C block competitive bidding rules.[33] Specifically, BET contends that *Adarand* does not wholly invalidate such provisions but merely requires that their constitutionality be determined utilizing a strict scrutiny standard of review.[34] BET and NABOB argue that the race- and gender-based provisions can and should be retained because they would survive a strict scrutiny standard of review and comply with the congressional mandate of the Budget Act.[35] Similarly, Giles contends that the proposed rule changes contravene the spirit and mandate of the Budget Act.[36] BET also proposes alternative rule changes that it contends will satisfy the Congressional goals outlined in the Budget Act, flow from the Commission's record, and comport with the standards pronounced in *Adarand*.[37]

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[32]A list of these commenters is attached as Appendix D.

[33]BET Comments at 6; NABOB Comments at 1, 7.

[34]BET Comments at 6.

[35]BET Comments at 25-36; NABOB Comments 7-12.

[36]Giles Comments at 2-5.

[37]BET Comments at 3, 12-17.

11. Upon careful review we remain concerned that our present record would not adequately support the race- and gender-based provisions in our C block competitive bidding rules under a strict scrutiny standard of review. Significantly, the D.C. Circuit previously stayed the C block auction in response to a constitutional equal protection challenge against these provisions when a less strict standard of review was applicable. As a result, we strongly believe that there is a substantial likelihood of further legal challenge to the C block auction in the wake of *Adarand* if such provisions remain unchanged. None of the commenters have challenged this belief. Furthermore, as we indicated in the *Further Notice*, we would need additional evidence to sufficiently develop our record to support these race- and gender-based provisions consistent with the dictates of *Adarand*. Any efforts to obtain this additional evidence would require additional time and, therefore, further delay the commencement of the C block auction. The legal uncertainty associated with the race- and gender-based provisions, combined with the views of potential C block bidders that the auction not be subject to any further delay, prompt us to modify our rules in a fashion which would be minimally disruptive to as many of the interested parties, potential bidders as well as members of the financial and investment communities as possible. We also disagree with the assertion by BET and Giles that today's rule changes are inconsistent with the Budget Act. As we concluded in the *Further Notice*, today's rule changes would allow small businesses to benefit from the most favorable bidding credits and installment payment plans contained in our rules. As a result, because we have evidence which supports a conclusion that many designated entities, including minority and women-owned businesses, would qualify as small businesses and, thus, benefit from such provisions, we believe that our action is fully consistent with the Budget Act. We further conclude that the proposals we adopt today are necessary under the circumstances and indeed will best serve the public interest.

12. With respect to alternative rule change proposals presented by the commenters, we conclude, as discussed more fully below, that because they draw distinctions based upon race, most of these proposals would engender the same danger of constitutional infirmity and would result in the same legal uncertainties that we seek to mitigate by these decisions. To the extent that the commenters have presented race- and gender-neutral rule changes, we conclude, as discussed herein, that the proposals set forth in the *Further Notice*, which are broadly supported by numerous commenters, constitute the more prudent and expedient course of action for proceeding with the auctioning of the C block licenses post-*Adarand*.

B. 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 "control group" structures,[38] so that the gross revenues and total assets of persons or entities holding interests in such applicants will not be considered. These two equity structures are the *Control Group Minimum 25 Percent Equity Option*[39] (which is available to all applicants) and the *Control Group Minimum 50.1 Percent Equity Option*[40] (which is currently available only to minority or women applicants).[41] In the *Further Notice*, we proposed to modify our rules to permit all C block applicants, including small businesses[42] and entrepreneurs,[43] to avail themselves of the *Control Group Minimum 50.1 Percent Equity Option*.[44] 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.[45] We tentatively concluded that such a rule change would cause the least disruption and open up additional financing options for other applicants in the C block auction.[46] The *Further Notice* sought comment on this proposed rule change and tentative conclusion.

14. Comments. Most commenters agree that the *Control Group Minimum 50.1*

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[38]Under the two control group options, the gross revenues and total assets of certain investors are not attributed to the applicant provided the applicant has a control group consisting of one or more individuals or entities that have *de jure* and *de facto* control of the applicant. The gross revenues and total assets of each member of the control group (with the exception of certain control group investors) aggregated and counted toward the financial caps applicable to the entrepreneurs' block licenses including the small business size standard. *See* 47 CFR §§ 24.709(a)(2), (b)(3), (b)(4). Other options are available to small business consortia and certain publicly-traded corporations. *Id.* at 24.709(b)(1), (b)(3).

[39]47 CFR §§ 24.709(b)(3), (b)(5).

[40]47 CFR §§ 24.709(b)(3), (b)(5).

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

[42]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).

[43]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).

[44]*Further Notice* at ¶ 15.

[45]*Fifth R&O*, 9 FCC Rcd at 5537.

[46]*Id.*

Percent Equity Option should be made available to all C block applicants.[47] Several commenters express concerns about further delay of the auctioning and licensing of the C block and agree that this minimal rule change would not unduly disrupt existing business relationships.[48] Other commenters support the proposed rule change on the basis that it would substantially reduce, if not eliminate, the possibility of legal challenges to the C block auction based on the *Adarand* decision.[49] DCR Communications and Small Business PCS argue that elimination of minority- and gender-based provisions would provide meaningful opportunity for small businesses, as well as minority- and women-owned businesses, to participate in the C block auction.[50]

15. Other commenters, however, oppose extending availability of the *Control Group Minimum 50.1 Percent Equity Option* to all entrepreneurs.[51] K&M proposes that this equity structure only be available to "very small businesses," defined as businesses with revenues up to $20 million.[52] Omnipoint argues that because the *Control Group Minimum 50.1 Percent Equity Option* was created to address the problems experienced by women- and minority-owned companies in accessing capital, the Commission should either justify the measure under the strict scrutiny standard of review or eliminate it completely.[53] Omnipoint expresses concern that extension of the *Control Group Minimum 50.1 Percent Equity Option* equity structure to all C block applicants would increase the number of "shams" financed by big companies.[54] Similarly, Silverman and Century oppose allowing large companies, whether

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[47]Spectrum Resources Comments at 2; Minority Media *et al.* Comments at 1; GO Communications Comments at 2-3; CIRI Comments at 24; Oneida Tribe Comments at 16; Central Alabama & Mobile Tri-States Comments at 4; DCR Communications Comments at 5-6, 8; Airlink Comments at 3-5; General Wireless Comments at 4-5; Small Business PCS Comments at 1-2; Infocore Comments at 2, 3; Century Comments at 1; Chase Telecommunications Comments at 1; Prairie Island Comments at 1; U.S. Airwaves Comments at 1-2; National Telecomm Comments at 1; CSI Comments at 1-2.

[48]Spectrum Resources Comments at 3-4; GO Communications Comments at 3; CIRI Comments 23-24; Airlink Comments 4-5; Infocore Comments at 3; CSI Comments at 1-2.

[49]Central Alabama & Mobile Tri-States Comments at 4; Airlink Comments at 4-5; General Wireless Comments at 4-5; Small Business PCS Comments at 1-2; CSI Comments at 1-2.

[50]DCR Communications Comments at 5-6; Small Business PCS Comments at 2.

[51]O.N.E. Comments at 1; Omnipoint Comments at 9-10.

[52]K&M Comments at 5.

[53]Omnipoint Comments at 9-10.

[54]Omnipoint Ex Parte Comments at 1.

minority- or women-owned, as a general matter, to own more than 25 percent of a C block applicant's equity.[55]

16. Decision. We have decided to amend our rules to permit all C block applicants to avail themselves of the *Control Group Minimum 50.1 Percent Equity Option*. This amendment enables minority- or women-owned applicants structured under our prior rule to retain the *Control Group Minimum 50.1 Percent Equity Option*, while extending this option to other applicants in the entrepreneurs' block as well. We recognize that we originally established the *Control Group Minimum 50.1 Percent Equity Option* as a race- and gender-based measure aimed at addressing the unique financing problems experienced by women- and minority-owned businesses. All C block applicants, as well as the public, will be better served if we proceed expeditiously in a manner which both reduces the likelihood of legal challenges and enhances the opportunities for a wide variety of applicants, including designated entities, to obtain licenses and rapidly deploy broadband PCS service.[56] Thus, we conclude that use of this equity structure should now be dependent upon economic size, a factor not implicated by the Court's decision in *Adarand*. Moreover, retaining the *Control Group Minimum 50.1 Percent Equity Option* should help to preserve existing business relationships formed in reliance on our prior rules and encourage participation in the C block auction.

17. We disagree with Omnipoint's position on the *Control Group Minimum 50.1 Percent Equity Option* rule change. In the *Fifth R&O* and the *Fifth MO&O*, we indicated that the equity structure options provided under our rules are designed to provide qualified bidders with a reasonable amount of flexibility in attracting needed financing from other entities, while ensuring that such entities do not acquire controlling interests in the qualified bidders.[57] With respect to the *Control Group Minimum 50.1 Percent Equity Option*, we previously explained that in order to guard against abuses, the control group of applicants choosing this option must own at least 50.1 percent of the applicant's equity, as well as retain control and hold at least 50.1 perent of the voting stock.[58] We have previously concluded that this requirement reduces substantially the danger that a well-capitalized investor with substantial ownership stake will be able to assume de facto control of the applicant.[59] In addition, we previously clarified our rules so that persons or entities that are affiliates of one another, or that have an "identity of interests," as well as their other investors pursuant to Sections

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[55]Silverman Comments at 1; Century Comments at 1.

[56]*See* 47 U.S.C. 309(j)(3)(A) and (B).

[57]*Fifth R&O*, 9 FCC Rcd at 5602, 5603; *Fifth MO&O*, 10 FCC Rcd at 453.

[58]*Fifth R&O*, 9 FCC Rcd at 5602.

[59]*Id.* at 5603.

24.709(c) and 24.813 will be treated as though they are one person or entity and their ownership interests aggregated for purposes of determining compliance with our nonattributable equity limits.[60] This clarification was aimed at discouraging large investors from circumventing our equity limitations for nonattributable investors.[61] We believe that these measures will be effective in deterring the type of "sham" deals described by Omnipoint. Moreover, we will have the opportunity to review these structures through the application process when bidders who elect to utilize such equity structures are required to identify the members of their control groups. Consequently, we believe that our rules adequately protect against "sham" deals.

18. Accordingly, under Section 24.709 of the rules, all applicants in the C block auction selecting a "control group" structure in order to exclude the total assets and gross revenues of certain investors will have two options for raising capital through the distribution of equity among "qualifying investors," other eligible investors in the control group (e.g., management and institutional investors) and other non-attributable "strategic" investors. In light of the fact that we have eliminated the eligibility dichotomy in the two control group equity options, we specify and clarify here how both options apply to C block applicants.

19. First, we note that under both options the following control and voting requirements continue to apply: (1) the control group must own at least 50.1 percent of the applicant's voting stock, if a corporation, or all of the applicant's general partnership interests, if a partnership;[62] (2) qualifying investors, as defined in the rules, must hold at least 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 the applicant;[63] and (3) the investor(s) holding "nonattributable equity" (up to 25 percent or 49.9 percent) are limited to 25 percent of a corporate applicant's voting equity (including the right to vote such interests through a voting trust or other arrangement) and may hold only limited partnership interests, if the applicant is a partnership.[64]

20. *Control Group Minimum 25 Percent Equity Option.* This equity structure option requires the control group to hold at least 25 percent of the applicant's total equity.[65] Of this

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[60] *Fifth MO&O*, 10 FCC Rcd at 453-454.

[61] *Id.* at 453.

[62] 47 CFR § 24.709(b)(3)(iii) and (4)(iii).

[63] *Id.* § 24.709(b)(5)(i)(B) and (6)(i)(B).

[64] *Id.* §§ 24.709(b)(3)(i) and (4)(i), 24.720(j) (definition of "nonattributable equity").

[65] *Id.* § 24.709(b)(5)(i).

25 percent equity, at least 15 percent must be held by "qualifying investors."[66] A "qualifying investor" is generally defined as a member of, or a holder of an interest in a member 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 or status as a small business.[67] With regard to the remaining 10 percent of the control group's equity, this may be held by four types of noncontrolling investors without these investors' assets and revenues being attributed to the applicant, as is the case with other control group members.[68] These are (1) qualifying investors (small businesses or entrepreneurs); (2) individuals who are members of the applicant's management team; (3) existing investors in a preexisting entity that is a member of the control group; and (4) institutional investors.[69] The minimum equity amounts within the control group vary slightly three years after the license is received and for applicants whose sole control group member is a preexisting entity.[70] As for the remaining 75 percent of the applicant's equity (assuming the control group holds no more than the minimum 25 percent), the gross revenues and total assets (and other affiliations) of an investor holding a portion of this remaining equity are not considered so long as such investor (together with its affiliates) holds no more than 25 percent of the applicant's total equity.[71]

21. *Control Group Minimum 50.1 Percent Equity Option.* This equity structure option requires the control group to hold at least 50.1 percent of the applicant's total equity.[72] Of this 50.1 percent equity, at least 30 percent must be held by "qualifying investors."[73] The remaining 20.1 percent of the control group's equity may be held by the same four types of

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[66] *Id.* § 24.709(b)(5)(i)(A).

[67] 47 CFR § 24.720(n)(1). Below, we clarify the definition of "qualifying investor" with respect to holders of the remaining control group equity.

[68] *Id.* § 24.709(b)(5)(i)(C) and (3)(ii).

[69] *Id.* § 24.709(b)(5)(i)(C); *See Fifth MO&O*, 10 FCC Rcd at 438-444, *erratum* at ¶¶ 2-5.

[70] 47 CFR § 24.709(b)(5)(i)(D) and (5)(ii).

[71] *Id.* § 24.709(b)(3).

[72] *Id.* § 24.709(b)(6)(i).

[73] *Id.* § 24.709(b)(5)(i)(A) (as revised herein).

investors specified above.[74] As with the *Control Group Minimum 25 Percent Equity Option*, the minimum equity amounts within the control group vary slightly three years after the license is received and for applicants whose sole control group member is a preexisting entity.[75] As for the remaining non-control group equity, the gross revenues and total assets (and affiliates) of the investor(s) holding this remaining equity is not considered so long as such investor(s) (together with its affiliates) holds no more than 49.9 percent of the applicant's total equity.[76] The reasoning behind these two options and their advantages to applicants for purposes of raising capital are set forth in our *Fifth R&O* and *Fifth MO&O*.[77] We affirm here that this reasoning and the advantages for maintaining both options remain applicable. We note that, under our prior rules, businesses owned by minorities and women had the option to use either equity structure. It is our understanding that such businesses, depending on their particular circumstances, were forming applicants based on the option that best met their needs for outside investment and what the capital markets were seeking from them in the form of equity interests. We now provide both options to all C block applicants and we anticipate that each applicant will pursue (or switch to) the option that best suits its particular capital needs and equity ownership situation.

22. *Qualifying Investors*. The modification in the *Fifth MO&O* and here of the control group minimum equity requirements to allow certain other investors to own "control group equity" -- and not have their assets and revenues attributed to the applicant[78] -- may not be clear in light of the definition of "qualifying investor" in section 24.720(n) of the Commission's rules.[79] Specifically, in the *Fifth MO&O*, we modified the rules to allow certain noncontrolling investors who do not qualify for the entrepreneurs' block or as a small business to be investors in an applicant's control group. In making these limited changes to the control group equity requirements, we said that this added, but limited, flexibility will (1) promote investment in designated entities generally; (2) attract and promote skilled management for applicants; and (3) encourage involvement by existing firms that have valuable management skills and resources to contribute to the success of applicants.[80]

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[74] *Id.* § 24.709(b)(6)(i)(C) and (4)(ii).

[75] *Id.* § 24.709(b)(6)(i)(D) and (6)(ii) (as modified herein).

[76] *Id.* § 24.709(b)(4).

[77] *See Fifth R&O*, 9 FCC Rcd at 5584-5585; *Fifth MO&O*, 10 FCC Rcd at 438-443.

[78] *See* ¶¶ 16-21 *supra*.

[79] The term "qualifying minority and/or women investor" in section 24.720(n)(2), and anywhere it is used, will be deleted from the C block auction rules in accordance with the changes made herein.

[80] *See Fifth MO&O*, 10 FCC Rcd at 438, 441.

23. We stated that the first category for inclusion in this 10 percent or 20.1 percent portion of the control group is "investors in the control group that are women, minorities, small businesses or entrepreneurs."[81] The text of the rules adopted in the *Fifth MO&O* and the *erratum* to the *Fifth MO&O* capsulized this category as "qualifying investors,"[82] but the definition of "qualifying investors" in the rules failed to reflect the broader nature and purpose for allowing "women, minorities, small businesses or entrepreneurs" hold shares or options in the 10 percent or 20.1 percent portion of the control group even though they -- like the other categories -- "if attributed, would cause the applicant to exceed the small business or entrepreneurs' block financial caps . . .." Consistent with our intent in the *Fifth MO&O*, we clarify that, so long as the minimum equity requirements for "qualifying investors" (15 percent or 30 percent) under our new rules are met, the remaining control group equity (10 percent or 20.1 percent) may be held by investors that meet either the small business or entrepreneur eligibility requirements. We continue to believe that such entities, if they wish to provide financial support to C block applicants, should not be precluded from doing so because their financial status would, if considered with other control group members, make the applicant ineligible for the C block or small business status. Accordingly, we clarify our definition of "qualifying investor" for purposes of Section 24.709(b)(5)(i)(C) and (6)(i)(C).

C. Affiliation Rules

24. Background. We adopted affiliation rules for purposes of 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.[83] There are two exceptions to our broadband PCS affiliation rules. 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 exempt from the affiliation rules for purposes of determining eligibility to participate in bidding on C block licenses. These applicants additionally 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 applicant's eligibility determination.[84] 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

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[81] *Fifth MO&O*, 10 FCC Rcd at 406, 440.

[82] *Erratum* at ¶¶ 5, 7.

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

[84] 47 CFR § 24.720(l)(11)(i).

determining compliance with the eligibility standards for entry into the entrepreneurs' block.[85]

25. In the *Further Notice*, we proposed to eliminate the exception pertaining to minority investors.[86] In crafting this exception, we anticipated that it would permit minority investors that control other business entities 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.[87] 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.[88] In the *Further Notice*, we tentatively concluded that it would be imprudent to respond to *Adarand* by extending this 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 including small businesses and rural telephone companies.[89]

26. The *Further Notice* proposed to retain the affiliation exception for Indian tribes and Alaska Regional or Village Corporations.[90] We tentatively concluded that the "Indian Commerce Clause" of the United States Constitution provides an independent basis for this exception that is not implicated by the *Adarand* decision.[91]

27. Comments. The commenters overwhelmingly support elimination of the exception to our affiliation rules that excludes the gross revenues and total assets of affiliates

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[85] 47 CFR § 24.720(l)(11)(ii).

[86] *Further Notice* at ¶ 19.

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

[88] *Id.*

[89] *Further Notice* at ¶ 19. *See also Fifth R&O*, 9 FCC Rcd at 5538.

[90] *Further Notice* at ¶ 20.

[91] *Id.*; *Order on Reconsideration*, FCC 94-217 (released Aug. 15, 1994); *Fifth MO&O*, 10 FCC Rcd at 427-428.

controlled by minority investors who are members of an applicant's control group.[92] Some commenters agree that this rule change would reduce the likelihood of a further delay to the C block auction resulting from legal challenges premised on the *Adarand* decision.[93] Other commenters argue that the Court's ruling in *Adarand* requires elimination of the affiliation rule exception applicable solely to investors who are members of minority groups.[94] With respect to the effect of such rule change, Central Alabama & Mobile Tri-States argue that by virtue of the current rule, well-financed entities who might otherwise not qualify as an entrepreneur or as small businesses are allowed to participate in the C block which is ultimately to the detriment of those C block applicants who actually experience difficulties in accessing capital.[95] DCR Communications contends that the proposed rule change would not deprive women and minority-owned businesses of investment from other minorities whose affiliates would exceed the financial size limitations imposed under our rules; rather, it would limit such investment to 25 percent before it becomes attributable.[96]

28. BET, NABOB, and O.N.E. oppose elimination of the affiliation rule exception pertaining to investors who are members of minority groups. NABOB argues that such elimination will prevent many bidders from including experienced, successful minority entrepreneurs in their control groups, which, in turn, may cause them to lose financing dependent upon such alliances, and, thus, prevent them from participating in the C block auctions.[97] Similarly, BET argues that this rule change would not only exclude several minority entrepreneurs, but, because the A and B blocks already have been licensed, such minorities would be precluded from any meaningful participation in broadband PCS.[98] BET further argues that elimination of the affiliation rule exception would be inconsistent with the congressional mandate given in the Budget Act and the record established by the Commission

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[92]CSI Comments at 1-2; National Telecomm Comments at 1; U.S. Airwaves Comments at 1-2; Chase Telecommunications Comments at 1; Prairie Island Comments at 1; Infocore Comments at 2,3; Small Business PCS Comments at 1-2; General Wireless Comments at 4-5; Airlink Comments at 3-5; DCR Communications Comments at 5-6, 8-9; Central Alabama & Mobile Tri-States Comments at 4; GO Communications Comments at 2-3; Minority Media *et al.* Comments at 1; Oneida Tribe Comments at 16.

[93]General Wireless Comments at 4-5; CSI Comments at 1-2; Airlink Comments at 4-5; Central Alabama & Mobile Tri-States Comments at 4.

[94]U.S. Airwaves Comments at 1-2; Infocore Comments at 2,3; Small Business PCS Comments at 1-2; GO Communications Comments at 3.

[95]Central Alabama & Mobile Tri-States Comments at 4.

[96]DCR Communications Comments at 8-9.

[97]NABOB Comments at 2-6.

[98]BET Comments at 7.

regarding those problems experienced by minority-owned businesses that the exception was specifically designed to address.[99] Also, BET contends that *Adarand* does not require such a rule change.[100]

29. Some commenters generally propose alternative modifications to the affiliation rule exception for minority investors. NABOB proposes that the exception be modified so that an entity controlled by a member of the control group of a small business applicant or licensee would not be considered an affiliate of the applicant if the entity would qualify as an entrepreneur.[101] Spectrum Resources proposes that investors who have affiliates with gross revenues and total assets sufficiently large to disqualify a small business applicant would still be allowed to invest in the application if their investment was capped at a relatively low level, such as $100,000. Spectrum Resources argues that this modification would increase the pool of investors for small businesses while ensuring that the applicant remains a small business.[102]

30. BET suggests four alternative affiliation rule exceptions. Under BET's first alternative exception, it proposes that the exception be made available only when the revenues and assets of each of the affiliates of minorities in a control group separately qualify as entrepreneurs under our rules. If, however, any of the affiliates exceeded the financial limitations for the C block, then the minority-owned applicant would not be allowed to participate in the C block auction.[103] BET argues that this proposal is analogous to the Commission's treatment of small business consortia in the C Block.[104] Under BET's second proposal, the revenues and assets of affiliates of minority members of an applicant's control group would be excluded if the average revenues of the affiliates over the past two years are less than the C block financial limits. BET argues that without such modification, Native Americans are being singled out for special treatment in violation of the Equal Protection Clause.[105] Under these proposals, BET suggests that aggregation of the gross revenues and total assets of these affiliates would not be required in determining whether the applicant qualifies as an entrepreneur or a small business. BET's other affiliation rule exception

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[99]BET Comments at 10-12.

[100]BET Comments 24-37.

[101]NABOB Comments at 5.

[102]Spectrum Resources Comments at 2-3.

[103]BET Comments at 13-14.

[104]BET Comments at 14.

[105]BET Comments at 16, n.25.

proposals consist of making the first two proposals described above applicable to all members of a control group regardless of race. BET argues that these proposals would exclude large telecommunications companies, allow otherwise excluded minority applicants to participate in the C block auction, and provide for the limited growth of small companies.[106]

31. With regard to the affiliation rule exception pertaining to Native Americans, CIRI, the Oneida Tribe, and Prairie Island agree that such exception should be retained.[107] These commenters also agree that this exception is authorized by the Indian Commerce Clause of the Constitution.[108] Furthermore, CIRI and Prairie Island contend that the affiliation rule exception is not a race-based measure implicated by *Adarand*.[109] Prairie Island argues that the exception is an outgrowth of an accommodation by the federal government of several Indian tribes as sovereign political entities in a trust relationship with the United States.[110] CIRI and Prairie Island also argue that this exception is part of federal Indian law and policy.[111] CIRI also argues that elimination of the affiliation rule exception pertaining to Indian tribes would be: (1) inconsistent with the Small Business Administration's treatment of tribal entities; and (2) without record support since the record supports the exception's underlying purpose and the essential circumstances justifying such exception have not changed.[112]

32. Decision. Although we proposed to eliminate the exception to our affiliation rules pertaining to minority-controlled affiliates, we now decide to modify it in a manner similar to BET's proposal.[113] When we originally crafted this exception for minority-owned applicants, we anticipated that it would permit minority investors who control other concerns to be members of a minority-owned 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

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[106]BET Comments at 18-19.

[107]CIRI Comments at 4-23; Oneida Tribe Comments at 6; Prairie Island Comments at 2-5.

[108]CIRI Comments at 5-6; Oneida Tribe Comments at 6; Prairie Island Comments at 4.

[109]CIRI Comments at 4-10; Prairie Island Comments at 2.

[110]Prairie Island Comments at 2.

[111]CIRI Comments at 11-15; Prairie Island Comments at 4-5.

[112]CIRI Comments at 13-14, 15-23.

[113]*See also* Comtech Ex Parte Letter, filed July 14, 1995.

other concerns being counted as part of the applicant's total assets and revenues.[114] We further anticipated that such an exception would permit minority-owned 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.[115] However, as we recognized in allowing small business consortia to apply in the C block and in granting small businesses special measures, all small businesses, including those owned by minorities and women, should not be precluded from pooling their resources in this capital intensive service. We believe that to some extent, these firms face barriers to raising capital not faced by the larger firms. In addition, small businesses experienced in managing smaller businesses should not be penalized because they own or are otherwise affiliated with other businesses whose assets and revenues must be considered on a cumulative basis and aggregated for purposes of qualifying for the C block auction.[116]

33. Our modification will benefit small business applicants only where the financial position of their affiliates or their qualifying control group member's affiliates, when considered individually and on a cumulative basis, would not present an unfair competitive advantage in the auction. Thus, to achieve the objectives outlined above -- including minimizing the adverse impact on existing business relationships, mitigating the risk of legal challenges, and ensuring that the auctions are fair and do not present any bidder with an unfair competitive advantage -- we modify this exclusion from affiliation coverage as follows:

> o For purposes of the affiliation rules, a small business applicant can exclude from coverage of the affiliation rules any affiliate of the small business applicant if the following conditions are met:
>
> > (1) the affiliate would otherwise qualify as an entrepreneur pursuant to section 24.709(a)(1) ($125 million in gross revenues and $500 million in total assets); and
> >
> > (2) the total assets and gross revenues of all such affiliates, when considered on a cumulative basis and aggregated with each other, do not exceed these amounts.

This exemption will apply for purposes of qualifying for both the C block auction and small business status.

34. We will also retain the affiliation exception for Indian tribes and Alaska Regional

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

[115] *Id.*

[116] See 47 CFR § 24.709(a)(2).

or Village Corporations. In the *Fifth MO&O*, we stated that our decision to exempt Indian tribes generally from our affiliation rules was premised on the fact that Congress has imposed unique legal constraints on the way they can utilize their revenues and assets.[117] We recognized that as a result of such constraints imposed by the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 *et seq.*, Native American corporations are precluded from utilizing two important means of raising capital: (1) the ability to pledge the stock of the company against ordinary borrowings, and (2) the ability to issue new stock or debt securities.[118] We further recognized that Congress has mandated that the Small Business Administration determine the size of a business concern owned by a tribe without regard to the concern's affiliation with the Indian tribe and determined that the affiliation exception contained in our C block affiliation rules mirrored this congressional mandate.[119] Although Indian tribes are minorities under our C block auction rules, we conclude that their affiliation rule exception is different from the exception applicable only to minority investors in that it is premised on their unique legal status as recognized in the "Indian Commerce Clause" of the United States Constitution.[120]

D. Installment Payments

35. Background. Five different installment payment plans are available to C block applicants under Section 24.711 of the Commission's Rules.[121] In the *Further Notice*, we sought comment on our proposal to allow all small businesses, regardless of racial or gender classification, the opportunity to use the most favorable installment payment plan to pay for their licenses. This proposal provides for interest-only payments for six years and payments of principal and interest amortized over the remaining four years of the license term. We indicated that this approach would allow many prospective bidders to maintain their pre-*Adarand* business arrangements.

36. Comments. A majority of the comments support the elimination of installment payment plans 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. Several commenters note that our proposal will result in the least amount of delay to the

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[117] *Fifth MO&O*, 10 FCC Rcd at 427.

[118] *Id.*

[119] *Id.*

[120] U.S. Const. art. I, § 8, cl. 3.

[121] 47 CFR § 24.711.

auction and grant of C block licenses.[122] GO Communications asserts that delays and threats of delay to the C block auction will irrevocably damage all entrepreneurs.[123] Airlink expresses a similar opinion when it notes that there is a direct link between auction delays, market competitiveness and investor confidence.[124] Airlink further maintains that auction delays inhibit the ability of applicants to keep and find sources of investment.[125] Small Business PCS was even more adamant that any other alternative would result in further delay and no viable licenses for any small businesses.[126] Although the majority of commenters favor our proposal, Minority Media *et al.* also suggests allowing any applicant who can demonstrate "good cause" to request a waiver under Sections 1.3 and 24.819(a) of our rules[127] to be eligible for small business preferences and the bidding credit under our proposed rule.[128] Under Minority Media *et al.*'s proposed alternative, any waiver requests by women and minorities would receive a "plus" factor since there is record evidence in this proceeding and in congressional legislation that establishes compelling governmental interests in diversity of ownership.[129]

37. Several commenters oppose our proposal to modify our installment payment plan. InTouch asserts that we are raising barriers to accessing capital by minority-owned businesses.[130] By eliminating the race and gender preference, BET argues that we are not assisting minority-owned small businesses in overcoming obstacles to entry into the PCS marketplace.[131] BET further maintains that the *Further Notice* must still satisfy Congress' directive to disseminate licenses among a wide variety of applicants and to ensure that

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[122]GO Communications Comments at 3; General Wireless Comments at 4-5; CSI Comments at 1-2; Small Business PCS Comments at 1-2; Airlink Comments at 3-5.

[123]GO Communications Comments at 3.

[124]Airlink Comments at 3-5.

[125]Airlink Comments at 3-5.

[126]Small Business PCS Comments at 2.

[127]47 CFR §§ 1.3 and 24.819(a).

[128]Minority Media *et al.* Comments at 7-8.

[129]Minority Media *et al.* Comments at 8-9.

[130]InTouch Comments at 3.

[131]BET Comments at 33.

minorities are not excluded from the auction process.[132] O.N.E. charges that we are wrong to eliminate all race- and gender-based preferences without proposing a race- and gender-neutral solution.[133] Specifically, O.N.E. argues that our proposals do not create a size standard that is race and gender neutral yet small enough to ensure that businesses owned by members of minority groups and women are given the opportunity to participate in the provision of PCS.[134] As a result, they assert that our proposals have the effect of restricting opportunities to only an elite handful of minorities and women.[135]

38. RTC disagrees with our installment plans as set forth in the *Further Notice* and suggests two proposals of its own. First, RTC would make the same installment payment terms available to all small businesses that qualify to participate in the C block auction. Alternatively, RTC would maintain the existing differentials available to small businesses that meet the $40 million gross revenues test vis-a-vis other small businesses that qualify as "entrepreneurs."[136] RTC asserts that the effect of the proposals creates a massive gulf between small businesses whose control groups can meet the $40 million gross revenues test versus those whose control group cannot meet that test.

39. Decision. We will amend our rules concerning installment payments as set forth in the *Further Notice*. We have concluded that revision of our installment payment program in this manner, is minimally disruptive to the established business arrangements of the applicants.[137] All small businesses, including minority- or women-owned small businesses, will continue to be eligible for the most favorable installment plan.

40. We further conclude that our installment payment plan designed solely for small businesses will give designated entities an opportunity to participate in the provision of spectrum-based services. By allowing all small businesses to pay for their licenses in this manner (*i.e.*, using installments, at a rate equal to ten-year U.S. Treasury obligations applicable on the date the license is granted and requiring that payments include interest only

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[132]BET Comments at 33.

[133]O.N.E. Comments at 1.

[134]O.N.E. Comments at 1.

[135]O.N.E. Comments at 1.

[136]RTC Comments at 2.

[137]*See e.g.*, Letter from Tara Kalagher Guinta representing TTW Communications Inc. to Regina M. Keeney, Chief, Wireless Telecommunications Bureau, FCC and Kathleen O. Ham, Chief, Auctions Division (June 25, 1995); Letter from Steven Y. Barnes, President, PCS Consultants, Inc. to Reed Hundt, Chairman, FCC (June 16, 1995).

for the first six years with payments of principal and interest amortized over the remaining four years of the license term), we will provide the most favorable plan to the smallest companies. We are not, as O.N.E. suggests, restricting opportunities to a handful of minorities and women. We are complying with our statutory obligations in a manner that we believe is necessary under the circumstances. We reject RTC's alternatives to make the same installment plan available to all applicants. Our record shows that smaller companies need more assistance accessing capital for broadband licenses and, therefore, the Commission decided these businesses should receive more favorable treatment than the medium to large companies participating in the C block auction.

41. Based on our experience, we conclude that Minority Media *et al.*'s waiver proposal as described in its comments is administratively burdensome, and potentially has its own legal risks since it is based in part on an applicant's status as a woman or minority. A major purpose of our proposals is to avert further delays in the auction and grant of C block licenses. The waivers would give losing applicants a built-in reason to challenge the auction results with petitions to deny if a winning applicant utilized the bidding credit solely as a result of a waiver for "good cause." Therefore, for purposes of the C block auction, we will not adopt such a waiver proposal.

42. Although the revised rules do not specifically target minorities and women, we realize that because a large number of minority- or women-owned businesses are small businesses, our new rules will nonetheless, afford designated entities opportunities to participate in the C block auction. We recognize that this amendment to the installment payment plan will not allow some minority- and women-owned businesses to elect the most favorable installment payment plan because these businesses exceed our small business threshold. We further recognize that these businesses may have to restructure agreements to obtain additional capital to participate in the C block auction.

43. We weighed the risks of litigation to the Commission and to winning bidders, the need to preserve competition, and our commitment to providing service to the public as expeditiously as possible against the additional financial burden this rule change will have on minority- and women-owned businesses that do not qualify as small businesses under our rules. After carefully considering these issues, we determined that the need to mitigate litigation risks, enhance market competition, and encourage prompt service to the public far out-weigh the additional financial burden this rule change would create for potential bidders.

E. Bidding Credits

44. Background. Our current rules provide three tiers of bidding credits ranging between 10 percent and 25 percent.[138] Small businesses are eligible for a 10 percent bidding credit. Businesses owned by women or minorities are eligible for a 15 percent bidding credit

[138] 47 CFR § 24.712.

and small businesses owned by women or minorities are eligible for a 25 percent total bidding credit. The bidding credit acts as a discount on the winning bid amount that a licensee actually pays for the license. In the *Further Notice*, we proposed increasing the bidding credit for small businesses from 10 percent to 25 percent and eliminating the remaining bidding credits. We recognized that this proposal would enhance the competitiveness of all small businesses which will receive a 15 percent increase in their bidding credits. The positions of minority- or women-owned small businesses will remain the same because they are already eligible for a 25 percent bidding credit.

45. Comments. Commenters generally advocate increasing the small business bidding credit to 25 percent and the elimination of bidding credits based upon an applicant's race or gender.[139] Some commenters supported our proposal to differentiate between applicants on the basis of size in order to avert any *Adarand* or *TEC* legal challenges to our rules.[140] Minority Media *et al.* repeated its "good cause" waiver argument under Sections 1.3 and 24.819(a)[141] of our rules.[142]

46. Two commenters oppose the proposed bidding credit modification.[143] Both BET and InTouch argue that race neutral alternatives serve only to reinforce the barriers to capital that many minority-owned businesses face.[144] BET specifically states that the bidding credit is meant to "address directly the financing obstacles encountered by minorities."[145] Two

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[139]Infocore Comments at 2-3; Small Business PCS Comments at 1-2; Airlink Comments at 3-5; CSI Comments at 1-2; General Wireless Comments at 4-5; GO Communications Comments at 2-3; Spectrum Resources Comments at 3; Central Alabama & Mobile Tri-States Comments at 5; Prairie Island Comments at 1; Chase Telecommunications Comments at 1; U.S. Airwaves Comments at 1-2; National Telecomm Comments at 1; Minority Media *et al.* Comments at 1. *See eg.* Letter from Tara Kalagher Guinta representing TTW Communications, Inc. to Regina M. Keeney, Chief, Wireless Telecommunications Bureau, FCC and Kathleen O. Ham, Chief, Auctions Division (June 15, 1995); Letter from Gloria Borland, Gloria Borland Hawaii, PCS to William F. Caton, Acting Secretary, FCC (June 19, 1995); Letter from Steven Y. Barnes, President, PCS Consultants, Inc. to Reed Hundt, Chairman, FCC (June 16, 1995).

[140]General Wireless Comments at 4-5; Small Business PCS Comments at 1-2; Airlink Comments at 3-5; Infocore Comments at 2-3; Central Alabama & Mobile Tri-States Comments at 5.

[141]47 CFR §§ 1.3 and 24.819(a).

[142]*See infra* ¶¶ 36, 41.

[143]BET Comments at 34; InTouch Comments at 3.

[144]BET Comments at 34; InTouch Comments at 3.

[145]BET Comments at 34 (*citing Fifth R&O*, 9 FCC Rcd at 5589-5590).