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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

APR 15 1996

In the Matter of	)	
	)	
Amendment of Parts 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
	)	

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COMMENTS OF
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SUMMARY

North Coast Mobile Communications, Inc. ("NCMC") submits these Comments in the Commission's *Notice of Proposed Rule Making in WT Docket No. 96-59 and GN Docket No. 90-314*, which addresses a variety of issues relating to the Commission's competitive bidding and ownership rules for the upcoming broadband PCS D, E and F block auction. The underlying premise of NCMC's Comments is that the Commission must keep in mind Congress' directive in Section 309(j) of the Communications Act that the Commission avoid an excessive concentration of licenses and assure the wide dissemination of licenses among a variety of applicants when it crafts competitive bidding design rules. As the C block broadband PCS auction draws to a close, it is becoming increasingly evident that the majority of broadband PCS licenses auctioned thus far, are or will be held by a relatively modest number of companies. Accordingly, in adopting rules to govern the auctioning of the remaining broadband PCS licenses, the Commission must take bold steps to ensure that the D, E and F block licenses are realistically accessible to new entrants in the upcoming auction.

To that end, NCMC encourages the Commission to adopt the following rule modifications, policies or schedule changes:

1.) Modify its F block auction rules to be race and gender neutral;

2.) Adopt its existing C block Control Group requirements and equity structures for the F block auction, with no new exceptions;

3.) Adopt the C block modified exception to the affiliation rule for the F block auction;

4.) Adopt the C block installment payment plan for the F block;

5.) Modify its existing C block bidding credit preference for use in the F block auction;

6.) Continue to utilize the C block small business definition in the F block auction, with minor modifications;

7.) Allow small businesses preferences to be applied in the D and E block auction, as well as the F block;

8.) Slightly modify its anti-trafficking rule to allow designated entities to transfer their licenses to qualified small businesses within the first three years after licensing;

9.) Tighten rather than loosen the existing PCS/Cellular crossownership rules;

10.) Amend the ownership disclosure provisions as proposed; and

11.) Auction all three D, E and F block licenses in a single simultaneous multiple round auction.

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COMMENTS OF
NORTH COAST MOBILE COMMUNICATIONS, INC.

North Coast Mobile Communications, Inc. ("NCMC")[1], pursuant to Section 1.415 of the Commission's rules, 47 C.F.R. § 1.415 (1995), submits these Comments in the referenced *Notice of Proposed Rule Making ("NPRM")* proceeding. The Comments address a range of issues relating to the Commission's competitive bidding and ownership rules for the D, E and F frequency blocks of the broadband Personal Communications Service ("broadband PCS"). In refining the auction design for the D, E and F blocks, the Commission must keep in mind Congress' objectives of avoiding "the excessive concentration of licenses", and assuring the

[1]NCMC is a start-up Ohio corporation which was a qualified bidder in the FCC's C block auction, and eligible for all small business designated entity preferences. Like many other C block applicants, NCMC determined that the prices bid in the auction became excessive and withdrew on March 26, 1996. Therefore, NCMC, like many other small businesses, is relying upon the FCC to establish rules for the D, E and F blocks in this proceeding that provide a realistic opportunity for such applicants to compete for the last remaining broadband PCS licenses.

dissemination of "licenses among a wide variety of applicants".[2] Consequently, the Commission must take bold steps to ensure that D, E and F block licenses are realistically accessible to new entrants in the upcoming auction. These Comments address how the Commission can achieve these important congressional objectives, while simultaneously structuring an auction process that is fair, efficient and not vulnerable to viable legal challenges.

I. INTRODUCTION

In July 1994, the Commission adopted its *Fifth Report and Order in PP Docket 93-253*[3], in which it designated broadband PCS blocks C and F as "entrepreneur blocks", where bidder eligibility was limited to "entities that, together with their affiliates and certain investors, have gross revenues of less than $125 million in each of the last two years and total assets of less than $500 million."[4] The Commission adopted the entrepreneurs' block rules in order to satisfy the statutory mandate of 47 U.S.C. § 309(j)(3)(B), which, as stated above, directs the Commission to promulgate competitive bidding rules that avoid excessive concentration of licenses and that broadly disseminate licenses among a wide variety of applicants, including small businesses.

As addressed later in these Comments, the majority of broadband PCS licenses issued thus far, or that are expected to be issued to C block winners in the near future, are held by a relatively modest number of companies. However well-intentioned and carefully crafted the

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[2]47 U.S.C. § 309(j)(3)(B).

[3]*Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, 9 FCC Rcd 5532 (1994) (hereinafter *Fifth Report and Order*).

[4]*Fifth Report and Order*, 9 FCC Rcd 5532, 5585 (1994).

Commission's broadband PCS rules and policies have been, an examination of the list of current and likely broadband PCS licensees establishes that Congress' objectives of wide dissemination of PCS licenses among a broad group of entities have not been met. Accordingly, in adopting rules to govern the auctioning of the remaining broadband PCS licenses, the Commission must take this final opportunity to ensure that Congress' objectives are fulfilled.

As explained below, Congress' goals can only be accomplished by applying all C block entrepreneur preferences (and related financial eligibility restrictions), not only to the F block licenses as proposed, but also in the D and E block context, which will result in entrepreneurs competing against larger businesses for D and E block licenses due to the availability of the preferences. Because the 10 MHz blocks can be aggregated to better compete with the 30 MHz PCS licensees and cellular incumbents, it is critical that the Commission adopt rules for the D, E and F blocks that are no less favorable or flexible than the C block has received. Otherwise, the D, E and F block licensees, already disadvantaged by the headstart of their competitors, will be obstructed in their efforts to compete for scarce investment capital relative to the C block licensees.

II. TREATMENT OF DESIGNATED ENTITIES IN THE F BLOCK AUCTION

A. The Commission Should Modify its F Block Bidding Rules to be Race and Gender Neutral

NCMC appreciates the difficult balancing of statutory considerations that the Commission must perform in determining how and when to auction the remaining 10 MHz broadband PCS licenses. NCMC submits, however, that a careful balancing of all relevant factors leads to one inescapable conclusion: The Commission must move swiftly and

efficiently to auction all three 10 MHz broadband PCS blocks if future 10 MHz licensees are to have any reasonable chance to compete with incumbent CMRS licensees, and with the A, B and C block licensees.

While it is clear that the FCC has a statutory obligation to disseminate broadband PCS licenses to "a wide variety of applicants, including small businesses ... and businesses owned by members of minority groups and women"[5], it also has a duty to promote "the development and rapid deployment of new technologies, products and services for the benefit of the public, . . . without administrative or judicial delays".[6] NCMC notes that the FCC's record to support race and gender preferences in the broadband PCS Entrepreneur Blocks was gathered **before** the United States Supreme Court issued its decision in *Adarand Constructors, Inc. v. Pena*,[7] where the Court held for the first time that race-based federal programs must be able to pass the two prong strict standard of review, or be deemed unconstitutional. Since the Commission's existing record in this proceeding does not contain the types of specific evidence of discrimination against particular racial groups necessary to justify race-based preferences under *Adarand*, it is highly unlikely that the existing F block race-based preferences would withstand judicial challenge.

NCMC recognizes that the Commission might develop a record of specific instances of discrimination against minorities (and women) who have sought to enter the telecommunications industry, sufficient to satisfy strict scrutiny. However, that record would

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[5]47 U.S.C. § 309(j)(3)(B).

[6]47 U.S.C. § 309(j)(3)(A).

[7]115 S. Ct. 2097 (1995).

take many more months, at least, to compile, and even then might be insufficient. NCMC agrees with the Commission that the PCS industry in general already has been subjected to excessive delays, and that further delay in auctioning the remaining broadband PCS licenses would have a catastrophic impact upon entrepreneurs relying entirely on these licenses to establish service. Moreover, the delay caused by building the necessary legal record would only be compounded by the inevitable legal challenges to the F block rules if the race- and gender-preferences are retained. Consequently, a balancing of the interests weighs heavily towards the adoption of the proposed race- and gender-neutral auction rules for the F block.[8]

B. The Commission's Existing C Block Control Group Requirements Should be Adopted for the F Block Auction

1. The Commission Should Maintain the Existing C Block Control Group Equity Structures

Based on the need for comparable treatment of C block and F block licensees, and for expedient licensing of the broadband PCS D, E and F blocks,[9] NCMC supports the Commission's tentative conclusion to also make the Control Group Minimum 50.1% Equity Option available to small businesses in the F block auction. While the FCC's control group structures could undoubtedly be refined and improved, there are several compelling reasons why these equity options should be made available to F block auction participants.

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[8]NCMC notes that the C block race and gender-neutral auction rules have not precluded women and minorities in participating in the C block auction, as 31% of the qualified bidders in that auction were either minority- or women-owned businesses.

[9]As discussed in Section III, NCMC supports extending small business preferences to the D and E blocks as well.

First, the federal Circuit Court for the District of Columbia already has reviewed and upheld these rules.[10] Consequently, the likelihood of a judicial challenge, much less a successful judicial challenge, is reduced. Second, both interested PCS entrepreneurs and the financial industry have gained a certain level of familiarity with and expertise in applying these complex rules to proposed applicant structures. Modifying the control group structure rules **once again** will disadvantage all interested participants by introducing substantial new uncertainty over rules that are already complex. Any uncertainty will be especially damaging given the expected short time frame that applicants will have before filing their short form applications. To the extent that any changes in the rules result in less flexible or less favorable options for entrepreneurs in the upcoming auction than what has been available to the C block winners, such entrepreneurs will be placed at an unfair disadvantage in the highly competitive market for scarce investment sources. Finally, as a practical matter, the FCC itself has been analyzing control group structures and interpreting the relevant rules for almost two years, and analyzing and interpreting modified control group structures for almost one year. Given the tremendous demands presently being placed on Commission staff in implementing the Telecommunications Act of 1996, that collected staff wisdom relating to already complex rules should not be diluted or undermined with unnecessary rule modifications.

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[10] *See Omnipoint Corp. v. FCC*, No. 95-1374, slip op. at 17 (D.C. Cir. March 8, 1996).

2. There Should be No Exceptions to the F Block Financial Eligibility Threshold

The Commission requests comment as to whether it should make adjustments to the financial eligibility threshold for the F block auction.[11] NCMC asserts that no adjustments are justified or necessary, and that no special exceptions or eligibility provisions should be adopted. Indeed, any change in the existing rules that would allow C block winners to participate as entrepreneurs in the D, E and F block auction[12] despite having assets in excess of $500 million (including in that calculation the winning bids for any C block allocations), would directly undermine Congress' goal of avoiding concentration of licenses and assuring dissemination of licenses among a wide variety of applicants. Specifically, if after the conclusion of the C block auction, qualified C block winners continue to meet the total assets and gross revenue entrepreneur block requirements at the time the short form applications are filed for the F block, and otherwise remain basically qualified to participate, they should be able to do so. However, to create an exception to the financial eligibility criteria solely to accommodate a minority of C block bidders (who were so successful in acquiring licenses during the C block auction that they would no longer meet the total assets eligibility criteria) would contravene congressional intent and constitute unjustifiable disparate treatment among

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[11]NPRM at ¶33. The current rules limit participation in the F block auction to applicants that meet the financial eligibility threshold at the time that the short form application is filed. 47 C.F.R. §24.715(a)(1).

[12]As discussed in Sections VII and III, NCMC urges the Commission to hold a single auction for the D, E and F blocks and to extend small business preferences to the D and E blocks.

similarly situated entities.[13] Thus, the FCC must make it explicitly clear that the financial eligibility of applicants for the F block licenses. as well as financial eligibility for preferences for D and E block licenses as discussed later. will be premised upon an applicant's eligibility under the entrepreneurs' block financial limits. These financial limits should include in the total assets calculation the dollar amount of any winning bids in the C block auction, whether or not a license has actually been issued at the time the short form applications are filed.

For example, the majority of C block auction winners should be eligible to participate in the F block auction, under the existing rules, even if the value of the licenses won in the C block is included in their total assets calculation. However, as the C block auction nears its conclusion, it appears that a small handful of C block bidders will acquire C block licenses, which represent the vast majority of the close to $10 billion bid in the auction to date. Accordingly, certain C block auction winners will have greater total assets than many entities who were initially precluded from participating in the C block auction, and who will continue to be precluded from participating in the F block auction. Moreover, the FCC's existing rules recognize that entities of such financial size and strength should not be the beneficiaries of public support intended by Congress to provide assistance to small businesses that are without access to capital generally available to larger concerns.

[13]If the Commission were to modify the rules to permit such applicants to qualify as entrepreneur, it runs the significant risk that litigation will result which could delay the upcoming auction.

C. The C Block Modified Exception to the Affiliation Rule Should be Maintained for the F Block Auction

In reviewing the various options for revising the F block affiliation rule, NCMC encourages the Commission to adopt the C block's modified exception. The present C block modified exception has played an important role in allowing C block entrepreneurs to attract both investors and experienced managers. Further, as the D.C. Circuit Court of Appeals recognized in upholding the C block modified exception, in "making a limited exception available to a broader range of businesses, the FCC created an additional vehicle for small businesses to pool their resources."[14] The court further explained that "modification of the affiliation rule aids participation by small businesses ... by providing an additional means for small businesses to meet their financial needs."[15]

It is undeniable that the auctioning of broadband PCS licenses has generated tremendous interest among telecommunications entrepreneurs. Interest in the remaining 10 MHz broadband PCS licenses promises to be even more intense. Despite the fact that the F block licenses are "smaller" than the A, B and C block licenses, broadband PCS auction results up to this point indicate that many competing broadband PCS providers are willing to pay a premium for any broadband PCS license. Accordingly, the Commission's rationale in the *Sixth Report and Order* for adopting the modified exception to the affiliation rule, as upheld by the D.C. Circuit Court of Appeals, remains equally compelling in the context of the F block auction.

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[14] *Omnipoint Corporation v. FCC*, No. 95-1374, slip op. at 23.

[15] *Omnipoint*, slip op. at 24.

D. The FCC Should Adopt its C Block Installment Payment Plan for the F Block

NCMC supports the Commission's proposal to remove the race and gender based provisions of Section 24.716 of the rules, and further encourages the Commission to maintain the three installment payment plans currently provided for in the C block rules. However, NCMC strongly disagrees with the Commission's speculation that 10 MHz licenses will draw lower bids, which consequently leads the Commission to question whether such favorable payment terms are necessary for F block auction winners. NCMC contends that the present C block auction results present a compelling case that neither the FCC nor any interested industries can accurately predict the prices that will be bid for, or the values that will be assigned to, broadband PCS licenses. Accordingly, a present expectation that lower prices will be bid for F block licenses does not provide a basis for adopting less favorable installment payment plans. Moreover, small business licensees may seek to aggregate two or three 10 MHz licenses in order to more effectively compete with the A, B and C block licensees and other incumbent CMRS service providers. Such licensees can expect to pay at least as much as the C block winners will pay for the same quantity of spectrum, and should not be subject to less favorable financing terms.

As previously addressed, small business winners of licenses in the D, E and F blocks will already suffer competitively from the substantial headstart that the other broadband PCS winners enjoy. Winners in the next broadband PCS auction must be in a position to successfully compete for scarce capital to acquire and build out their systems. To the extent that the Commission extends less favorable financing terms to future broadband PCS licensees than those presently available to the C block licensees, access to capital will be substantially impaired.

E. The Commission Should Adopt a Modified Bidding Credit Preference for the F Block

For the reasons stated above[16], NCMC supports the Commission's proposal to eliminate the race- and gender-based bidding credits in the F block rules. Further, NCMC encourages the Commission to adopt its two-tiered bidding credit proposal for small businesses participating in the F block, with a minor modification. Specifically, in crafting the tiered bidding credit rules, the Commission should retain the 25 percent bidding credit for "very small businesses." Such a modification will advance Congress' goals of avoiding concentration of licenses and promoting dissemination of licenses to a broad variety of applicants. NCMC supports a 25% bidding credit for very small businesses that have aggregate gross revenues under $15 million, and a 15% bidding credit for businesses with gross revenues between $15 million and $40 million.

F. The C Block Small Business Definition Should be Utilized in the F Block Auction, With Minor Modifications

NCMC encourages the Commission to adopt its proposal to utilize the current C block small business definition in the F block.[17] However, as discussed in Section II.B.2., *supra*, in adopting this rule, NCMC objects strongly to the inclusion of any rule provisions or exceptions that would favor or grandfather C block auction winners. Such provisions would not only be at odds with the entire entrepreneur block concept as envisioned by Congress, but they also would be unfair and legally indefensible. Accordingly, NCMC encourages the Commission to clarify that the value of any licenses acquired in the C block absolutely should

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[16]*See* Section II.A. of NCMC Comments.

[17]*See NPRM* at ¶50.

be included in determining compliance with the entrepreneurs' block total assets tests, and should be part of the small business eligibility calculation.[18]

III. SMALL BUSINESS PREFERENCES SHOULD BE APPLIED IN THE D AND E BLOCK AUCTIONS

As indicated on several occasions above, NCMC urges the Commission to extend all entrepreneur's block and small business preferences to the D and E blocks.[19] Such an extension of the rules could only have a positive effect on the auction. For example, expansion of the preferences into the D and E blocks would not only increase total participation in the auction, but it very likely would result in the dissemination of licenses among a broader number and variety of applicants, thereby fulfilling statutory intent. Furthermore, the FCC's experience in conducting the nationwide narrowband PCS auction establishes that designated entities require substantial preferences if they are to bid successfully for licenses in head-to-head competition against incumbent telecommunications giants. Specifically, in the nationwide narrowband PCS auction, none of the available licenses were reserved exclusively for designated entities. In addition, the only preference granted to designated entities was a 25% bidding credit.[20] Because not one designated entity

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[18]In the *NPRM*, the Commission suggests that the value of C block licenses could be considered as part of the gross revenues calculation. NCMC believes the value of licenses (or winning bids if licenses have not yet been issued) may be more appropriately considered as part of the total assets calculation. *NPRM* at ¶50. However, NCMC generally supports the concept of applying the value of C block winnings in gross revenues as well.

[19]The *NPRM* proposes only to extend installment payments to small businesses bidding for the D and E licenses. As explained herein, extension of all F block preferences to qualified entrepreneurs seeking D and E block licenses is essential.

[20]*See* 47 C.F.R. §§24.129; 24.309(b)(2).

won a nationwide narrowband license,[21] the Commission felt compelled to modify the designated entity preferences awarded in future narrowband PCS auctions, in order to encourage designated entity participation.[22]

In response to the Commission's suggestion that the current designated entity installment payment preferences might be too generous in light of the expected lower values for the 10 MHz licenses, NCMC reiterates its position that the Commission should not engage in predicting values of PCS licenses to be auctioned. It is widely accepted that the prices bid for the C block auction have far exceeded all expectations of their value, and many C block license bids, net the 25% bidding credit, already are two to three times the prices paid per pop for the much larger A and B block licenses. The Commission adopted the favorable C block financing terms when it expected C block prices/values to be **much lower** than the A and B block prices/values. Given this outcome, NCMC contends that it is highly unlikely that any of the current financing provisions will be too generous for successful small business bidders. In addition, from a basic fairness standpoint, many potential F block applicants have been developing business plans that are dependent upon these existing preferences. Given the fact that FCC Chairman Hundt recently has stated his intention for the 10 MHz broadband PCS license auction to commence this July, a downward adjustment in the value of the preferences at this point in time could be devastating to broadband PCS entrepreneurs.

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[21]*See FCC Public Notice 44394, Narrowband PCS Nationwide Auction Winners,* Report No. PCS-NB-94-1, released August 17, 1994.

[22]*See* 47 C.F.R. §§24.129; 24.309.

Consequently, all the relevant F block preferences available to qualified entrepreneurs should be available to such entrepreneurs seeking D and E block licenses.[23]

Finally, it is not necessary to adjust upward the discounted down payments and upfront payments currently provided for in the F block rules to guard against bidder default. Other than one anomalous situation (the IVDS auction), the Commission has not experienced significant bidder default relating to the down payment requirement, regardless of designated entity status. Further, the Commission has recently warned C block bidders that it does not intend to waive or extend its down payment deadline.[24] Since potential bidders are on notice that these financing requirements will not be waived, presumably they will arrange their financing appropriately so as to not risk liability for the specified default penalties.

IV. THE FCC SHOULD AMEND ITS ANTI-TRAFFICKING RULES FOR BROADBAND PCS DESIGNATED ENTITIES

NCMC strongly supports the Commission's proposal to amend the F block rule that prohibits designated entities from transferring licenses within the first three years after license grant.[25] Given the transfer restrictions that will continue to exist during the five years, the proposed revision will not negatively affect the purpose behind the original rule. Further, in cases where broadband PCS entrepreneur licensees experience a change in financial circumstances such that continued operation of the facilities and service to the public could be

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[23]These preferences include installment payments, bidding credits, discounted upfront payments and reduced down payments.

[24]*See FCC Public Notice Wireless Telecommunications Bureau Will Strictly Enforce Default Payment Rules*, DA 96-481, released April 4, 1996.

[25]Further, NCMC encourages the Commission to apply the proposed modified F block anti-trafficking rule to D and E block licenses acquired by small businesses.

jeopardized, the modified rule would provide for a resolution that would benefit all parties involved, including the licensee's customers.

V. CELLULAR/PCS CROSS-OWNERSHIP RULE

In the wake of the *Cincinnati Bell* decision by the Sixth Circuit determining that the 10 MHz PCS spectrum cap, and the related 20 percent attribution rule, applicable to cellular operators, was arbitrary and capricious, the NPRM inquires whether these rules should be modified.[26] As previously explained, experience to date in the PCS auctions, including the now impending results of the C block auction, establish that a fundamental objective of Congress set forth in Section 309(j)(3) of the Communications Act has not been achieved. Specifically, the Commission was instructed to design competitive bidding rules that promote economic opportunity and competition and that ensure that 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."[27]

The auction results to date, including the present status of the almost concluded C block auction, which was not available at the time the Sixth Circuit issued its decision, provide compelling new evidence that the Commission must take additional steps to ensure that a wide variety of new entrants have a meaningful opportunity to acquire D, E and F block licenses, and to avoid the further concentration of PCS licenses in the hands of a

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[26]*See Cincinnati Bell Telephone Company v. FCC*, 69 F.3d 752 (6th Cir. 1995); *47 C.F.R. §24.204.*

[27]47 U.S.C. §309(j)(3)(B).

relatively few huge telecommunications companies. Based upon the C block auction results as of Round 94, the top 20 bidders hold the high bids in 302 of the 493 BTAs, which represents 61 percent of the licenses available in this auction. Those markets also contain the vast majority of the population of the United States. Compare this to the 255 applicants that originally submitted applications for the C block. In the A and B block MTA auction, the 99 licenses were awarded to just 19 bidders. A substantial number of these A and B block licensees already hold cellular licenses collectively for the most of the country. Clearly, if new entrants into the wireless telecommunications industry are to have any realistic opportunity to acquire licenses in the D, E and F blocks, then the FCC must foreclose by its rules the further concentration of PCS licenses by existing cellular and PCS operators. Thus, the Commission should hardly relax its cellular/PCS cross-ownership and PCS spectrum cap rules, it should tighten them to prohibit entities holding interests in such licenses to acquire any of the D, E and F block licenses in markets where their cellular and PCS interests exist.[28]

Alternatively, if the Commission determines that it will not contain the further concentration of spectrum by existing cellular and PCS operators in their service areas, it must at a minimum retain the existing restrictions on the acquisition of PCS licenses by these entities. If Congress' intent is to be realized, the Commission cannot relax its existing rules in any respect to expand the rights of entities that already hold significant wireless interests to participate in auctions for the **last remaining** broadband PCS spectrum.

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[28]In the NPRM, the Commission has specifically placed in issue both its cellular/PCS crossownership rule and the 40 MHz PCS spectrum cap rule. NPRM at ¶66.

In response to the specific inquiries in the NPRM,[29] if the Commission will not prohibit the acquisition of D, E and F block spectrum by cellular operators in their service areas, the FCC must retain its 10 MHz cellular/PCS restriction as well as the 20 percent attribution standard. These rules are the only barriers preventing the well entrenched entities owning existing cellular operations from crowding out entrepreneurs that have thus far been unsuccessful in gaining a foothold in the wireless telecommunications industry. In addition, the FCC should not eliminate its 40 MHz PCS spectrum cap, which again will have the effect of creating excessive ownership concentration over broadband PCS licenses, and will effectively foreclose the dissemination of the last remaining broadband PCS licenses to a wide variety of applicants as Congress intended.

Although the Sixth Circuit determined in its November 6, 1995 decision that the Commission had not demonstrated why 20 percent was an appropriate attribution standard for cellular ownership, circumstances since the decision confirm that such an ownership level exceeds what could be legally imposed and is in fact appropriate. As noted above, the impending C block auction results provide hard new evidence that Congress' objective of avoiding excessive concentration of ownership and assuring dissemination of licenses to a wide variety of applicants has not been achieved thus far. While the FCC has made sincere efforts throughout this process to try to ensure that Congress' goal was met, the simple fact is that the now likely outcome of the C block auction, in which a small handful of entities have acquired the vast majority of the most valuable spectrum, simply could not be foreseen. At this point, there is no more room for error and the Commission must take bold action to

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[29]NPRM at ¶66.

ensure that new entrants have a meaningful chance of acquiring D, E and F block licenses. Thus, although the Sixth Circuit was not convinced that a basis existed for imposing a 20 percent attribution based on anticompetitive concerns, the 20 percent limit is independently supportable, in light of the outcome of the auctions to date, to "avoid excessive concentration of licenses" and to disseminate "licenses among a wide variety of applicants".[30]

VI. OWNERSHIP DISCLOSURE PROVISIONS

NCMC supports the Commission's proposal to amend 24.813(a)(1) and 24.813(a)(2) to require only the disclosure of attributable stockholders' direct, attributable ownership in other businesses holding or applying for CMRS or PMRS licenses. NCMC also supports the proposal to amend 24.720(f) and 24.720(g) which would allow applicants without certified financial statements to rely upon a certification from the applicant's chief financial officer concerning the veracity of the gross revenue and total asset figures in the short and long form applications. This amendment should apply to small businesses applying in the D, E and F blocks.

Applicants should be required to base their gross revenue calculations on the most recent four quarters, and their total assets at the time the short forms are filed, otherwise the information received by the Commission will not necessarily reflect the true financial size and strength of the applicant at the time the short form application is filed. As previously noted,

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[30]In addition, as the Commission noted in the NPRM, subsequent to the Cincinnati Bell decision the Telecommunications Act of 1996 was enacted, which provides a new definition of the term "affiliate" generally applicable under the Communications Act. Section 3 (1) of the Communications Act reflects an increased congressional concern over the control implications of even relatively small equity ownership levels by providing that a 10 percent equity interest (or equivalent thereof) in an entity is sufficient to establish an affiliation. 47 U.S.C. §3(1).

with respect to parties that have won C block licenses in the current auction, but that have not yet had the licenses awarded at the time the D, E and F block short form applications are due, the winning bids for such applicants must be included in the total asset figure provided in the short form application. Failure to account for such assets would materially understate the true size of such applicants for the purpose of assessing eligibility for the F block and for small business preferences in the D and E blocks.

VII. AUCTION SCHEDULE

NCMC urges the Commission to auction the D, E and F blocks in a single simultaneous multiple round auction. As explained in section -- above, the Commission should extend small business preferences to the D and E blocks and retain the entrepreneurs' block eligibility criteria for the F block, along with the modified preferences described previously. Under these circumstances, by simultaneously auctioning the three blocks in a single multiple round auction, eligible entrepreneurs can attempt to aggregate up to 30 MHz of PCS spectrum in BTA's in order to provide additional competition to the incumbent A, B and C block auction winners. As the Commission has stated, a single auction recognizes the natural interdependencies between the three blocks and will allow bidders to adjust bidding strategies in response to the changing prices of blocks in particular markets and to pursue back up strategies.[31]

There is no need to hold a separate F block auction as the Commission suggests to "accommodate the difference in eligibility requirements for the F block auction". The

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[31]Implementation of Section 309(j), *Second Report and Order*, 9 FCC Rcd. 2348, 2366 ¶106-07 (1994). ("Licenses that are highly interdependent will be grouped together and auctioned simultaneously").

different eligibility requirements can be accommodated in a single auction, as the Commission successfully demonstrated in the nationwide and regional narrowband PCS auctions in which licenses with and without entrepreneur preferences were simultaneously auctioned.

VIII. CONCLUSION

North Coast Mobile Communications, Inc. respectfully requests that the Commission modify its competitive bidding and ownership rules for the D, E and F broadband PCS frequency blocks to the extent detailed in these Comments.

Respectfully submitted,
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