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FCC 96-119

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

In the Matter of)	
)	
Amendment of Part 20 and 24 of the)	
Commission's Rules -- Broadband)	WT Docket No. 96-59
PCS Competitive Bidding and the)	
Commercial Mobile Radio Service)	
Spectrum Cap)	
)	
Amendment of the Commission's)	
Cellular PCS Cross-Ownership Rule)	GN Docket No. 90-314
)	

NOTICE OF PROPOSED RULE MAKING

Adopted: March 20, 1996

Released: March 20, 1996

Comment Date: April 15, 1996

Reply Comment Date: April 25, 1996

By the Commission: Commissioner Barrett issuing a separate statement.

TABLE OF CONTENTS

	<u>Paragraph</u>
I. Introduction/Executive Summary	1
II. Background	2
III. Overview	5
IV. Proposals	11
A. Treatment of Designated Entities	11
1. Meeting the <i>Adarand</i> Standard	11
a. Control Group Equity Structures	28
b. Affiliation Rules	34
c. Installment Payments	40
d. Bidding Credits	46
e. Information Collection	48

2. Definitions	
a. Small Business	49
b. Rural Telephone Company	51
3. Extending Small Business Provisions to the D and E Blocks	53
4. Adjusting for Lower Values of 10 MHz Licenses	55
5. Rules Regarding the Holding of Licenses	60
B. The <i>Cincinnati Bell</i> Remand	63
1. The Cellular/PCS Cross-ownership Rule	64
2. The 20 Percent Attribution Standard	67
C. Ownership Disclosure Provisions	75
D. Auction Schedule	83
V. Conclusion	87
VI. Procedural Matters	89
A. Regulatory Flexibility Act	89
B. Ex Parte Rules -- Non-Restricted Proceeding	90
C. Initial Paperwork Reduction Act of 1995 Analysis	91
D. Comment Dates	92
E. Contact Person	94
VII. ORDERING CLAUSES	95

APPENDIX A: Initial Regulatory Flexibility Analysis

I. Introduction/Executive Summary

1. In this Notice of Proposed Rule Making ("Notice"), we seek comment on a range of issues pertaining to our competitive bidding and ownership rules for the D, E, and F frequency blocks of the Personal Communications Services in the 2 GHz band ("broadband PCS"), and we propose modifications to these rules.¹ A number of the issues we address relate to the treatment of designated entities, *i.e.*, small businesses, rural telephone companies, and businesses owned by members of minority groups and women. In addition, on remand from the U.S. Circuit Court of Appeals for the Sixth Circuit, we reexamine certain rules governing cellular licensees' ownership of broadband PCS licenses in all frequency bands. The specific issues on which we request comment are set forth below.

¹ The Commission allocated six frequency blocks for broadband licensed PCS. Specifically, these are designated as the A and B blocks (consisting of 102 30 MHz Major Trading Area ("MTA") licenses); the C block (consisting of 493 30 MHz Basic Trading Area ("BTA") licenses); and the D, E, and F blocks (each consisting of 493 10 MHz BTA licenses). Amendment of the Commission's Rules to Establish New Personal Communications Services, *Memorandum Opinion and Order*, 9 FCC Rcd 4957, 4978 (1994). The Commission completed its auction of the 99 A and B block licenses available for competitive bidding in March 1995. 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 auction for the 493 C block licenses, which began on December 18, 1995, is in progress.

- We seek comment on whether the race-based provisions in our competitive bidding rules for the F block are supported by a record that can withstand the strict scrutiny standard of judicial review required by the Supreme Court's ruling in *Adarand Constructors, Inc. v. Peña*.² Further, we seek comment on whether our gender-based provisions are supported by an adequate record, and we seek additional evidence to support these provisions.
- In the absence of sufficient supporting data, we propose to make our F block rules race- and gender-neutral. We seek comment on whether we should extend small business installment payments to all of the remaining broadband PCS 10 MHz frequency blocks.
- We seek comment on whether our definition of small business continues to be appropriate in light of these proposals, and whether our definition of rural telephone company should be changed based on the definition enacted by Congress in the Telecommunications Act of 1996 ("1996 Act").³
- We reexamine our rules governing discounted upfront payments, reduced down payments, and installment payment plans for designated entities and entrepreneurs. We request comment on whether these provisions should be modified since the value of the 10 MHz broadband PCS licenses may be lower than that of the 30 MHz licenses of the C block.
- We propose that, in the event race- and gender-based provisions are eliminated, we should modify our rule restricting designated entities' ability to transfer broadband PCS licenses.
- We also seek comment on whether, in light of the decision of the U.S. Court of Appeals for the Sixth Circuit in *Cincinnati Bell Telephone Co. v. FCC*,⁴ we should retain or modify our cellular/PCS cross-ownership rule and our attribution rules for cellular licensees interested in acquiring broadband PCS licenses. We seek comment on whether we should simplify our ownership information disclosure requirements for broadband PCS applicants.
- We request comment on how we should schedule the D, E, and F block auctions.

² 115 S. Ct. 2097 (1995).

³ Pub. L. No. 104-104, 110 Stat. 56 (1996).

⁴ 69 F.3d 752 (6th Cir. 1995).

II. Background

2. In the Omnibus Budget Reconciliation Act of 1993,⁵ Congress added Section 309(j) to the Communications Act, authorizing the competitive bidding of spectrum-based services and mandating that small businesses, rural telephone companies, and businesses owned by members of minority groups and women be ensured the opportunity to participate in the provision of such services.⁶ In the *Competitive Bidding Fifth Report and Order*, we adopted competitive bidding rules designed to provide meaningful opportunities for designated entity participation in broadband PCS.⁷ Specifically, we established "entrepreneurs' blocks" (the C and F frequency blocks), for which eligibility is limited to individuals and entities under a certain financial size.⁸ We also adopted C and F block rules that contained special provisions for businesses owned by members of minority groups and women. We analyzed the constitutionality of these provisions utilizing the "intermediate scrutiny" standard of review articulated in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), in which the Supreme Court held that the Commission's minority preference program for mutually exclusive applications for licenses for new radio and 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."⁹

3. Three days before the deadline for bidders to file their short-form applications for the C block auction, the Supreme Court decided *Adarand*. In *Adarand*, the Supreme Court overruled *Metro Broadcasting* to the extent that it was inconsistent with *Adarand's* holding that "all racial classifications . . . must be analyzed by a reviewing court under strict scrutiny."¹⁰ As a result of the *Adarand* decision, any federal program that makes distinctions

⁵ Pub. L. No. 103-66, Title VI, § 6002(a), 107 Stat. 312, 388 (1993) ("Budget Act").

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

⁷ Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Fifth Report and Order*, PP Docket 93-253, 9 FCC Rcd 5532 (1994) ("*Competitive Bidding Fifth Report and Order*"), *recon.* Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Fifth Memorandum Opinion and Order*, PP Docket 93-253, 10 FCC Rcd 403 (1994) ("*Competitive Bidding Fifth Memorandum Opinion and Order*"), *erratum*, 60 Fed. Reg. 5333 (1995).

⁸ 47 C.F.R. § 24.709(a).

⁹ *Metro Broadcasting*, 497 U.S. at 565. *See Competitive Bidding Fifth Report and Order*, 9 FCC Rcd 5532, 5537; *see also* Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Second Report and Order*, PP Docket No. 93-253, 9 FCC Rcd 2348, 2398-99 (1994) ("*Competitive Bidding Second Report and Order*").

¹⁰ *Adarand*, 115 S. Ct. at 2113.

on the basis of race must serve a compelling governmental interest and must be narrowly tailored to serve that interest in order to pass constitutional muster.¹¹ In light of *Adarand*, the Commission postponed the C block auction in order to reexamine the race- and gender-based provisions of the C block auction rules. In July 1995, we released the *Competitive Bidding Sixth Report and Order*,¹² which modified the designated entity provisions of the C block rules to make them race- and gender-neutral. The *Competitive Bidding Sixth Report and Order* was affirmed recently by the D.C. Circuit Court of Appeals.¹³

4. On November 9, 1995, the Sixth Circuit Court of Appeals decided *Cincinnati Bell v. FCC*, which affects not only entities interested in the F block but also entities interested in other blocks of broadband PCS spectrum. The Court held that the cellular/PCS cross-ownership restrictions found in Section 24.204 of the Commission's Rules are arbitrary, stating that the record contains little or no factual support for the rules.¹⁴ The Court also held that Section 24.204(d)(2)(ii) of the Commission's Rules, which provides that an ownership interest of 20 percent or more in an existing cellular provider is attributable for purposes of the cellular/PCS cross-ownership rule, is arbitrary. According to the Court, this attribution rule bears no relationship to the ability of an entity with a minority interest in a cellular licensee to obtain a PCS license and then engage in anticompetitive behavior. The Court further found that the Commission failed to supply a reasoned basis for declining to adopt less restrictive measures.¹⁵ The Court remanded these matters for further proceedings.

III. Overview

5. Prompted by *Adarand*, *Cincinnati Bell*, and our experience with conducting the A, B, and C block broadband PCS auctions, we propose in this Notice to resolve a group of issues that affect the auctioning of the remaining broadband PCS licenses. We consider a mix of topics, from race- and gender-based special provisions to ownership reporting requirements. While diverse, these issues all relate to how and when we should auction the 10 MHz broadband PCS licenses and, thus, how to complete the award of broadband PCS licenses by competitive bidding. In completing the broadband PCS auctions we strive to fulfill statutorily

¹¹ *Id.*

¹² Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Sixth Report and Order*, PP Docket 93-253, 60 FR 37786 (July 21, 1995) ("*Competitive Bidding Sixth Report and Order*").

¹³ *Omnipoint Corp. v. FCC*, No. 95-1374, slip op. (D.C. Cir. March 8, 1996).

¹⁴ *Cincinnati Bell*, 69 F.3d at 764.

¹⁵ *Id.* at 761.

required objectives for auction design¹⁶ and our own commitments to consumers and the communications industry.

6. First, we are committed to fulfilling the mandate of Section 309(j) of the Communications Act to ensure that women- and minority-owned businesses have opportunities to participate in the provision of spectrum-based services. The Court's extension of the strict scrutiny standard of review to federal race-based programs in *Adarand* leads us to consider whether we have a sufficient record to support the F block provisions for women- and minority-owned businesses. We request statistical and anecdotal evidence for developing a record to support F block gender- and race-based provisions. We also question whether, to avoid delay, we should modify certain designated entity provisions; and we offer proposed F block rule modifications.

7. Second, we are committed to conducting efficient auctions. Modification of certain F block rules might serve to streamline our procedures and minimize the possibility of insincere bidding and bidder default. The specific F block auction provisions that we propose modifying for these reasons include: the requirement that audited financial statements support reports of gross revenue and total assets; reduced upfront payments; reduced down payments; and installment payment plans. We also propose that, in the event race- and gender-based provisions are eliminated, we should modify our unjust enrichment rules restricting designated entities' ability to transfer F block licenses during the five-year period following license grant.

8. Modification of particular general PCS rules could also serve to streamline our procedures. In this connection, we propose to limit the ownership information disclosure requirement with respect to outside ownership interests of applicants' attributable stockholders. We also propose to delete the requirement that partnership applicants submit a copy of their partnership agreement with their applications.

9. Third, we are committed to increasing competition. In response to *Cincinnati Bell*, we question whether we should retain or modify our cellular/PCS cross-ownership rules and our 20 percent attribution standard for determining if cellular licensees are precluded from obtaining broadband PCS licenses in their service areas. We seek comment on whether these

¹⁶ 47 U.S.C. § 309(j)(2)(B). These objectives include:

(A) the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays;

(B) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women;

(C) recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource; and

(D) efficient and intensive use of the electromagnetic spectrum.

47 U.S.C. § 309(j)(3).

rules can be supported or whether competition will be enhanced by their modification.

10. Fourth, we are committed to expediting the delivery of new services to the public. In this regard, we ask whether we should auction the D, E, and F blocks concurrently. We tentatively conclude that because of the various ways the 10 MHz D, E, and F block licenses can be used, particularly in combination with each other or with other PCS spectrum blocks, we will further competition and speed delivery of new services to the public by auctioning the three blocks concurrently in simultaneous multiple round auctions. We seek comment on the option of awarding the D and E block licenses in one auction that will occur simultaneously with an auction for the F block licenses.

IV. Proposals

A. Treatment of Designated Entities

1. Meeting the *Adarand* Standard

11. Background. In the *Competitive Bidding Fifth Report and Order*, we adopted gender- and race-based provisions as part of our F block rules to encourage the participation of women- and minority-owned businesses in the provision of PCS. These provisions, which responded to Congress' directive that such entities be given the opportunity to provide spectrum-based services, were designed in particular to ease the difficulties women and minorities often experience in gaining access to capital.¹⁷ F block auction rules with special provisions for women- and minority-owned businesses include:

- Section 24.715 of the Commission's Rules, which provides that businesses owned by women or minorities may establish a 50.1 percent "control group" equity structure and thereby enable a single investor to hold 49.9 percent of the passive equity without being considered for entrepreneurs' block eligibility purposes.¹⁸
- Section 24.716 of the Commission's Rules, which sets out two installment payment plans available only to F block applicants that are minority- or women-owned businesses.¹⁹
- Section 24.717 of the Commission's Rules, which provides tiered bidding credits based

¹⁷ See *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5571-79.

¹⁸ 47 C.F.R. § 24.715

¹⁹ 47 C.F.R. § 24.716.

in part on whether the applicant is minority- or women-owned.²⁰

- Section 24.204 of the Commission's Rules, which establishes a 40 percent attribution threshold for purposes of our cellular/PCS cross-ownership rule for ownership interests held by minority- or women-owned businesses, or ownership interests held by investors in broadband PCS applicants and licensees that are minority- or women-owned businesses.²¹
- Section 20.6 of the Commission's Rules, which establishes a 40 percent attribution threshold for purposes of our 45 MHz Commercial Mobile Radio Services ("CMRS") spectrum cap applicable only to ownership interests held by minority- and women-owned companies.

12. The standard of review applied to federal programs designed to enhance opportunities for racial minorities at the time our F block rules were adopted was an intermediate scrutiny standard. As the Supreme Court stated in *Metro Broadcasting, Inc. v. FCC*:

[B]enign race-conscious measures mandated by Congress -- even if those measures are 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.²²

13. In *Adarand v. Peña*, the Supreme Court invalidated the intermediate scrutiny standard for federal race-based programs. The Court held that all racial classifications, imposed by whatever federal, state or local government actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored to further a compelling governmental interest.²³ Moreover, as the Court made clear in *Adarand*, a strict scrutiny standard of review will be applied even if the racial classifications are well motivated or "benign."²⁴

14. Application of the two-prong strict scrutiny standard of review to provisions

²⁰ 47 C.F.R. § 24.204.

²¹ 47 C.F.R. § 20.6.

²² *Metro Broadcasting*, 497 U.S. at 564-65.

²³ *Adarand*, 115 S. Ct. at 2113.

²⁴ *Id.* at 2112.

designed to encourage minority participation in PCS requires the Commission to show (1) that a compelling governmental interest exists for taking race into account in adopting such provisions, and (2) that the provisions in question are narrowly tailored to further the compelling governmental interest established by the record and findings.²⁵ *Adarand* offers little guidance regarding the specific requirements of this test. However, other cases, including *Richmond v. J.A. Croson Co.*,²⁶ provide us with some indications of the type of record it might be necessary to develop in order to meet the strict scrutiny standard.

15. In *Croson*, the Supreme Court applied strict scrutiny to invalidate as unconstitutional a municipality's partial set-aside for minority-owned businesses. The Court held that remedying past discrimination constitutes a compelling interest, whether the discrimination was committed by the government or by private actors within its jurisdiction.²⁷ Other courts have also held remedial measures -- those intended to compensate for past discrimination -- to be compelling governmental interests.²⁸ In *Croson*, however, the Court makes clear that an interest in remedying general societal discrimination could not be considered compelling because a "generalized assertion" of past discrimination "has no logical stopping point" and would support unconstrained uses of racial classifications.²⁹ Whether other objectives for race-based measures rise to the level of a compelling governmental interest is unclear. However, in a plurality opinion issued before *Adarand*, the Supreme Court indicated that non-remedial measures aimed at fostering ethnic diversity could satisfy the compelling interest requirement of strict scrutiny.³⁰

16. The Supreme Court in *Croson* noted the high standard of evidence required of the government to establish a compelling interest. It stated that the government must demonstrate a "strong basis in evidence for its conclusion that remedial action was necessary" and that such evidence should approach "a prima facie case of a constitutional or statutory violation of the rights of minorities."³¹ Other courts, in cases decided after *Croson*, have held that statistical evidence can be probative of discrimination in the remedial setting, and that

²⁵ *Id.* at 2113.

²⁶ *Croson*, 488 U.S. 469 (1989).

²⁷ *Id.* at 491-93.

²⁸ See, e.g., *Associated General Contractors v. Coalition for Economic Equity*, 950 F.2d 1401, 1413 (9th Cir. 1991), *cert. denied*, 503 U.S. 985 (1992); *O'Donnell Construction Co. v. District of Columbia*, 963 F.2d 420 (D.C. Cir. 1992); *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 913 (11th Cir. 1990), *cert. denied*, 498 U.S. 983 (1990); *Milwaukee County Pavers Ass'n v. Fiedler*, 922 F.2d 419, 421-22 (7th Cir. 1991) *cert. denied*, 111 S.Ct. 2261 (1991).

²⁹ *Croson*, 488 U.S. at 498 (quoting *Wygant v. Jackson Board of Education*, 476 U.S. 267, 275 (1986)).

³⁰ See *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

³¹ *Croson*, 488 U.S. at 500.

anecdotal evidence can buttress statistical evidence.³²

17. As indicated above, even if a compelling governmental interest is established, the second prong of the strict scrutiny test, narrow tailoring, must also be shown. This requirement is intended to ensure "that the means chosen 'fit' [the] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype."³³ The Court in *Croson* required that the government's remedial actions be narrowly tailored "to break down a pattern of deliberate exclusion" and stated that broader relief could be justified only on the basis of "evidence of a pattern of individual discriminatory acts . . . supported by appropriate statistical proof. . . ."³⁴ Different factors have been used by courts to determine, under a strict scrutiny standard, whether a program is narrowly tailored. These include: (1) whether race-neutral measures were considered before adopting race-conscious measures;³⁵ (2) the scope of the program and whether it contains a waiver mechanism that facilitates narrowing of that scope;³⁶ (3) the comparison of any numerical target to the number of qualified minorities in the relevant sector;³⁷ (4) the duration of the program and whether it is subject to periodic review;³⁸ (5) the manner in which race is considered;³⁹ and (6) the degree and type of burden on non-minorities.⁴⁰

18. An intermediate scrutiny standard of review currently applies to gender-based measures.⁴¹ Under this standard, a gender-based provision is constitutional if it serves an

³² See, e.g., *Peightal v. Metropolitan Dade County*, 26 F.3d 1548, 1556 (11th Cir. 1994) (statistical evidence constitutes requisite "strong basis in evidence"); *Coral Construction Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991) *cert. denied*, 502 U.S. 1033 (1992) (convincing anecdotal and statistical evidence can be "potent").

³³ *Croson*, 488 U.S. at 493.

³⁴ *Id.* at 509.

³⁵ See *Adarand*, 115 S.Ct. at 2118; *Croson*, 488 U.S. at 507.

³⁶ See *Metro Broadcasting*, 497 U.S. at 622 (O'Connor, J., dissenting).

³⁷ See *Croson*, 488 U.S. at 501-02 (finding that the percentage figure used by the government to determine its minority subcontracting requirement, which was calculated in part based on the African-American population of Richmond, was improper because its usage relied on the assumption that minorities choose trades in direct proportion to their representation in the local population).

³⁸ See *Fullilove v. Klutznick*, 448 U.S. 448, 513 (Powell, J. concurring) (1980).

³⁹ See *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir 1994), *cert. denied*, 115 S. Ct. 2001 (1995).

⁴⁰ See *Johnson v. Transportation Agency*, 480 U.S. 616, 638 (1987).

⁴¹ See, e.g., *Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548, 1579-80 (11th Cir. 1994); *Contractors Association v. City of Philadelphia*, 6 F.3d 990, 1009-10 (3d Cir. 1993); *Lamprecht v. FCC*, 958 F.2d 382, 391 (D.C. Cir. 1992); *Coral Construction Co. v. King County*, 941 F.2d 910, 930-31 (9th Cir. 1991) *cert. denied*, 502

important governmental objective and is substantially related to achievement of that objective. The Supreme Court has not addressed constitutional challenges to federal gender-based programs since *Adarand*. However, the Court's refusal in *Adarand* to apply a less strict standard to benign race-based classifications than that applied to "invidious" race-based classifications suggests that the same standard should be applied to benign and invidious gender-based classifications.

19. Discussion. In the *Competitive Bidding Sixth Report and Order*, in which we eliminated the race- and gender-based provisions in our C block rules, we expressed our concern that our 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.⁴² The evidence supporting our gender- and race-based provisions cited in the *Competitive Bidding Fifth Report and Order* primarily shows broad discrimination against racial groups and women by lenders and underrepresentation of these groups as owners and employees in the communications industry.⁴³ Similar evidence has been submitted to the Commission since that time, including evidence supporting a petition for reconsideration of the *Competitive Bidding Sixth Report and Order*.⁴⁴

20. We continue to believe that this evidence is insufficient to demonstrate a compelling interest under the strict scrutiny standard to support the race-based provisions of the F block because it reflects primarily generalized assertions of discrimination. *Adarand* and *Croson* make clear that only a record of discrimination against a particular racial group would support remedial measures designed to help that group. Therefore, we believe that a record of discrimination against minorities in general is not sufficient. Specific evidence of discrimination against particular racial groups would be required to support a rule for any group. Our rules define minority group members to include Blacks, Hispanics, American Indians, Alaskan Natives, Asians, and Pacific Islanders.⁴⁵ Although we have some general evidence of discrimination against certain racial groups, none of the evidence we have appears to satisfy strict scrutiny.

21. We note too that last year the D.C. Circuit Court of Appeals stayed the C block auction in response to a constitutional equal protection challenge against women- and minority-based provisions, even though an intermediate level standard of review applied.⁴⁶

U.S. 1033 (1992).

⁴² *Competitive Bidding Sixth Report and Order*, FCC 95-301 at ¶ 11.

⁴³ *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd 5573-80.

⁴⁴ See Petition for Reconsideration of Columbia Cellular, Inc., et al. filed August 21, 1995.

⁴⁵ 47 C.F.R. §24.720(i).

⁴⁶ *Telephone Electronics Corp. v. FCC*, No. 95-1015 (D.C. Cir. Mar. 15, 1995) (order granting stay).

Thus, we tentatively conclude that our present record in support of our race-based F block provisions is insufficient to satisfy strict scrutiny. We seek comment on our tentative conclusion. We also request comment on whether our F block provisions promote a compelling governmental interest and, more particularly, whether compensating for discrimination in lending practices and in practices in the communications industry constitutes such an interest. We also ask interested parties to comment on nonremedial objectives that could be furthered by the minority-based provisions of our F block rules and whether they could be considered compelling governmental interests, such as increased diversity in ownership and employment in the communications industry or increased industry competition. In commenting, we ask parties to submit statistical data, personal accounts, studies, or any other data relevant to the entry of specific racial groups into the field of telecommunications. Examples of relevant evidence could include discrimination against minorities trying to obtain FCC licenses for auctioned or non-auctioned spectrum; discrimination against minorities seeking positions of ownership or employment in communications or related businesses; discrimination against minorities attempting to obtain capital to start up or expand a telecommunications enterprise, including terms and conditions; and discrimination against minorities operating telecommunications businesses, including treatment by vendors, FCC licensees, and suppliers.

22. We also ask those parties who conclude that our race-based provisions serve a compelling governmental interest to comment on whether the provisions are narrowly tailored to serve that interest. Are these provisions sufficiently narrow in scope? Do they unduly burden non-minorities?⁴⁷ Would race-neutral measures further the same interests and achieve the same objectives as race-conscious measures?⁴⁸

23. In addition, we also tentatively conclude that the present record in support of our gender-based F block rules may be insufficient to satisfy intermediate scrutiny. We seek comment on our tentative conclusion. We also seek comment on whether there are remedial or nonremedial goals that would satisfy the "important governmental objective" requirement of the intermediate scrutiny standard. Are our gender-based F block rules "substantially related" to the achievement of such objectives? Just as we requested above, in addressing evidence to support the F block race-based provisions, we ask parties to submit statistical data, personal accounts, studies, or any other data relevant to the entry of women into the field of telecommunications.

24. We also are interested in supplementing the current record to support race- and gender-based provisions in our other rules. In this regard, the Commission plans shortly to issue a Notice of Inquiry that requests evidence of current and past discrimination experienced by small businesses and businesses owned by women and minorities or by individual women and minorities. The record outlined in response to this Notice will also be incorporated into

⁴⁷ See *Johnson v. Transportation Agency*, 480 U.S. 616, 638 (1987).

⁴⁸ See *Adarand*, 115 S.Ct. at 2118; *Crosan*, 488 U.S. at 507.

that Docket.

25. We undertake this effort to support our auction rules because we are committed to fulfilling the Congressional mandate to provide opportunities for women- and minority-owned businesses through the competitive bidding process. We believe, however, that marshaling sufficient evidence to satisfy the strict scrutiny standard of review now applicable to federal race-based programs may be a time-consuming process, and we are mindful that we may not fulfill our other obligations under Section 309(j) if we delayed the award of F block licenses until that process is complete.

26. We note that some representatives of the telecommunications industry have voiced a need to have the D, E, and F block licenses awarded quickly.⁴⁹ With the completion of the C block auction, we will have neared completion of awarding the 30 MHz A, B, and C block licenses. Any entity with plans to aggregate a 10 MHz F block license with a 30 MHz A, B, or C block PCS license or any cellular or Specialized Mobile Radio ("SMR") licensee that plans to acquire a 10 MHz license for use in its service area, we believe, will be interested in swift auctioning of D, E, and F block licenses. We also believe that entities that were unable to win licenses in the previous PCS auctions may be interested in bidding on the D, E, and F blocks, and that it will be important to these entities to acquire licenses quickly so that they can compete at the earliest point possible with other providers of CMRS, and with wireline service providers. Further, we believe that both Congress and consumers expect us to promote the rapid development of PCS. Balancing our obligation to provide opportunities for women- and minority-owned businesses to participate in spectrum-based services against our statutory duties to facilitate the rapid delivery of new services to the American consumer and promote efficient use of the spectrum, we tentatively conclude that we should not delay the F block auction for the amount of time it would take to adduce sufficient evidence to support our race- and gender-based F block provisions. While we could proceed with the F block auction under the current rules, we tentatively conclude that this course of action would not serve the public interest because it may likely result in litigation that would delay the auction, the dissemination of additional broadband PCS licenses, and ultimately the introduction of competition.⁵⁰ As a result, we tentatively conclude that if we are unable to gather sufficient evidence to support our race- and gender-based provisions in the instant proceeding, we should eliminate these provisions from our rules and proceed as expeditiously as possible to auction the remaining broadband PCS licenses. We seek comment on these tentative conclusions.

27. In reaching these tentative conclusions, we note that of the 255 bidders that qualified to bid in the C block auction, 46 claimed minority-owned business status and 34 claimed women-owned business status. These statistics indicate that even without the women-

⁴⁹ See *Ex Parte* Presentation by U.S. West, Inc., January 31, 1996; *Ex Parte* Presentation by Cook Inlet Region, Inc., February 1, 1996; *Ex Parte* Presentation by AT&T, March 6, 1995.

⁵⁰ *Omnipoint*, slip op. at 17.

and minority-owned business specific provisions in our C block rules, women- and minority-owned businesses were able to participate in the auction. However, one could also argue that the presence of race- and gender-based rules before the *Competitive Bidding Sixth Report and Order* encouraged the participation of minorities and women. It may have helped such companies open the door to discussions with investors that persisted even when the rules changed. Indeed, in the *Competitive Bidding Sixth Report and Order*, one of the Commission's primary objectives was to preserve the relationships and deals minority- and women-owned companies had made prior to the rule change. As discussed more fully below, we seek comment on whether, if we ultimately decide to make our F block rules race- and gender-neutral, we should do so by making these rules conform to our C block rules, or whether other approaches to amending the F block rules would be more appropriate. We also seek comment on how the Commission can meet its statutory requirement under Section 309(j) to ensure participation by minorities and women in the provision of service, if the rules are changed to be race- and gender-neutral.

a. Control Group Equity Structures

28. **Background.** To be eligible to participate in our entrepreneurs' block auctions, an applicant, together with its affiliates and persons or entities that hold interests in the applicant, must have gross revenues of less than \$125 million in each of the last two years and total assets of less than \$500 million. Under our current rules, the gross revenues and total assets of certain persons or entities holding interests in an applicant will not be considered for purposes of determining eligibility to participate in the F block auction if the applicant utilizes one of two equity structures.⁵¹ Use of either of these equity structures requires the applicant to form a "control group,"⁵² but one of these options is available only to minority- and women-owned businesses.

29. The first equity structure option, the *Control Group Minimum 25 Percent Equity Option*, is available to all applicants for the F block auction.⁵³ Under this option, the control group must hold at least 25 percent of the applicant's total equity. Of that 25 percent, at least 15 percent must be held by "qualifying investors."⁵⁴ The remaining ten percent may be held

⁵¹ See 47 C.F.R. § 24.715(b)(3)-(b)(6).

⁵² A control group is an entity, or a group of individuals or entities, that possesses *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 C.F.R. § 24.720(k).

⁵³ 47 C.F.R. § 24.715(b)(5).

⁵⁴ *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 C.F.R. §

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.⁵⁵ In addition, 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 or all general partnership interests.⁵⁶ If these requirements are met, the remaining 75 percent of the applicant's equity may be held by other non-controlling investors, and the gross revenues and total assets of any such investor will not be attributed to the applicant provided that the investor holds no more than 25 percent of the total equity of the applicant.⁵⁷

30. The second equity structure option, the *Control Group Minimum 50.1 Percent Equity Option*, is currently available only to minority- or women-owned applicants for the F block auction.⁵⁸ Under this option, the control group must own at least 50.1 percent of the applicant's total equity. Of that 50.1 percent equity, at least 30 percent must be held by qualifying investors who are members of minority groups or women.⁵⁹ 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 who are members of the applicant's management.⁶⁰ In addition, members of the control group must hold 50.1 percent of the voting stock or all general partnership interests, and have *de facto* control of both the control group and the applicant.⁶¹ If these requirements are met, the remaining 49.9 percent of the applicant's equity may be held by a single non-controlling investor, and the gross revenues and total assets of any such investor will not be attributed.⁶²

31. Discussion. When we adopted the *Control Group Minimum 50.1 Percent Equity Option* in the *Competitive Bidding Fifth Report and Order*, we determined that making such a mechanism available to minority- and women-owned businesses would help them attract adequate financing. We have previously concluded that the primary impediment to participation by businesses owned by women and minorities in broadband PCS is a lack of

24.720(n)(1).

⁵⁵ 47 C.F.R. § 24.715(b)(5)(i)(C).

⁵⁶ 47 C.F.R. §24.715(b)(5)(i).

⁵⁷ 47 C.F.R. § 24.715(b)(3).

⁵⁸ 47 C.F.R. § 24.715(b)(6).

⁵⁹ 47 C.F.R. § 24.715(b)(6)(i)(A).

⁶⁰ 47 C.F.R. § 24.715(b)(6)(i)(C).

⁶¹ 47 C.F.R. § 24.715(b)(6)(i).

⁶² 47 C.F.R. § 24.715(b)(4).

access to capital.⁶³ However, in light of the Supreme Court's holding in *Adarand*, we tentatively conclude that, if we determine after reviewing the comments in this proceeding that we still do not have a sufficient record to support offering the 50.1/49.9 percent equity structure only to women- and minority-owned businesses, we should make the *Control Group Minimum 50.1 Percent Equity Option* available to small businesses⁶⁴ and entrepreneurs as we did in the C block auction. In other words, if commenters in this proceeding are unable to supply sufficient evidence to meet the applicable standard of review, we propose to modify our rules to permit all F block applicants to avail themselves of the 50.1/49.9 percent equity structure. We believe that such a rule change, which is identical to a rule change upheld in the C block by the D.C. Circuit, would facilitate the expeditious dissemination of the F block licenses by forestalling the legal challenges based on *Adarand* that would likely result if we moved forward with this rule in its current form.⁶⁵ We seek comment on this proposal. Since this control group option was adopted to help minority- and women-owned businesses in particular attract capital, we also seek comment on whether we need to extend this provision to all small businesses here.

32. As an alternative to adopting the above rule change, we could simplify or abandon both control group equity structure options currently offered to F block applicants. Should we, for example, provide that only the gross revenues and assets of controlling principals in the applicant, together with any affiliates of the applicant, be aggregated to determine eligibility? If we were to modify our rules in this way, how should we determine who is a controlling principal? Alternatively, we could aggregate the gross revenues and assets of controlling principals and any investor that has an interest in the applicant that exceeds a certain percentage. For example, we could provide that only the gross revenues of investors with an ownership interest of 25 percent or more in the applicant will be aggregated with the assets of controlling principals. If we were to adopt this modification, what percentage of interest in the applicant should we adopt as the threshold? We seek comment on these and other options that interested parties might wish to propose.

33. Finally, we ask commenters to discuss whether there is any need to make adjustments to the financial eligibility threshold for the F block auction. Is there a concern, for example, that C block winners will be disqualified from acquiring F block licenses by virtue of the valuation of their C block licenses? Should we simply allow any qualified C block bidder to bid on F block licenses?

⁶³ *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5537.

⁶⁴ 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 C.F.R. § 24.720(b)(1).

⁶⁵ *Omnipoint*, slip op. at 17.

b. Affiliation Rules

34. **Background.** In the *Competitive Bidding Fifth Report and Order*, we adopted affiliation rules for identifying all individuals and entities whose gross revenues and assets must be aggregated with those of the applicant to determine whether the applicant exceeds the financial caps for the entrepreneurs' blocks or for small business size status.⁶⁶ 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 an affiliation.

35. We adopted two exceptions to our affiliation rules in the broadband PCS C and F block 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 and F block licenses and to qualify as a small business.⁶⁷ Under the second exception, as originally adopted, 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 participation in the entrepreneurs' block auctions.⁶⁸

36. In the *Further Notice of Proposed Rule Making* released on June 23, 1995, we proposed elimination of the exception to our affiliation rules pertaining to minority investors for purposes of the C block auction.⁶⁹ This exception was intended to 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.⁷⁰ 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.⁷¹ We tentatively concluded that it would be imprudent to extend such an exception to all

⁶⁶ *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5620-25.

⁶⁷ 47 C.F.R. § 24.720(l)(11)(i). This exception, however, provides for a rebuttable presumption that revenues derived from gaming, pursuant to the Indian Gaming Regulatory Act will be included in the applicant's eligibility determination. See 25 U.S.C. § 2701 *et seq.*

⁶⁸ 47 C.F.R. § 24.720(l)(11)(ii).

⁶⁹ Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Further Notice of Proposed Rule Making*, PP Docket No. 93-253, 60 Fed. Reg. 3420 (released June 23, 1995) ("*Further Notice*").

⁷⁰ *Competitive Bidding Fifth Memorandum Opinion and Order*, 10 FCC Rcd at 425-26.

⁷¹ *Id.*

entrepreneurs because to do so would frustrate the Commission's goals in establishing the entrepreneurs' blocks -- namely, to ensure that broadband PCS licenses will be disseminated among a wide variety of applicants and to exclude large telecommunications companies from bidding on such blocks.⁷²

37. In the *Competitive Bidding Sixth Report and Order*, however, we declined to eliminate the exception and adopted a modification to the minority affiliation rule for the C block which was suggested by commenters.⁷³ The modified rule, 47 C.F.R. § 24.720(l)(11)(ii), allows all small business applicants to exclude any affiliates who would otherwise qualify as entrepreneurs by having gross revenues under \$125 million and total assets under \$500 million and whose total assets and gross revenues, when considered on a cumulative basis and aggregated with each other, do not exceed these amounts. This rule change in the C block was affirmed by the D.C. Circuit Court of Appeals.⁷⁴

38. Discussion. We seek comment on whether, if we determine that the record is insufficient to support an exception to our affiliation rules based on race, we should amend our affiliation rule for the F block to eliminate the exception pertaining to minority investors, as we originally proposed to do for the C block, or whether we should adopt the C block's modified exception. It has been alleged that our modification of the exception for minority investors for purposes of the C block auction could lead to abuse.⁷⁵ We believe that our experience with the C block auction may show whether this rule has had its intended effect of allowing small businesses to pool their resources to bid on capital-intensive services and draw on the expertise of those who have started small businesses.⁷⁶ If information from the C block auction is relevant to whether we should amend our rule, we propose to incorporate it here. We also seek comment on whether this modified minority investors exception would serve the public interest given the fact that F block licenses are smaller than C block licenses and are expected to have lower values.

39. We 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

⁷² See *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5602-03.

⁷³ *Competitive Bidding Sixth Report and Order*, FCC 95-301 at ¶ 32.

⁷⁴ *Omnipoint*, slip op. at 23-24.

⁷⁵ See, e.g., Motion for Declaratory Ruling, PP Docket No. 93-253, filed by Central Wireless Partnership, Nov. 2, 1995. See also *Omnipoint v. FCC*, No. 95-1374 slip op. (D.C. Cir. March 8, 1996).

⁷⁶ *Competitive Bidding Sixth Report and Order*, FCC 95-301 at ¶ 32.

is not implicated by the holding in *Adarand*.⁷⁷ We request comment on this tentative conclusion.

c. Installment Payments

40. **Background.** As a general matter, entrepreneurs' block licensees are eligible for installment payment plans that afford them the opportunity to pay for their licenses over a period of time at favorable interest rates, rather than pay for the licenses in full at the time of grant. In the *Competitive Bidding Second Report and Order*, the Commission recognized that by allowing installment payments, the government would be extending credit to an eligible winner, thus reducing the amount of private financing needed in advance of the auction by a prospective licensee. It was hoped that installment payments would encourage entities facing difficulties in gaining access to private capital markets to participate in the auctions.⁷⁸

41. Five different installment payment plans are currently available to F block applicants under Section 24.716 of the Commission's Rules.⁷⁹ The first installment payment plan, which is available to entities with gross revenues in excess of \$75 million, allows them to pay interest based on the ten-year U.S. Treasury rate plus 3.5 percent, with payment of principal and interest amortized over the term of the license.⁸⁰ The second installment payment plan, which is available to entities with gross revenues between \$40 and \$75 million,⁸¹ provides for the payment of interest equal to the ten-year U.S. Treasury rate plus 2.5 percent. Entities eligible for this plan make interest-only payments for one year, with the principal and interest amortized over the remaining nine years of the license term.

42. The third installment payment plan is available only to entities that qualify as a small business or consortium of small businesses.⁸² This plan provides for the payment of interest at the ten-year U.S. Treasury rate plus 2.5 percent, but allows eligible entities to make interest-only payments for two years, with principal and interest amortized over the remaining

⁷⁷ *Order on Reconsideration*, 9 FCC Rcd 4493 (1994); *Competitive Bidding Fifth Memorandum Opinion and Order*, 10 FCC Rcd at 427. See also *Oklahoma Tax Commission v. Chickasaw Nation*, 115 S. Ct. 2214 (1995) (Supreme Court upheld applicability of a categorical immunity from certain State taxation to Indian tribes and their members and not to "non-Indians").

⁷⁸ See *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2389; *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5592; and *Competitive Bidding Fifth Memorandum Opinion and Order*, 10 FCC Rcd at 459.

⁷⁹ 47 C.F.R. § 24.716.

⁸⁰ 47 C.F.R. § 24.716(b)(1).

⁸¹ 47 C.F.R. § 716(b)(2).

⁸² 47 C.F.R. § 24.716(b)(3).

eight years of the license term.

43. The fourth plan provides for 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.⁸³ The final and most favorable installment payment plan provides for interest-only payments for six years and payments of principal and interest amortized over the remaining four years of the license term.⁸⁴ This plan is available only to small businesses owned by members of minority groups or women.

44. A licensee making installment payments that is in default, or in anticipation of default, may request a three- to six-month grace period from the Commission, during which no installment payments need be made.⁸⁵ When the grace period expires, if the grace period request is denied, or if the licensee defaults without making such a request, the license will automatically cancel and the Commission will initiate debt collection procedures.⁸⁶

45. Discussion. In the event we find after reviewing the comments in this proceeding that the record is insufficient to sustain the race- and gender-based provisions of our F block rules under the appropriate standard of review, we propose to modify Section 24.716 to eliminate the special provisions that are tied to an applicant's status as a minority- or women-owned business. We seek comment on whether we should provide for three installment payment plans based solely on financial size, as we did for the C block. Under this approach, the first two installment payments described above -- those for eligible bidders with gross revenues exceeding \$75 million and with gross revenues between \$40 and \$75 million -- would remain unchanged.⁸⁷ The most favorable installment payment plan -- set forth in Section 24.716(b)(5) and previously available only to small minority- or women-owned firms -- would be made available to all small businesses. Thus, all small businesses would be permitted to pay for their licenses in installments at the ten-year U.S. Treasury rate applicable on the date the license is granted, and would be permitted to make interest-only payments for the first six years, with payments of principal and interest amortized over the remaining four years of the license term. As discussed below, however, we also seek comment on whether such favorable payment terms are necessary for F block auction winners and, in particular, whether the 6-year interest-only period serves the public interest, given that the amounts bid for the 10 MHz licenses most likely would be lower than those bid for 30 MHz licenses in

⁸³ 47 C.F.R. § 24.716(b)(4).

⁸⁴ 47 C.F.R. § 24.716(b)(5).

⁸⁵ 47 C.F.R. § 1.2110(e)(4)(ii).

⁸⁶ 47 C.F.R. § 1.2110(e)(4)(iii).

⁸⁷ 47 C.F.R. § 24.716(b)(1) and (2).

the C block.⁸⁸

d. Bidding Credits

46. **Background.** A bidding credit acts as a discount on the winning bid amount that a bidder actually has to pay for the license. Our current F block rules provide for three tiers of bidding credits ranging between 10 percent and 25 percent.⁸⁹ Under these rules, a small business is granted a 10 percent bidding credit,⁹⁰ a business that is owned by members of minority groups or women is granted a 15 percent bidding credit,⁹¹ and a small business owned by members of minority groups or women is allowed to aggregate the bidding credits for a 25 percent bidding credit.⁹²

47. **Discussion.** If we find that they cannot withstand a judicial review on the basis of the evidence adduced in this proceeding, we propose to eliminate the race- and gender-based bidding credits in our F block rules. We believe that this proposed rule change, like our other proposals for making our rules race- and gender-neutral, should allow the Commission and prospective bidders to avoid litigation based on *Adarand* and thus will permit the auction to proceed without delay. We seek comment on this proposal. We also seek comment on whether we should, in place of these bidding credits, extend a single bidding credit to all small businesses as we did for the C block. If we choose to adopt a single small business bidding credit for the F block, how big should the credit be? Should we retain one of the three bidding credits currently provided -- 10, 15 or 25 percent -- and make it available to all small businesses bidding in the F block? In the alternative, should we offer tiered bidding credits, such as 15 percent for small businesses with aggregate gross revenues under \$15 million and 10 percent for businesses with gross revenues between \$15 million and \$40 million? We tentatively conclude that because the value of 10 MHz licenses may be lower than the value of 30 MHz licenses, a smaller bidding credit than we offered C block bidders may be appropriate for F block bidders. We also tentatively conclude that these lower expected values may attract smaller businesses, thus justifying a tiered bidding credit. We seek comments on these tentative conclusions.

e. Information Collection

48. If we eliminate the race- and gender-based provisions in our F block rules because

⁸⁸ See *infra* ¶ 55.

⁸⁹ 47 C.F.R. § 24.717.

⁹⁰ 47 C.F.R. § 24.717(a).

⁹¹ 47 C.F.R. § 24.717(b).

⁹² 47 C.F.R. § 24.717(c).

we find after reviewing the comments in this proceeding that we still do not have a record sufficient to withstand the appropriate standard of review, we intend nonetheless to continue to request that applicants provide information regarding minority- or women-owned status in their short-form applications. We note that we have collected such information concerning participants in ongoing auctions, including the C block auction. We believe that continuing to collect such information will assist us in analyzing applicant pools and auction results to determine whether we have promoted substantial participation in auctions by minorities and women, as we are directed by Congress, through the special provisions we propose to make available to small businesses. This information will also 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.⁹³ In addition, such information will be relevant in developing a supplemental record should we find that special provisions for small businesses prove unsuccessful in encouraging the dissemination of licenses to a wide variety of applicants, including businesses owned by members of minority groups and women. We seek comment on this information collection proposal.

2. Definitions

a. Small Business

49. **Background.** Our proposal to extend to small businesses certain F block rule provisions previously applicable only to women- and minority-owned businesses highlights the importance of our definition of a small business. Our original general auction rules adopted the Small Business Administration definition of small business, giving small business status to any entity that, with its affiliates, had no more than \$6 million net worth and, after federal income taxes, no more than \$2 million in annual profits each year for the previous two years.⁹⁴ Based on the diversity of services subject to competitive bidding and the varied spectrum costs and build-out requirements associated with them, we revised our general eligibility requirements for small businesses to take into account the capital requirements of each particular service.⁹⁵ Our current generic auction rules enable us to establish a small business definition in the context of each particular service.⁹⁶ Under our specific rule for the C and F blocks, a "small business" is defined as an entity that, together with its affiliates and persons or entities that hold interests in such entity and their affiliates, has average gross

⁹³ See 47 U.S.C. § 309(j)(12)(D).

⁹⁴ *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2395-96.

⁹⁵ Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Second Memorandum Opinion and Order*, PP Docket No. 93-253, 9 FCC Rcd 7245, 7269 (1994) ("*Second Memorandum Opinion and Order*").

⁹⁶ *Id.*; 47 C.F.R. § 1.2110(b)(1).

revenues that are not more than \$40 million for the preceding three years.⁹⁷

50. **Discussion.** We request comment on whether our definition of small business continues to be appropriate. Is a threshold of average gross revenues of not more than \$40 million too high or too low for entities bidding on 10 MHz licenses? How does our definition of small business in Section 24.720(b)(1) compare to the definition of small businesses for other services?⁹⁸ Does our current service-by-service approach remain valid? In the alternative, would it be feasible to establish an appropriate small business size applicable to all CMRS services? We propose to keep the current small business definition for the F block -- the same definition used for the C block -- to allow C block small business licensees to benefit from the small business provisions of the F block. We request comment on this proposal. However, we are concerned that by using this threshold, C block winners may not be able to acquire F block licenses given the value of their C block licenses. We, therefore, request comment on whether the value of a C block license should be part of the gross revenues calculation. We also request comment on whether we should define and adopt rules for very small businesses. If so, what should be the appropriate size standard for very small businesses and why? Instead of or in addition to modifying our small business definition, should we modify or simplify the affiliation rules? We note that the Small Business Administration recently simplified the definition of "affiliate" in its rules.⁹⁹

b. Rural Telephone Company

51. **Background.** In the *Competitive Bidding Fifth Report and Order*, the Commission established provisions to help rural telephone companies become meaningful participants in the PCS industry. In that proceeding, we defined a rural telephone company as "a local exchange carrier having 100,000 or fewer access lines, including all affiliates."¹⁰⁰ This definition departed from a more restrictive definition adopted in the *Competitive Bidding Second Report and Order* that defined a rural telephone company as "an independently owned and operated local exchange carrier with 50,000 access lines or fewer, and serving communities with 10,000 or fewer inhabitants."¹⁰¹ We stated in the *Competitive Bidding Fifth Report and Order* that we believed that the revised definition would facilitate the rapid deployment of broadband PCS to rural areas without giving benefits to large companies that do not require special assistance."¹⁰² The impact of this definition was to identify entities that

⁹⁷ 47 C.F.R. § 24.720(b)(1).

⁹⁸ See, e.g., 47 C.F.R. § 90.912(b)(1).

⁹⁹ 13 C.F.R. § 121.103; see 61 Fed. Reg. 3280 (Jan. 31, 1996).

¹⁰⁰ *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5617; 47 C.F.R. § 24.720(e).

¹⁰¹ *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2397.

¹⁰² *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5617.

qualified for the partitioning system that we adopted to allow rural telephone companies to obtain broadband PCS licenses that are geographically partitioned from large PCS service areas.¹⁰³

52. Discussion. The Telecommunications Act of 1996 creates, for the first time, a statutory definition for rural telephone companies. The Act provides, in relevant part:

Rural telephone company.--The term 'rural telephone company' means a local exchange carrier operating entity to the extent that such entity--

(A) provides common carrier service to any local exchange carrier study area that does not include either--

(i) any incorporated place of 10,000 inhabitants or more, or any part thereof, based on the most recently available population statistics of the Bureau of the Census; or

(ii) any territory, incorporated or unincorporated, included in an urbanized area, as defined by the Bureau of the Census as of August 10, 1993;

(B) provides telephone exchange service, including exchange access, to fewer than 50,000 access lines;

(C) provides telephone exchange service to any local exchange carrier study area with fewer than 100,000 access lines; or

(D) has less than 15 percent of its access lines in communities of more than 50,000 on the date of enactment of the Telecommunications Act of 1996.¹⁰⁴

We request comment on whether Congress intended to define the term rural telephone company used in Section 309(j) or whether it only meant to define the term as used in new sections of the Communications Act, such as Section 251. In any event, should we change our definition of a rural telephone company to this definition for purposes of our broadband PCS designated entity provisions? We also ask commenters to discuss how adoption of this definition would affect our current rules allowing geographic partitioning of rural areas served by rural telephone companies.¹⁰⁵

3. Extending Small Business Provisions to the D and E Blocks

53. Background. The rule modifications discussed above would extend greater

¹⁰³ *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5597-99.

¹⁰⁴ Pub. L. No. 104-104, Section 3(a)(47), 110 Stat. 56 (1996).

¹⁰⁵ 47 C.F.R. § 24.714.

bidding credits and more favorable installment payment plans to all small business bidders in the F block auction. The D and E blocks are not entrepreneurs' blocks, and current D and E block auction rules do not make special provision for small businesses. Members of the telecommunications industry, however, have expressed a desire for the Commission to extend the small business provisions of the F block auction rules to bidders for D and E block licenses.¹⁰⁶

54. Discussion. We request comment on whether we should extend installment payment plans to small businesses bidding on the D and E blocks. From parties that believe we should extend these provisions to the D and E blocks, we also request comment on the terms for these provisions for D and E block small businesses. For example, should small businesses bidding in the D and E blocks qualify for installment payments with the same terms as small businesses in the F block, or should D and E block small businesses receive less favorable payment terms? We tentatively conclude that extension of installment payments could result in disseminating licenses in the D and E blocks to a wider variety of applicants in two ways. First, it could increase the chances for all small businesses, including those that are women- or minority-owned and that would have benefited from the F block provisions that we propose to change, to win a D, E, or F block license. Second, it could increase opportunities for small businesses that are current PCS, cellular, or SMR licensees to obtain 10 MHz licenses that they could aggregate with their current licenses. We request comment on this tentative conclusion.

4. Adjusting for Lower Values of 10 MHz Licenses

55. Notwithstanding our desire to increase opportunities for small businesses, including those that are women- and minority-owned, to acquire PCS licenses, we are aware that winning bids for the D, E, and F block licenses, which authorize the use of 10 MHz, could be lower than those for the 30 MHz A, B, and C block licenses. Accordingly, we ask for comment on whether we should adjust the terms of our installment financing provisions to reflect the lower values of the 10 MHz license. Are our installment payment plans for small businesses too generous in light of the expected lower values of the 10 MHz licenses? In particular, is it in the public interest to offer a 6-year interest-only period for all small business F block licensees?

56. Similarly, we seek comment on whether our F block rules establishing discounted

¹⁰⁶ See, e.g., Comments of O.N.E., filed January 23, 1995 and Comments of Calcell, Inc., filed January 25, 1995 in response to News Release, December 23, 1994. See also *Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, Implementation of Sections 3(n) and 322 of the Communications Act Regulatory Treatment of Mobile Services, Implementation of the Communications Act -- Competitive Bidding*, PR Docket No. 93-144, RM-8117, RM-8030, RM-8029; GN Docket No. 93-252; PP Docket 93-253, *First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rule Making*, FCC 95-501 (December 15, 1995) ("*Competitive Bidding Eighth Report and Order*") (where the Commission created similar small business provisions for bidders in the 800 MHz SMR auction).