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

To: The Commission

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COMMENTS

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Dated: April 15, 1996

No. of Copies rec'd 0+9
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SUMMARY

Cook Inlet Region, Inc. ("CIRI") urges the Commission to consider new ways to increase the opportunities for responsible entrepreneurial bidders to become Commission licensees as it auctions the remaining broadband PCS licenses. In light of the unexpectedly high costs of licenses in the broadband PCS C Block auction, the Commission should examine its preference programs for entrepreneurial companies in general, and for small businesses and businesses owned by member of minority groups in particular, to ensure that they are as effective as possible in opening the Commission's auctions to new bidders.

Principally, the Commission should draw from the lessons of the first three broadband PCS auctions to see that the remaining auctions are competitive and reliable. The Commission not only can extend full entrepreneurial preferences to bidders in the F Block auction, it can offer installment payments and bidding credits to smaller bidders in the D and E Block auctions as well. Bidding credits in particular are key to helping smaller bidders compete in the unrestricted non-entrepreneurs' block auctions. To encourage sincere bidding by those entrepreneurial companies, however, the Commission should increase the upfront payment and downpayment required of them to participate.

To preserve competition in the remaining auctions, CIRI urges the Commission to limit the availability of government funded preferences once a bidder has won a large amount of spectrum in the C Block auction. Specifically, a bidder that has

utilized C Block preferences to win broadband PCS licenses covering more than 2 percent of the national population should not be permitted to rely on Federal assistance to win additional licenses in the remaining auctions. Those companies may participate fully in the remaining auctions if they are otherwise eligible; they simply should not be offered Commission preferences within those auctions. The Commission also should attempt to retain its cellular-PCS cross-ownership rule.

In addition, CIRI agrees with the Commission's conclusion that its tribal affiliation exemption has an independent foundation in the Indian Commerce Clause of the United States Constitution. The tribal affiliation exemption is based on the unique relationship between Native American entities and the Federal government and does not implicate racial classifications or traditional equal protection analysis. Thus, the Commission is correct that the exemption is not affected by the Supreme Court's decision in Adarand Constructors, Inc. v. Pena.

Finally, CIRI urges the Commission to examine its preferences for businesses owned by members of minority groups and, if possible, to preserve those preferences within the F Block auction rules. With the correct evidentiary support, the Commission's minority preferences may survive the strict scrutiny called for under the Adarand decision. Although passing strict scrutiny is quite difficult, the Commission has established an innovative preference scheme that should be given a chance to succeed if the standard can be met.

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COMMENTS

Cook Inlet Region, Inc. ("CIRI"), by its attorneys and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, submits these Comments in response to the above-captioned Notice of Proposed Rule Making ("NPRM"), adopted and released by the Commission on March 20, 1996.

I. INTRODUCTION

This rule making proceeding presents the Commission with an opportunity to draw from the lessons of the A, B, and C Block broadband personal communications services ("PCS") auctions as it prepares to complete the award of broadband PCS licenses by competitive bidding. CIRI is a strong supporter of the Commission's spectrum auction programs and of the Commission's provisions for entrepreneurial companies in particular. CIRI urges the Commission to consider new ways to increase the opportunities for responsible entrepreneurial bidders to become Commission licensees as it auctions the remaining broadband PCS licenses.

In particular, CIRI urges the Commission to expand the opportunities for responsible smaller bidders as a way to ensure greater participation by all entrepreneurs, including businesses owned by members of minority groups. This means that the Commission should offer entrepreneurial preferences in the D, E, and F Block auctions, but should require those utilizing the preferences to submit higher upfront payments and downpayments. The Commission also should limit the availability of government preferences once an entity has been a successful bidder on a number of licenses as a result. Finally, CIRI urges the Commission to examine and, if possible, to retain its F Block minority preferences rules. These measures will help the Commission to increase competition and opportunities for new bidders in the D, E, and F Block auctions.

II. THE COMMISSION SHOULD INCREASE OPPORTUNITIES FOR RESPONSIBLE SMALL BIDDERS IN THE REMAINING AUCTIONS

As a threshold matter, CIRI urges the Commission to increase opportunities for responsible small bidders in the remaining broadband PCS auctions. As the prices for licenses in the C Block auction grow unexpectedly high, it is more important than ever that the Commission promote economic opportunity by "avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants."[1] The Commission can draw from the lessons learned in the first three

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1. 47 U.S.C. § 309(j)(3)(B).

broadband PCS auctions to see that its future auctions are competitive and reliable.

A. The Commission Should Extend Preferences in the D, E, and F Blocks

First, CIRI urges the Commission to extend entrepreneurial preferences in the D, E, and F Blocks. In the F Block, this means retaining the Control Group Minimum 25 Percent Equity Option and making the Control Group Minimum 50.1 Percent Equity Option available to all bidders.[2] The Control Group Minimum 50.1 Percent Equity Option provides potential F Block applicants with more flexibility in attracting capital investments. At the same time, that option encourages responsible bidding by requiring entrepreneurial bidders to retain a much higher percentage of equity than the Control Group Minimum 25 Percent Equity Option. A higher equity stake injects the discipline that comes with a meaningful ownership stake in a venture and requires smaller bidders seriously to consider how to employ their capital.

In addition, CIRI encourages the Commission to extend small business preferences to bidders in the D and E Block auctions. In the NPRM, the Commission requests comment only on whether it should extend installment payment plans to small businesses bidding in the D and E Blocks.[3] Although installment payments will help small businesses to pay for licenses won in those blocks, payment terms alone will not permit entrepreneurial

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2. NPRM at ¶ 31.

3. Id. at ¶ 54.

companies to compete against larger, more entrenched telecommunications companies. Indeed, payment terms will be of little use if there is no license for which to pay. Thus, CIRI urges the Commission to offer both installment payments and bidding credits to small businesses bidding in the D and E Blocks. Particularly where there might be good cause for the Commission to reduce the scope of its installment payment benefit,[4] offering bidding credits to small businesses bidding in the D and E Blocks will help to encourage meaningful competition in those auctions.

In the competitive bidding Fifth Report and Order, the Commission reasoned that bidding credits in a non-entrepreneurs' block would have no meaningful effect due to the probable high cost of licenses and ability of larger participants to outbid entrepreneurs.[5] The costs of licenses in the C Block auction have become unexpectedly high, however, and the funds available to some bidders seem to be considerable. In any event, bidding credits will have an even more meaningful effect in an auction with non-credited entities — irrespective of the potential values at stake — rather than in an auction such as the C Block in which most parties hold the same benefit. Indeed, once the Commission undertakes to encourage small bidders to participate in the non-

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4. In subsection B below, CIRI urges the Commission to increase the downpayment required of entrepreneurial bidders to as much as 30 percent of the winning bid.

5. Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Fifth Report and Order, 9 FCC Rcd 5532, 5589 (1994) ("Fifth Report and Order").

entrepreneurs' blocks, the Commission should consider providing those bidders the most effective tools with which to compete in that arena.

Finally, CIRI encourages the Commission to make its Control Group Minimum 25 and 50.1 Percent Equity Options available to small businesses bidding in the D and E Blocks. The Commission's fears that large telecommunications entities can easily outbid smaller, entrepreneurial companies will be realized unless the Commission permits those smaller companies to attract meaningful equity investments. As noted above, the Commission's equity investment models are effective vehicles through which responsible entrepreneurs may attract capital without surrendering managerial autonomy. To the extent those equity investment models are important in the context of the C and F Block auctions, they are that much more critical to smaller bidders in the non-entrepreneurs' blocks.

B. The Commission Should Adopt Rules Further to Encourage Sincere Bidding in the Entrepreneurs' Block

CIRI supports the Commission's efforts to encourage sincere bidding in all Commission auctions and in bidding for the entrepreneurs' blocks in particular. To ensure that licenses are awarded to parties that truly value them most highly, the Commission must guard against speculative bidding that drives up the cost of licenses unnecessarily and dampens the vitality of the competition in an auction. The Commission also should work to minimize the administrative costs and service delays caused by licensee defaults after the auction. While the Commission must

fulfill its statutory mandate to disseminate licenses among a wide variety of applicants, awarding licenses to applicants that cannot pay for them does not achieve that goal.

First, CIRI encourages the Commission to increase the upfront payments required of entrepreneurial bidders.[6] In the competitive bidding Second Report and Order, the Commission wrote:

> In determining the amount of upfront payment required, we are balancing the goal of encouraging bidders to submit serious, qualified bids with the desire to simplify the bidding process and minimize implementation costs that will be imposed on bidders. This balancing may yield different results depending on the particular licenses being auctioned, so we have determined that the best approach is to retain the flexibility to determine the amount of upfront payment on an auction-by-auction basis.[7]

In addition, the Commission wrote that upfront payments will "provide the Commission with a source of available funds in the event that a penalty must be assessed for bid withdrawal prior to further payments."[8] Upfront payments also help "to ensure that those bidding on large numbers of licenses have the financial capability to build out those licenses and are bidding in good faith."[9]

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6. NPRM at ¶¶ 55-59.

7. Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Second Report and Order, 9 FCC Rcd 2348, 2378 (1994) ("Second Report and Order")

8. Id. at 2379.

9. Id.

Against this background, raising the upfront payment required of entrepreneurial entities will help the Commission address many of the lessons of the C Block auction. At a minimum, eliminating the 25 percent discount in upfront payments for entrepreneurial entities — i.e., moving from $0.015 to $0.02 per MHz per pop — should begin to ensure that serious and qualified bidders undertake to bid in an auction in the first instance.[10] Eliminating the discounted upfront payment also would force entrepreneurial bidders to demonstrate that they have the wherewithal to make good on their bids and build-out requirements, or to tender penalties to the Commission in the event of insincere bidding.

Second — in conjunction with offering bidding credits to small businesses in the D, E, and F Blocks — CIRI urges the Commission to increase the required downpayment for entrepreneurial bidders to 30 percent of the winning bid.[11] A higher downpayment helps to stabilize the results of the auction, and does not hinder growth and access to capital. Indeed, in the Second Report and Order, the Commission determined,

> Requiring a significant down payment is especially important in spectrum auctions in light of our goal of promoting economic growth. Default could force re-auctioning of the license and might cause significant delays in service provision, and a significant down payment tends to ensure that winning bidders actually

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10. NPRM at ¶¶ 56-57.

11. Id. at ¶ 59.

> qualify as licensees and can build their systems expeditiously.[12]

As noted above, disseminating licenses among a wide variety of applicants is meaningless if those applicants cannot pay for the licenses after the auction. Similarly, economic growth is not promoted if parties take advantage of a low downpayment only to default on very high license payments. Default also delays the provision of service to consumers and taxes scarce Commission resources in resolving the forfeiture.[13] Increasing the current downpayment required of entrepreneurial bidders will help to see that winning bidders are also successful and responsible service providers.

C. The Commission Should Restrict Preferences for Bidders and Investors That Win Large Amounts of Spectrum in the C Block Auction

In addition, CIRI urges the Commission to restrict the government funded preferences for bidders and investors that win large amounts of spectrum in the C Block auction. In the Fifth Report and Order, the Commission wrote:

> [I]n adopting the financial assistance measures set forth in this Report and Order, we are concerned about the possibility, even if remote, that a few bidders will win a very large number of the licenses in the entrepreneurs' blocks. As a consequence, the benefits that Congress intended for designated entities would be enjoyed, in disproportionate measure, by only a few individuals or

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12. Second Report and Order 9 FCC Rcd at 2381 (emphasis added).

13. See, e.g., Public Notice: Wireless Telecommunications Bureau Will Strictly Enforce Default Payment Rules, DA 96-481 (rel. April 4, 1996).

entities. Congress, in our view, did not intend that result.[14]

Similarly, in the NPRM, the Commission expresses its interest in improving opportunities for bidders that would have benefited from the F Block provisions that the Commission proposes to change[15] and for entities that were unable to win licenses in the previous broadband PCS auctions.[16] Restricting preferences for bidders and investors that win large amounts of spectrum in the C Block auction would help the Commission to achieve these goals.

Specifically, CIRI urges the Commission to declare any C Block licensees for basic trading areas ("BTAs") covering more than 2 percent of the national population ineligible for further government funded preferences. Parties who have sufficient resources to acquire C Block licenses covering more than 2 percent of the national population — approximately 5.05 million pops[17] — most likely do not need additional Federal assistance in the remaining broadband PCS auctions. Those licensees would be free to bid in the F Block auction if otherwise eligible and to

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14. Fifth Report and Order, 9 FCC Rcd at 5606. CIRI also questions whether Congress intended that a large measure of the benefits for designated entities would be enjoyed ultimately by foreign investors. See, e.g., Mike Mills, South Korean Money Pumps Up Auction for Wireless Licenses, Wash. Post, April 4, 1996, at D9 (detailing substantial foreign investments in leading C Block bidders).

15. NPRM at ¶ 54.

16. Id. at ¶ 26.

17. Public Notice: FCC Issues New Procedures, Terms and Conditions for Broadband PCS C Block Auction Attachment B (rel. Oct. 6, 1995) (listing aggregate population of United States BTAs as 252,556,719).

bid in the D and E Block auctions without restriction. They simply would not receive discounts through bidding credits and government financing through installment payments.

In applying this limitation, CIRI encourages the Commission to utilize the definition of PCS licensee already employed for its 40 MHz broadband PCS spectrum cap.[18] For the purposes of that spectrum cap, PCS licensees are:

> (1) Any institutional investor, as defined in § 24.720(h), with an ownership interest of 10 or more percent in a broadband PCS license; and
>
> (2) Any other entities having an ownership interest of 5 or more percent or other attributable ownership interest, as defined in § 24.204(d), in a PCS license.[19]

In the NPRM, the Commission notes that no party has challenged this attribution standard and that the Commission does not propose to modify it.[20] Applying this attribution standard in the context of restricting the availability of government assistance, C Block bidders and their attributable partners will be ineligible for Federal aid after they have benefitted substantially from the provisions in the C Block rules.

CIRI also urges the Commission to include the value of any licenses won in the C Block auction in the total assets calculation for admission to the F Block auction.[21] In limiting

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18. 47 C.F.R. § 24.229(c).

19. Id.

20. NPRM at ¶ 74.

21. Id. at ¶ 50. The Commission requests comment in the NPRM on "whether the value of a C Block license should be part of the gross revenues calculation." Id. It would appear that the

the ability of larger C Block bidders to reserve a similar number of F Block licenses, the Commission will give a greater number of responsible parties the opportunity to become Commission licensees. By expanding the number of broadband PCS licensees, the Commission also will create strategic partnership opportunities for holders of valuable 10 MHz licenses.

D. The Commission Should Retain its Cellular-PCS Cross-Ownership Rule

Finally, CIRI urges the Commission to attempt to retain its cellular-PCS cross-ownership rule.[22] Limiting the broadband PCS eligibility of established cellular service providers to one 10 MHz license in their service areas will permit them to participate in providing PCS if they are successful bidders, and will ensure that the remaining PCS spectrum is available for competitors. Similarly, prohibiting cellular providers from purchasing up to 20 MHz of the remaining 30 MHz of spectrum allocated to PCS in each cellular area will afford smaller licensees a better opportunity to compete and to grow.

Without the cross-ownership restriction, smaller bidders will have fewer opportunities to become PCS licensees and will face an even more entrenched competitor if they do. Currently, cellular providers are eligible to purchase one 10 MHz license in their service areas and an additional 5 MHz in the year 2000. In addition, they can bring substantial industry experience, vendor

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value of C Block license more appropriately should be part of the total assets calculation.

22. Id. at ¶ 66.

contacts, and technical skill to larger broadband PCS efforts outside of their home territories. Against this background, the Commission should work to retain the cellular-PCS cross-ownership rule to preserve competition in the wireless services market. By retaining the cross-ownership limitation — and by making the improvements discussed above — the Commission will have a much better chance to succeed in "promoting economic opportunity and competition . . . by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants."[23]

III. THE COMMISSION'S TRIBAL AFFILIATION RULE HAS AN INDEPENDENT CONSTITUTIONAL BASIS IN THE INDIAN COMMERCE CLAUSE

CIRI agrees with the Commission's conclusion that the Tribal Affiliation Rule is not affected by the Supreme Court's decision in Adarand Constructors, Inc. v. Pena, 115 S.Ct. 2097 (1995).[24] Regulations directed at Tribal entities are grounded in the unique, sovereign-to-sovereign relationship between the federal government and Indian Tribes. Such regulations do not implicate racial classifications and are not subject to traditional equal protection analysis.

The Indian Commerce Clause of the United States Constitution provides Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian

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23. 47 U.S.C. § 309(j)(3)(B).

24. NPRM at ¶ 39.

Tribes."[25] This separate, enumerated constitutional power has long been recognized to provide Congress "plenary" authority to deal with Native Americans in unique ways[26] and authorizes legislation reflecting "the unique legal relationship between the Federal Government and tribal Indians."[27]

The enabling constitutional provisions themselves make clear that federal regulation of Indian tribes "is governance of once-sovereign political communities; it is not to be viewed as legislation of a 'racial' group consisting of 'Indians.'"[28] Thus, under long settled law, "Indian tribes are 'domestic dependent nations,'" entitled to unique treatment[29] and subject to federal restraints and regulations which would be unthinkable

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25. U.S. Const. art. I, § 8, cl. 3. The provision applies with equal force to Alaska Natives. See United States v. Native Village of Unalakleet, 411 F.2d 1255 (Ct. Cl. 1969); Treaty Concerning the Cession of Russian Possessions in North America, Mar. 30, 1867, art. 3, 15 Stat. 539, 542. See also Felix S. Cohen, Handbook of Federal Indian Law 734-64 (1982 ed.).

26. See, e.g., Morton v. Mancari, 417 U.S. 535, 551-52 (1974) ("[t]he plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself").

27. Id. at 550.

28. United States v. Antelope, 430 U.S. 641, 646 (1977) (quoting Morton, 417 U.S. at 553 n.24) (emphasis added).

29. Oklahoma Tax Comm'n v. Potawatomi Indian Tribe, 498 U.S. 505, 509 (1991).

in any other context.[30] As Chief Justice Burger wrote for a unanimous Supreme Court:

> [t]he decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications. Quite the contrary, classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution and supported by the ensuing history of the Federal Government's relations with the Indians.[31]

Similarly, Justice Scalia, then writing for the United States Court of Appeals for the District of Columbia Circuit, acknowledged that "the Constitution itself . . . 'singles Indians out as a proper subject for separate legislation,'" providing the constitutional basis for "rejecting equal protection challenges" to such legislation.[32] Political settlements relating to Tribes have been an essential and lawful part of the formation and expansion of the Nation.[33]

As the Court in Adarand carefully and repeatedly pointed out, equal protection requires strict scrutiny only for preferen-

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30. See, e.g., Chugach Alaska Corp. v. Lujan, 915 F.2d 454 (9th Cir. 1990) (affirming Secretary of Interior's regulation of Alaskan village membership).

31. Antelope, 430 U.S. at 645 (footnote omitted) (emphasis added).

32. United States v. Cohen, 733 F.2d 128, 139 (D.C. Cir. 1984) (en banc).

33. See, e.g., Treaty Concerning the Cession of Russian Possessions in North America, Mar. 30, 1867, art. 3, 15 Stat. 539, 542.

tial treatment based on race.[34] Under settled law, regulations specifically aimed at Native Corporations and Indian tribes are not based on race and are not subject to "[t]raditional equal protection analysis," regardless of the standard of review.[35] Congress has long used its special constitutional powers regarding Indians "to promote the 'goal of Indian self-government, including its "overriding goal" of encouraging tribal self-sufficiency and economic development.'"[36] Accordingly, even express employment preferences for individual Indians have been affirmed unanimously by the Supreme Court on the ground that the preference was not for a "discrete racial group," but for "quasi-sovereign tribal entities."[37] Far from violating equal protection, legislative recognition of the special place accorded

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34. Even within the category of "race," Justice O'Connor's opinion in Adarand made clear that the Court was articulating only a "general rule" that did not affect certain political powers of government, such as the enumerated federal power over immigration. Adarand, 115 S.Ct. at 2108 (citing Hampton v. Mow Sun Wong, 426 U.S. 88, 100, 101-02 n.21 (1976)). Further, Justice Stevens noted in his dissent that the Supreme Court has long recognized that Congress' special treatment of Native Corporations and Indian tribes is not based on race, but on their political status as quasi-sovereign entities. See Adarand, 115 S.Ct. at 2121 n.3 (Stevens, J., dissenting). The Adarand majority did not question this long established proposition.

35. United States v. Decker, 600 F.2d 733, 740 (9th Cir. 1979). See also Antelope, 430 U.S. at 646-47; Morton, 417 U.S. at 553.

36. Potawatomi Indian Tribe, 498 U.S. at 510.

37. Morton, 417 U.S. at 554.

the Indian tribes was required by "the solemn commitment of the Government toward the Indians."[38]

Nothing in Adarand even suggested a limitation on Congress' long-standing power over tribal entities. As the Commission noted in the NPRM, two days after Adarand was decided, the Supreme Court unanimously reaffirmed one of the many special rules applicable to Indian Tribes and their members and not applicable to "non-Indians."[39] More recently, the Court noted that "the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause."[40] The SBA also just completed a comprehensive overhaul of its small business affiliation rules in which it retained the Tribal Affiliation Exemption on which the Commission's Rule is based.[41]

In short, the Commission is correct that the Tribal Affiliation Rule is not affected by the Supreme Court's decision in Adarand. As the Commission concluded in the competitive bidding Sixth Report and Order, the Tribal "affiliation rule exception is different from the exception applicable only to minority investors in that it is premised on their unique legal

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38. Id.

39. See Oklahoma Tax Comm'n v. Chickasaw Nation, 115 S.Ct. 2214, 2218-19 (1995).

40. Seminole Tribe of Florida v. Florida, 64 U.S.L.W. 4167, 4172 (U.S. March 27, 1996).

41. See 13 C.F.R. § 121.103(b)(2); 61 Fed. Reg. 3280, 3287 (Jan. 31, 1996).

status as recognized in the 'Indian Commerce Clause' of the United States Constitution."[42] Nothing since the Sixth Report and Order has affected the accuracy of that determination and there is no cause for the Commission to reach a different conclusion here.[43]

IV. THE COMMISSION'S F BLOCK MINORITY PREFERENCE RULES MAY SURVIVE STRICT SCRUTINY

CIRI has long been an active supporter of responsibly managed government efforts to encourage minority participation in the communications industry. Since the advent of the Commission's spectrum auction proceedings, CIRI has been a strong proponent of what became the Commission's entrepreneurs' block rules. In Comments and Reply Comments[44] in PP Docket 93-253, for example, CIRI demonstrated that preferences to assist businesses owned by members of minority groups would survive the intermediate scrutiny analysis then called for under Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 564 (1990).[45] In a Written Statement to the Commission's PCS Task Force in April, 1994, CIRI demonstrated the need for preferential measures and

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42. Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Sixth Report and Order, FCC 95-301, ¶ 34 (rel. July 18, 1995) ("Sixth Report and Order").

43. CIRI is including as Exhibit 1 to these Comments a Memorandum further analyzing the Commission's Tribal Affiliation Rule in the wake of the Adarand decision.

44. Comments of Cook Inlet Region, Inc., PP Docket No. 93-253 (submitted Nov. 10, 1993); Reply Comments of Cook Inlet Region, Inc., PP Docket 93-253 (submitted Nov. 30, 1993).

45. See Second Report and Order, 9 FCC Rcd at 2398-2400 (citing CIRI constitutional analysis of minority preferences).

submitted statistical data illustrating the lack of minority participation in the telecommunications industry.[46] Similarly, CIRI Senior Vice President Margaret Brown testified before the Subcommittee on Minority Enterprise, Finance and Urban Development in May, 1994 about the problems that plague Native Americans in particular and the need for preferential measures in the telecommunications industry for members of minority groups.[47]

Against this background, CIRI urges the Commission to examine and, if possible without unduly risking prolonged litigation, to retain its F Block minority preference provisions. The Commission's entrepreneurs' block rules — including provisions for businesses owned by members of minority groups — remain a critical part of its national wireless telecommunications policy. As prices for broadband PCS spectrum become unexpectedly high, it is important that the Commission ensures that businesses owned by members of minority groups continue to have "the opportunity to participate in the provision

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46. Written Statement of Cook Inlet Region, Inc., GEN Docket 90-314 (submitted April 22, 1994) (with twelve attachments) ("CIRI PCS Task Force Statement").

47. Discrimination in the Telecommunications Industry: Hearing Before the Subcomm. on Minority Enterprise, Finance, and Urban Development of the House Comm. on Small Business, 103rd Cong., 2d Sess. 55-56 (1994) (statement of Margaret Brown, Senior Vice President, Cook Inlet Region, Inc.) ("Brown Testimony"). Ms. Brown's testimony was filed with the Commission by Chairman Mfume on May 31, 1994 and was cited by the Commission in its Order on Reconsideration in PP Docket 93-253. See Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Order on Reconsideration, 9 FCC Rcd 4493, 4494 n.13 (1994) ("Order on Reconsideration").

of spectrum-based services."[48] Retaining the minority preference provisions within its entrepreneurs' block plan would help to fulfill that congressional directive.

Here, CIRI discusses how the Commission's minority preference provisions may survive the strict scrutiny analysis called for under the Adarand decision. In Adarand, the Supreme Court declared that all racial classifications — even those imposed by a Federal government actor — "are constitutional only if they are narrowly tailored measures that further compelling governmental interests."[49] By analyzing the Commission's entrepreneurs' block rules against other applications of this strict scrutiny by Federal courts, it appears that the Commission's Rules could, indeed, be constitutional.

A. The Commission's Preferences May Serve a Compelling Governmental Interest

As a threshold matter, the Commission's provisions for businesses owned by members of minority groups may serve a compelling governmental interest. The Commission several times has recognized the purpose articulated by Congress as underlying the grant of authority to employ minority preferences. As the Commission wrote in the Competitive Bidding Fifth Report and Order:

> The rules we adopt also further Congress's objectives, set forth in Section 309(j)(3)(B), of "promoting economic opportunity and competition and ensuring that innovative technologies are readily accessible to the American

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48. 47 U.S.C. § 309(j)(4)(D).

49. Adarand, 115 S.Ct. at 2113. See also id. at 2117.

> 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."[50]

Thus, for the instant purpose, Congress authorized the preferential measures of the 1993 Budget Act "in the interest of promoting economic opportunity for minorities and women, who are underrepresented in the communications industry."[51]

To show a compelling governmental interest that justifies taking race into account, it is well-established that a governmental actor may rely on statistical evidence that discrimination in a particular industry has occurred. As the Supreme Court wrote in applying strict scrutiny in City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), "There is no doubt that where gross statistical disparities can be shown, they alone in the proper case may constitute prima facie proof of a pattern or practice of discrimination."[52] The Court also indicated that "evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical

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50. Fifth Report and Order, 9 FCC Rcd at 5537 (quoting 47 U.S.C. § 309(j)(3)(B)). See also Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Fifth Memorandum Opinion and Order, 10 FCC Rcd 403, 404 (1994) ("Fifth Memorandum Opinion and Order").

51. Second Report and Order, 9 FCC Rcd at 2398-99.

52. Croson, 488 U.S. at 501 (quoting Hazelwood School District v. United States, 433 U.S. 299, 307-08 (1977) (internal quotation marks omitted). The Court added, however, that comparisons to the general population may be unhelpful where special qualifications are required for the jobs at issue. Croson, 488 U.S. at 501.

proof, lend support to a . . . government's determination that broader remedial relief is justified."[53]

Lower courts have followed suit. In Peightal v. Metropolitan Dade County, 26 F.3d 1545 (11th Cir. 1994), a panel of the Eleventh Circuit Court of Appeals determined, "Evidence that the statistical imbalance between minorities and non-minorities in the relevant work force and available labor pool constitutes a gross disparity, and thus a prima facie case of a constitutional or statutory violation, may justify a public employer's adoption of racial or gender preferences."[54] Moreover, a panel of the Ninth Circuit Court of Appeals ruled in 1991 that statistical data developed after the enactment of a race-conscious measure may still support the finding of a compelling governmental interest.[55]

In this case, Congress and the Commission has before it substantial evidence of the need to promote economic opportunity for minorities — particularly in the communications industry. Although Congress made no specific findings as to the lack of economic opportunities for minorities when it enacted the spectrum auction provisions in the 1993 Budget Act, Congress has examined the issue of minority disadvantage both in and out of

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53. Id. at 509.

54. Peightal, 26 F.3d at 1555.

55. Coral Construction Co. v. King Cy., 941 F.2d 910, 920-21 (9th Cir. 1991), cert. denied, 502 U.S. 1033 (1992).