DOCKET FILE COPY ORIGINAL

FCC 96-278

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

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
	)	

REPORT AND ORDER

Adopted: June 21, 1996 **Released:** June 24, 1996

By the Commission:

TABLE OF CONTENTS

		Paragraph
I.	**Introduction and Executive Summary**	1
II.	**Rules Affecting Designated Entities**	7
	A. Meeting the *Adarand* Standard	7
	1. Control Group Equity Structures	19
	2. Affiliation Rules	28
	3. Installment Payments	37
	4. Bidding Credits	49
	5. Information Collection	56
	B. Definitions	57
	1. Small Business	57
	2. Rural Telephone Company	62
	C. Extending Small Business Provisions to the D and E Blocks	68
	D. Adjusting Payment Provisions for 10 MHz Licenses	73
	E. Rules Regarding the Holding of Licenses	80
III.	**The *Cincinnati Bell* Remand**	86

A. The Cellular/PCS Cross-ownership Rule 86
B. The 20 Percent Attribution Standard 108
IV. Ownership Disclosure Provisions 133
V. Auction Schedule 142
VI. Other Issues 149
A. Limit on Licenses Acquired at Auction 149
B. Partitioning and Disaggregation 151
C. Bid Withdrawal 152
VII. Conclusion 155
VIII. Procedural Matters and Ordering Clauses 156

APPENDIX A: Hypothetical Herfindahl-Hirschman Indices
APPENDIX B: Final Rules
APPENDIX C: Final Regulatory Flexibility Analysis
APPENDIX D: List of Parties Filing Comments and Reply Comments

I. Introduction and Executive Summary

1. In this Report and Order, we modify our competitive bidding and ownership rules for the Personal Communications Services in the 2 GHz band ("broadband PCS"). Many of our rule modifications concern the treatment of designated entities, *i.e.*, small businesses, rural telephone companies, and businesses owned by members of minority groups and women, under our rules for the F block.[1] We also amend other broadband PCS rules in order to encourage sincere bidding, streamline the auction process, and lessen administrative burdens. In addition, in response to the remand from the U.S. Court of Appeals for the Sixth Circuit in *Cincinnati Bell Telephone Co. v. FCC*,[2] we modify our rules governing cellular licensees' ownership of broadband PCS licenses in all frequency blocks.

2. As we explained in the *Notice of Proposed Rule Making*,[3] we were prompted by the Supreme Court's decision in *Adarand Constructors, Inc. v. Peña*[4] to reexamine our race- and gender-based F block rules. We adopted these rules in the *Competitive Bidding Fifth Report and Order* in order to fulfill our mandate under Section 309(j) of the Communications

---

[1] The D, E, and F blocks, each consisting of 493 10 MHz BTA licenses, are among the six frequency blocks designated by the Commission for broadband licensed PCS. Amendment of the Commission's Rules to Establish New Personal Communications Services, *Memorandum Opinion and Order*, 9 FCC Rcd 4957, 4978-5082 (1994).

[2] 69 F.3d 752 (6th Cir. 1995).

[3] Amendment of Parts 20 and 24 of the Commission's Rules, *Notice of Proposed Rule Making*, WT Docket 96-59, FCC 96-119, 61 Fed. Reg. 13133 (March 26, 1996) (*"Notice"*). In response to this *Notice*, 63 comments and 22 reply comments were filed. A list of commenters is attached as Appendix D.

[4] 115 S. Ct. 2097 (1995).

Act of 1934, as amended ("Communications Act"), to provide opportunities for businesses owned by members of minority groups and women to participate in the provision of spectrum-based services.[5] After we adopted these rules, however, the Supreme Court held in *Adarand* that any federal program that makes distinctions on the basis of race must satisfy the strict scrutiny standard of judicial review.[6]

3. Having examined the comments submitted in response to the *Notice*, we conclude that the present record is insufficient to support our race-based F block rules under the strict scrutiny standard, or to support our gender-based rules under the intermediate scrutiny standard that currently applies to those rules. We have considered the need to award the remaining broadband PCS licenses expeditiously and to promote the rapid deployment of new services to the public without judicial delays, as well as the statutory objective of disseminating licenses among a wide variety of applicants, including designated entities.[7] Bearing these factors in mind, we conclude that, to avoid uncertainty and the delay that would likely result from legal challenges to the special provisions for minority- and women-owned businesses in our broadband PCS rules, it is appropriate to make our F block rules race- and gender-neutral.[8] We believe that our action here is consistent with our obligations under Section 309(j).[9]

4. As we explained in the *Notice*, our experience conducting the A, B, and C block broadband PCS auctions also led us to examine other aspects of our rules, and we have determined that we should take certain steps to streamline our procedures and minimize the possibility of insincere bidding and bidder default. To achieve these goals, to make our F

---

[5] 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 (Jan. 27, 1995).

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

[7] 47 U.S.C. §§ 309(j)(3)(A) and (B).

[8] *See* Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Sixth Report and Order*, PP Docket 93-253, 11 FCC Rcd 136 (1995) ("*Competitive Bidding Sixth Report and Order*"), 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 U.S. Court of Appeals for the D.C. Circuit. *Omnipoint Corp. v. FCC*, 78 F.3d 620 (D.C. Cir. 1996).

[9] We also have initiated a comprehensive rule making proceeding to explore market barriers to women- and minority-owned businesses as well as small businesses pursuant to Section 257 of the Communications Act. *See* Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, *Notice of Inquiry*, GN Docket No. 96-113, FCC 96-216 (rel. May 21, 1996) ("*Market Entry Notice of Inquiry*").

block rules race- and gender-neutral, and in response to the *Cincinnati Bell* decision, we make the following changes:

- We amend Section 24.709 and eliminate Section 24.715 of the Commission's Rules to make the 50.1 percent "control group" equity structure, which previously was available only to women- and minority-owned businesses for purposes of F block eligibility, available to all small businesses and entrepreneurs.[10]

- We amend Section 24.720 of the Commission's Rules to eliminate the exception to our F block affiliation rules that excludes the gross revenues and assets of certain affiliates controlled by investors who are members of the applicant's control group.[11]

- We amend Section 24.716 of the Commission's Rules to eliminate two of the installment payment plans available to F block applicants and extend the most favorable plan to all small businesses.[12] We also shorten the interest-only payment period of this plan from six to two years.

- We amend Section 24.717 of the Commission's Rules to eliminate bidding credits based on minority- and women-owned status. Instead, we provide for a two-tiered small business bidding credit.[13]

- We amend our definition of "rural telephone company" in Section 24.720 of the Commission's Rules to make it conform to the definition in the Telecommunications Act of 1996 ("1996 Act").[14]

- We amend Sections 24.706 and 24.716 of the Commission's Rules to raise upfront payments for the D, E, and F blocks to $0.06 per MHz-pop and the down payment for the F block to 20 percent.[15]

- We amend Section 24.839(d) of the Commission's Rules to relax the restriction on designated entities' ability to transfer broadband PCS licenses.[16]

---

[10] 47 C.F.R. §§ 24.709 & 24.715.

[11] 47 C.F.R. § 24.720.

[12] 47 C.F.R. § 24.716.

[13] 47 C.F.R. § 24.717.

[14] 47 C.F.R. § 24.720.

[15] 47 C.F.R. §§ 24.706 & 24.716.

[16] 47 C.F.R. § 24.839(d).

- We eliminate Section 24.204 and amend Section 24.229 of the Commission's Rules to abolish our cellular/PCS cross-ownership rule and our PCS spectrum cap and rely on the 45 MHz cap on Commercial Mobile Radio Services ("CMRS") spectrum in Section 20.6.[17]

- We amend Section 20.6 of the Commission's Rules to eliminate the 40 percent attribution threshold's application to ownership interests held by minority- and women-owned companies for purposes of the CMRS spectrum cap; expand the post-auction divestiture provisions to come into conformity with those previously applied in our cellular/PCS cross-ownership rule; and allow an affirmative showing that an otherwise attributable ownership interest should not be attributed to its holder.[18]

- We amend Section 24.813 of the Commission's Rules to reduce ownership information disclosure requirements.[19]

5. To expedite the delivery of broadband PCS services to the public, we plan to offer the D, E, and F block licenses together in one simultaneous multiple round auction. Recognizing that there are operational concerns with auctioning all 1,479 licenses in the same auction, however, we also delegate authority to the Wireless Telecommunications Bureau to conduct two concurrent auctions if circumstances warrant. In general, we favor a single auction because of the efficiency it will provide to bidders and the Commission and the speed with which it will deliver the 10 MHz broadband PCS licenses into the hands of parties that can begin providing service to the public.

6. Finally, we address a number of other issues that were raised by commenters. We decline to modify our limitation on the total number of licenses that may be won by bidders in the C and F block auctions. In response to concerns about the impact of our rules regarding bids that are made erroneously, we amend Section 24.704 of our rules to modify our bid withdrawal payment requirements.

II. Rules Affecting Designated Entities

A. Meeting the *Adarand* Standard

7. Background. In the *Notice*, we explained the history of our race- and gender-based F block rules, the statutory objectives they were designed to promote, and the impact of the Supreme Court's decision in *Adarand v. Peña*. As we discussed, an intermediate scrutiny

---

[17] 47 C.F.R. §§ 20.6, 24.204, & 24.229.

[18] 47 C.F.R. § 20.6.

[19] 47 C.F.R. § 24.813.

standard of review was applied to federal race- and gender-based programs at the time our F block rules were adopted. In *Adarand*, however, the Supreme Court held that all racial classifications, whether imposed at the federal, state or local government level, must be analyzed by a reviewing court under strict scrutiny, which requires such classifications to be narrowly tailored to further a compelling governmental interest.[20] An intermediate scrutiny standard of review (under which a provision is constitutional if it serves an important governmental objective and is substantially related to achievement of that objective) continues to apply to gender-based measures.[21] We note, however, that the Supreme Court has not addressed constitutional challenges to federal gender-based programs since *Adarand*.[22]

8. In the *Notice*, we observed that judicial precedent indicates that only a record of discrimination against a particular racial group would support remedial measures designed to benefit that group and that generalized assertions of discrimination are inadequate. We explained that, although we have some general evidence of discrimination against certain racial groups, none of the evidence we have appears adequate to satisfy strict scrutiny. We requested comment on a number of questions related to this analysis, including whether compensating for discrimination in lending practices and in practices in the communications industry constitutes a compelling governmental interest. We also asked interested parties to comment on non-remedial objectives that might be considered compelling governmental interests, such as increased diversity in ownership and employment in the communications industry or increased industry competition. We asked 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, and we asked whether our race-based provisions are narrowly tailored to serve the interests that commenters assert to be compelling governmental interests.[23] We also tentatively concluded that the present record in support of our gender-based F block rules may be insufficient to satisfy intermediate scrutiny, and we asked commenters to submit evidence relevant to the entry of women into the field of telecommunications.[24]

9. In the *Notice*, we also tentatively concluded that we should not delay the F block auction for the amount of time it would take to adduce sufficient evidence to support our

---

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

[21] *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 U.S. 1033 (1992).

[22] *But see United States v. Commonwealth of Virginia*, 44 F.3d 1229 (4th Cir. 1995), *cert. granted*, 116 S. Ct. 281 (1995) (constitutional challenge to state gender-based program currently pending before the Court)

[23] *Notice* at ¶¶ 20-22.

[24] *Id.* at ¶ 23.

race- and gender-based F block provisions, and that proceeding with the F block auction with these rules intact would not serve the public interest because it might result in litigation that ultimately would delay the auction of additional broadband PCS licenses and, thus, postpone the introduction of new competition to the marketplace. We tentatively concluded that, if we were unable to gather sufficient evidence to support our race- and gender-based provisions in this proceeding, we should eliminate these provisions from our rules and proceed as expeditiously as possible to auction the remaining broadband PCS licenses.[25]

10. Comments. The majority of commenters addressing our present record in support of race-based F block provisions believe that this record is insufficient to withstand strict scrutiny.[26] Moreover, no parties offered specific anecdotal or statistical evidence to support our race-based F block rules. CIRI, however, states that Congress and the Commission have been presented with substantial evidence of the need to promote economic opportunity for minorities, particularly in the communications industry.[27] Encouraging the Commission to review this evidence, CIRI contends that the Commission should retain its minority preference provisions and can justify these provisions under the strict scrutiny standard mandated by *Adarand*.[28] According to Ondas, the lack of Latino-owned C block license winners serves as statistical and anecdotal evidence to support the F block raced-based rules.[29]

11. With respect to our gender-based F block provisions, the majority of commenters addressing our present record agree with our tentative conclusion that this record may be insufficient to satisfy the requirements of intermediate scrutiny.[30] No commenters offered data to supplement our record supporting gender-based provisions. AWRT and Antigone, however, contend that the record in support of our gender-based provisions will withstand intermediate scrutiny, and they ask the Commission to retain gender-based preferences for the F block auction.[31] These commenters argue that the gender-based provisions are substantially related to the achievement of a goal mandated by Congress and that there are no more

---

[25] *Id.* at ¶ 26.

[26] *See* Sprint Corp. Comments at 2 ("Sprint"); Virginia PCS Alliance, L.C. Comments at 2 ("The Alliance"); US West, Inc. Comments at 1, n.1 ("US West"); Auction Strategy Comments at 1; Vanguard Cellular Systems, Inc. Comments at 2 ("Vanguard"); Advanced Telecommunications Technology, Inc. Comments at 2 ("Advanced"); Columbia Cellular, Inc. Comments at 1 ("Columbia").

[27] Cook Inlet Region, Inc. Comments at 21-22 ("CIRI")

[28] *Id.* at 17-19.

[29] Ondas Communications Services, Inc. Comments at 1 ("Ondas").

[30] *See* Sprint Comments at 2; The Alliance Comments at 2; US West Comments at 1, n.1; Auction Strategy Comments at 1; Columbia Comments at 1

[31] American Women in Radio and Television Comments at 5-8 ("AWRT"); Antigone Communications L.P. Comments at 2-6 ("Antigone").

narrowly tailored alternatives available, nor any that put less of a burden upon men and male-owned entities.[32]

12. Most commenters support making the F block auction rules race- and gender-neutral.[33] AirLink and Auction Strategy, for example, recommend that, as in the C block auction, the Commission extend to all small businesses the same special provisions originally provided to small minority- and women-owned companies.[34] DCR, a minority- and women-owned business, believes that the Commission should forego the use of race- and gender-based special provisions in the F block to ensure that small businesses have a prompt and meaningful opportunity to compete for 10 MHz licenses.[35] In this connection, DCR notes that providing incentives to all small businesses will encourage the participation of minority- and women-owned businesses.[36] Similarly, PCIA and Gulfstream believe that the Commission can best serve its statutory duties to assist minority- and women-owned businesses by adopting generous rules for small businesses.[37] Devon, a women-controlled company, also agrees with the proposal to eliminate race- and gender-based provisions, stating that it is critical to avoid delays in licensing.[38] AT&T argues that we should not repeat the use of special provisions for small businesses in the F block in light of the "undesirable results" of the C block auction.[39] Allied opposes proceeding to auction with race- and gender-neutral rules without first

---

[32] AWRT Comments at 9; Antigone Comments at 4.

[33] *See* Sprint Comments at 2; Auction Strategy Comments at 1; The Alliance Comments at 3; Phoenix L.L.C. Comments at 2-3 ("Phoenix"); Conestoga Wireless Company Comments at 3 ("Conestoga"); Iowa L.P. 136 Comments at 4-5 ("Iowa"); National Telecom PCS, Inc. Comments at 2-3 ("NatTel"); North Coast Mobile Communications, Inc. Comments at 3-5 ("NCMC"); PCS Development Corporation Comments at 2-4 ("PCSD"); Harvey Leong Comments at 2 ("Leong"). *See also* Coalition of New York Rural Telephone Companies Comments at 2-3 ("NY Coalition"); U.S. Intelco Wireless Communications, Inc. Comments at 4-5 ("USIW"); National Telephone Cooperative Association Comments at 2 ("NTCA"); Telephone Electronics Corp. Comments at 12 ("TEC"); Personal Communications Industry Association Comments at 6-7 and Reply Comments at 2-3 ("PCIA"); Columbia Comments at 1 (offering alternatives to our proposal to proceed with the F block in generally the same way we proceeded with the C block but nonetheless supporting our conclusion to make our rules race- and gender-neutral)

[34] AirLink L.L.C. Comments at 13 ("AirLink"); Auction Strategy Comments at 1.

[35] DCR Communications, Inc. Comments at 2-4 ("DCR").

[36] *Id.* at 4.

[37] PCIA Comments at 7; Gulfstream Communications, Inc. Comments at 5-6 ("Gulfstream").

[38] Devon Mobile Communications, L.P. Comments at 2-3 ("Devon").

[39] AT&T Wireless Services, Inc. Comments at 4-6 ("AT&T"); *see also* TEC Comments at 2 (noting that TEC would not object to race- and gender-based preferences if such preferences were justified by a record sufficient to satisfy constitutional requirements).

conducting a "*Croson* study."[40]

13. Decision. Having evaluated the record before us, we revise our F block rules to make them race- and gender-neutral. Overall, the commenters agree that this approach will best serve our goal of rapidly conducting the F block auction with the least risk of judicial delay. Moreover, the arguments presented against it were, for the most part, already considered in the *Competitive Bidding Sixth Report and Order*, in which we concluded that the C block auction rules should be race- and gender-neutral. Significantly, this conclusion was upheld by the D.C. Circuit Court of Appeals, which held in *Omnipoint v. FCC* that we acted reasonably in concluding that, in light of the additional time it would take to develop a record to support the race- and gender-based provisions for the C block, we should revise these rules by providing the most favorable terms to all small businesses, *i.e.*, "leveling benefits upward."[41] In light of the comments and the *Omnipoint* decision, and because we do not have sufficient evidence to support our F block race- and gender-based provisions in this proceeding, we conclude that making our F block rules race- and gender-neutral will serve the public interest by enabling us to auction the remaining broadband PCS licenses as expeditiously as possible.

14. We recognize, as CIRI points out, that we have been presented with important evidence of the need to promote economic opportunity for minorities. Thus, in the *Competitive Bidding Fifth Report and Order*, when we adopted the race-based provisions for the entrepreneurs' blocks assuming an intermediate level of scrutiny, we cited studies and other evidence to support the existence of widespread discrimination against minorities in lending practices.[42] The evidence that we cited showed the difficulty African- and Hispanic-Americans have in obtaining mortgage loans;[43] the difficulty African-American business borrowers face in raising capital;[44] and the shortage of capital as the principal problem faced by minorities seeking ownership opportunities in the broadcast industry.[45] We believe such data are important. However, CIRI has not demonstrated that this information will be sufficient to provide a basis for measures benefitting specific racial groups seeking to

---

[40] Allied Communications Group, Inc. Comments at 4 ("Allied"). The Supreme Court said in *Richmond v. J.A. Croson Co.* that significant statistical disparities between the level of minority participation in a particular field and the percentage of qualified minorities in the applicable pool could permit an inference of discrimination that would support the use of racial classifications intended to correct those disparities. *Croson*, 488 U.S. 469, 507 (1989). *Croson* studies have been undertaken in the past to determine whether such disparities exist at the state or local level.

[41] *Omnipoint v. FCC*, 78 F.3d 620, 633.

[42] *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5573-74.

[43] *Id.* at 5573.

[44] *Id.* at 5573-74.

[45] *Id.* at 5576-78

participate in broadband PCS.

15. We also believe that at this time we cannot agree with AWRT and Antigone's proposal that we retain the gender-based F block provisions. As noted above, the Supreme Court has not addressed the level of scrutiny courts must apply to gender-based programs since *Adarand*. This issue is the subject of a case currently pending before the Court.[46] Additionally we observe that the D.C. Circuit Court of Appeals stayed the C block auction under an intermediate scrutiny standard on the basis of race- and gender-based provisions identical to those adopted for the F block.[47] Thus, we believe that retaining the gender-based provisions would create a substantial risk of delaying the F block auction due to litigation and could result in future legal challenges in the course of licensing F block winners.[48]

16. In deciding to make our F block rules race- and gender-neutral, we are balancing competing objectives under Section 309(j), including mandates to provide opportunities for women and minorities while at the same time to promote competition and the rapid delivery of services to the public.[49] On balance, we conclude that making our rules race- and gender-neutral is the best approach at this time, and the record reveals that many small businesses and women- or minority-owned entities agree with this assessment.[50] Also, we believe the impact of this change in our rules may not be significant, because many minority- and women-owned entities are small businesses and will therefore qualify for the same special provisions that would have applied to them under our previous rules.[51] Thus, we believe that our amended rules will continue to fulfill our mandate under Section 309(j) to provide opportunities for minority- and women-owned businesses to become providers of spectrum-based services.

17. Moreover, as noted above, we have initiated a separate inquiry to gather evidence regarding barriers to entry faced by minority- and women-owned firms as well as small

---

[46] *See supra* note 22.

[47] *Telephone Electronics Corp. v. FCC*, No. 95-1015 (D.C. Cir. Mar. 15, 1995) (order granting stay). Under *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), the governing case law at the time, intermediate scrutiny was applied to both race- and gender-based provisions.

[48] For similar reasons, we will not adopt Antigone's proposal that we exempt women-owned applicants from the 25 percent foreign ownership threshold adopted in Market Entry and Regulation of Foreign-Affiliated Entities, *Report and Order*, IB Docket No. 95-22, FCC 95-475 (Nov. 30, 1995). Antigone Comments at 6.

[49] 47 U.S.C. § 309(j)(3).

[50] *See, e.g.*, DCR Comments at 2-4; Devon Comments at 2; PCSD Comments at 4-5.

[51] *See generally 1992 Survey of Minority-Owned Business Enterprises*, December 11, 1995, Agriculture and Financial Statistics Division, Bureau of the Census, U.S. Department of Commerce; *1992 Survey of Women-Owned Businesses*, January 29, 1996, Agriculture and Financial Statistics Division, Bureau of the Census, U.S. Department of Commerce.

businesses.[52] If a sufficient record can be adduced, we will consider race- and gender-based provisions for future auctions. Toward this end, we have already gathered some information from recent auctions, including data on women- and minority-owned business participation. Minority- and women-owned firms participated in the C block auction in the absence of race- and gender-based rules, for example, and 36 percent of the winning bidders were women- and minority-owned firms.[53] On the other hand, we note that in other auctions where no race- or gender-based preferences were available, minority- and women-owned firm participation has not been as substantial. We will continue to track such information and evaluate it with other data gathered with the goal of developing a record to support race- and gender-based provisions that will satisfy judicial scrutiny. We note that by September 1997 we are required to submit a report to Congress on this issue.[54] Finally, we are looking for other ways to reduce barriers to entry for women- and minority-owned businesses, such as allowing partitioning and disaggregation of broadband PCS licenses, an adjustment to our rules that may be helpful to small businesses generally.[55]

18. Our decision to make the F block auction rules race- and gender-neutral leads us to modify specific F block provisions. As explained below, these provisions include the control group equity structures, the affiliation rules, installment payment plans, and bidding credits.

1. Control Group Equity Structures

19. Background. The F block auction is limited to applicants that, together with their affiliates and persons or entities that hold interests in them, have gross revenues of less than $125 million in each of the last two years and total assets of less than $500 million. In the *Notice*, we described the control group equity structures that applicants may use to establish eligibility to participate in the F block auction. Under the first equity structure option, the control group must hold at least 25 percent of the applicant's total equity.[56] Of that 25 percent, at least 15 percent must be held by "qualifying investors."[57] If these and certain other

---

[52] *See supra* note 9.

[53] Thirty-two of the 89 winning bidders claimed women- and/or minority-owned status. C Block Auction Closing Press Conference, Press Package (May 6, 1996).

[54] 47 U.S.C. § 309(j)(12)(D).

[55] The Commission plans to issue a notice of proposed rule making seeking comment on whether our partitioning and disaggregation rules for broadband PCS should be changed.

[56] 47 C.F.R. § 24.715(b)(5)

[57] *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. §

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.[58] Under the second equity structure option, available to minority- and women-owned applicants only,[59] 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.[60] If these and certain other requirements are met, the remaining 49.9 percent of the applicant's equity may be held by non-controlling investors, and the gross revenues and total assets of any such investor will not be attributed.[61]

20. In the *Notice*, we tentatively concluded that, in the absence of a sufficient record to support offering the 50.1/49.9 percent equity structure only to women- and minority-owned businesses, we should make it available to small businesses and entrepreneurs as we did in our C block competitive bidding rules.[62] Alternatively, we stated that we could simplify or abandon both control group equity structure options for F block applicants. Finally, we asked commenters to discuss whether there was any need to make adjustments to the financial eligibility threshold for the F block auction and whether there was a concern that C block winners might be disqualified from acquiring F block licenses by virtue of the valuation of their C block licenses.

21. Comments. Most commenters support extending the 50.1/49.9 equity option to all entrepreneurs and small businesses either expressly or by simply stating that the F block rules should mirror the C block rules.[63] Vanguard and NCMC, for example, advocate this approach

---

24.720(n)(1).

[58] 47 C.F.R. § 24.715(b)(3).

[59] 47 C.F.R. § 24.715(b)(6).

[60] 47 C.F.R. § 24.715(b)(6)(i)(A).

[61] 47 C.F.R. § 24.715(b)(4).

[62] 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). An "entrepreneur" is an entity that, together with its affiliates and persons holding interests in the entity and their affiliates, has gross revenues of less than $125 million in each of the last two calendar years and total assets of less than $500 million. 47 C.F.R. § 24.709(a).

[63] *See* Ad Hoc Rural PCS Coalition Comments at 18 ("PCS Coalition"); Sprint Comments at 2-3; PCSD Comments at 4-5; Vanguard Comments at 2-3; CIRI Comments at 3; DCR Comments at 4-5; Devon Comments at 6; Iowa Comments at 4-5; NCMC Comments at 5-6; Mid-Plains Telephone, Inc. Comments at 1-2 ("Mid-Plains"); Leong Comments at 4; WPCS, Inc. Comments at 1 ("WPCS"); PCIA Comments at 9 and Reply Comments at 3.

because it has already passed judicial review.[64] Many commenters cited interference with pre-existing ownership and investment relationships as their reason for opposing any other change to the control group structures.[65] AirLink, for example, states that the control group rules are now familiar to the investment community and industry and that their certainty and specificity provide a road map for investors and entrepreneurs.[66]

22. Other commenters oppose extending the 50.1/49.9 percent equity structure option to all small businesses and entrepreneurs because they claim that it has become a vehicle for subsidizing large companies[67] and that it has resulted in convoluted applicant ownership structures for designated entities.[68] Radiofone argues that our extension of the 50.1/49.9 percent equity option to all small businesses in the C block was based on the fact that many minority- and women-owned businesses had already established equity structures based on this provision, a justification that does not apply to the F block. Radiofone also asserts that because no 10 MHz licenses have been issued and large businesses will not have a "headstart" over entrepreneurs, time considerations do not compel an extension of the 50.1/49.9 percent equity structure option as they did for the C block.[69] Radiofone further argues that removing this exception completely from the F block rules should not prejudice minority- or women-owned businesses, which will have time to utilize other financing options.[70]

23. Conestoga, addressing directly the issue of whether we should change the financial eligibility threshold for the F block, contends that we should employ our previously established thresholds.[71] Conestoga also asserts that C block winners should be allowed to participate in the F block auction so long as the value of their C block license does not change their financial status.[72] Similarly, AirLink and other commenters argue that C block licenses should be counted as assets by C block auction winners in determining whether they

---

[64] Vanguard Comments at 2-3; NCMC Comments at 6

[65] *See, e.g.*, PCS Coalition at 18; DCR Comments at 4; Devon Comments at 6; NCMC Comments at 6.

[66] AirLink Comments at 14.

[67] Point Enterprises, Inc. Comments at 2 ("Point"); *see also* NTCA Comments at 4.

[68] NY Coalition Comments at 3.

[69] Radiofone, Inc. Comments at 9 ("Radiofone").

[70] Radiofone Reply Comments at 19.

[71] Conestoga Comments at 3.

[72] *Id.*

are eligible for the F block auction.[73] On the other hand, some commenters, such as Sprint, DCR, the Alliance, Western Wireless, NextWave, and Devon, advocate excluding C block licenses from F block applicants' assets.[74] Other commenters suggest ways of conducting the F block auction that would amount to a change in the financial eligibility threshold. For example, the PCS Coalition, the NY Coalition, USIW, Liberty, and the NTCA advocate a 10 MHz spectrum block set-aside for small businesses and rural telephone companies.[75] TEC and Mountain Solutions propose setting aside all three 10 MHz blocks as small business blocks, as the only approach that will allow small businesses to aggregate 30 MHz of PCS spectrum.[76] Conversely, AT&T argues that all three 10 MHz blocks should be open to all competitors.[77] Finally, Gulfstream proposes that all CMRS licensees be precluded from bidding on the F block to prevent spectrum warehousing and promote competition.[78]

24. Decision. As part of our decision to make the F block rules race- and gender-neutral, we conclude that the 50.1/49.9 percent equity option should be available to all small businesses and entrepreneurs. As we stated in the *Competitive Bidding Sixth Report and Order* (where we made this same modification to the C block rules), we believe that applicants and the public interest will be better served if we proceed in a manner that both reduces the likelihood of legal challenges and enhances the opportunities for a wide variety of applicants, including designated entities, to obtain licenses and rapidly deploy broadband PCS.[79] The D.C. Circuit Court of Appeals agreed with this approach when it upheld our decision to level benefits upward for C block applicants.[80] We also adopt this rule modification because we believe that making the same equity structures available to both C and F block applicants is necessary so that C block participants will not be required to structure themselves differently in order to participate in the F block auction. When we

---

[73] AirLink Comments at 10. *See also* CIRI Comments at 10-11; NatTel Comments at 4; NCMC Comments at 8; NCMC Reply Comments at 6

[74] Sprint Comments at 7; DCR Comments at 6-7; Alliance Comments at 4; Western Wireless Corp. Comments at 28 ("Western"); NextWave Telecom, Inc. Reply Comments at 5 ("NextWave"); Devon Comments at 11.

[75] PCS Coalition Comments at 4; NY Coalition Comments at 4-5; USIW Comments at 4; Liberty Cellular, Inc. Comments at 6-7 ("Liberty"); NTCA Comments at 4. *See also* Leong Comments at 4 (F block should be set aside for small and very small businesses).

[76] TEC Comments at 4-5; Mountain Solutions Comments at 4; *see also* Ken W. Bray Comments at 2 ("Bray"); *but see* BellSouth Reply Comments at 5

[77] AT&T Reply Comments at 3.

[78] Gulfstream Comments at 12-13.

[79] *Competitive Bidding Sixth Report and Order*, 11 FCC Rcd at 146.

[80] *See Omnipoint*, 78 F.3d at 633.

extended the 50.1/49.9 percent equity option to all small business applicants in the C block, we did so in part because minority- and women-owned applicants had already structured themselves under this rule, and we determined that retaining it would help to preserve existing business relationships formed upon such reliance. Providing for the same control group structures for the F block will benefit C block participants that also wish to apply for the F block. Moreover, it will benefit other entities that did not participate in the C block auction because it continues equity structures that are familiar to the industry and the financial community.[81]

25. We decline to make adjustments to the financial eligibility thresholds in our F block rules, which were previously justified in the *Competitive Bidding Fifth Report and Order* as promoting diversity of licensees without excluding firms that are likely to have the financial ability to provide sustained competition.[82] We believe that retaining the same thresholds as those used for the C block will allow for participation by entities which used our C block rules as guidelines for determining their structure in preparation for the F block auction. Moreover, these thresholds were used by C block bidders, many of whom will be interested in participating in the F block auction. We decline to further restrict participation in the F block (or any of the other 10 MHz blocks) to small businesses and rural telephone companies. We believe that setting aside the F block for both entrepreneurs and small businesses will be sufficient to achieve our objectives of providing opportunities for small businesses to obtain 10 MHz licenses and ensuring broad dissemination of 10 MHz licenses.

26. In addition, we decline to treat C block licenses as assets that could potentially preclude C block winners from F block eligibility, as some commenters advocate. We believe it would be unfair to disqualify C block winners on the basis of their success in acquiring capital to participate in that auction, primarily because we have indicated previously that the C and F blocks are linked. Specifically, we have stated that the C and F blocks occupy contiguous spectrum that offers the opportunity for entrepreneurs to efficiently aggregate spectrum.[83] Also, when we imposed a limitation on the total number of licenses that may be awarded to a single entity in the entrepreneurs' blocks, we provided that "no single entity may win more than 10 percent of the licenses available in the entrepreneurs' blocks, or 98 licenses. These licenses may all be in frequency block C or all in frequency block F, or in some combination of the two blocks."[84] We believe that treating C block winners' licenses as an asset for purposes of eligibility for the F block auction could frustrate business plans and

---

[81] We note that in the *Competitive Bidding Sixth Report and Order*, we clarified the definition of "qualifying investor" in Section 24.720(n) of the Commission's Rules for purposed of our control group rules. *Competitive Bidding Sixth Report and Order*, 11 FCC Rcd at 149-150.

[82] *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5586.

[83] *Id.* at 5587-88.

[84] *Id.* at 5606.

auction strategies made in reliance on our previous statements.[85] We note also that it is uncertain whether the C block licenses will be issued before the F block auction begins.

27. For the reasons stated above, we will not consider C block licenses as assets for purposes of F block eligibility, but we do believe that other types of licenses should be considered as assets. Applicants should be aware that other licenses (such as Specialized Mobile Radio ("SMR"), narrowband PCS, broadband PCS A and B blocks, and cellular) should be included in their total asset calculations for the F block.

2. Affiliation Rules

28. Background. In the *Notice*, we discussed the exceptions to our affiliation rules applicable to the F block. These rules identify 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. There are two exceptions to these rules. Under the first exception, 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 not considered affiliates of an applicant owned and controlled by such tribes and corporations.[86] Under the second exception, the gross revenues and assets of affiliates controlled by minority investors who are members of the applicant's control group are not attributed to the applicant.[87]

29. In the *Notice*, we requested comment on whether, if we determined that the record was 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, or whether we should modify the exception as we did for the C block. This 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 of less than $125 million and total assets of less than $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 was affirmed by the D.C. Circuit Court of Appeals.[88]

30. We did not propose to eliminate the affiliation exception for Indian tribes and

---

[85] *See, e.g.*, NextWave Reply Comments at 5-6

[86] 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.*

[87] We note that this exception for F block applicants, which was originally codified as a rule applying to both the C block and the F block at 47 C.F.R. § 24.720(l)(11)(ii), was inadvertently eliminated from our rules when we modified it for purposes of the C block auction

[88] *Omnipoint*, 78 F.3d at 631

Alaska Regional or Village Corporations. We tentatively concluded that the "Indian Commerce Clause" of the United States Constitution provides an independent basis for this exception that is not implicated by the holding in *Adarand*.[89]

31. Comments. Point urges us not to adopt the modified minority investors exception that we adopted for the C block, stating that this exception merely gave opportunities to large companies.[90] Similarly, DCR asserts that the exception is inconsistent with the goals of special provisions for small businesses because it permits control group members to be affiliated with large businesses, raising questions of control.[91] DCR contends that while C block licensees that relied on the exception should not be excluded from the F block, the exception should not be extended to new applicants.[92]

32. Sprint, on the other hand, asserts that all small business applicants should be allowed to exclude from attribution the assets of affiliates that would themselves qualify as entrepreneurs.[93] PCSD, Vanguard, NatTel, Conestoga, NCMC, RTC, PCIA, and WPCS also support adoption of the same change that we made for the C block.[94] Antigone asserts that the Commission should extend the C block affiliation rules to the D, E, and F blocks and that it should limit its inquiry with respect to entities not under common control to whether together they own cognizable interests in CMRS.[95] According to TEC, the FCC should not allow any investment in bidders by individuals or entities that do not individually and in the aggregate qualify as small businesses.[96]

33. CIRI and WPCS support our tentative conclusion that the "Indian Commerce Clause" of the United States Constitution provides an independent basis for the affiliation exception for Indian tribes and Alaska Regional or Village Corporations that is not affected by

---

[89] *Notice* at ¶ 39. *See also Order on Reconsideration*, 9 FCC Rcd 4493 (1994); *Competitive Bidding Fifth Memorandum Opinion and Order*, 10 FCC Rcd at 427.

[90] Point Comments at 2-3.

[91] DCR Comments at 5-6.

[92] DCR Comments at 6.

[93] Sprint Comments at 3.

[94] PCSD Comments at 5-6; Vanguard Comments at 3; NatTel Comments at 3; Conestoga Comments at 3; NCMC Comments at 9; Roseville Telephone Company Comments at 4-5 ("RTC"); PCIA Comments at 10; WPCS Comments at 4. *See also* Radiofone Reply Comments at 22.

[95] Antigone Comments at 7.

[96] TEC Comments at 8-10.

the Supreme Court's holding in *Adarand*.[97] PCIA also supports retention of this exception.[98]

34. Decision. We will eliminate the exception to our affiliation rules pertaining to minority investors for purposes of the F block auction. We believe that to retain this exception in its present state poses legal risks that, as discussed above, could delay the award of F block licenses. Furthermore, we decline to adopt the modification that we utilized for the C block, which enabled small business applicants to be affiliated with larger entrepreneur-size entities without jeopardizing their eligibility.

35. We adopted the modified exception for the C block in order to allow small businesses to pool their resources in a capital intensive service.[99] We stated that we believed that these firms face barriers to raising capital not faced by larger firms and that small businesses experienced in managing smaller businesses should not be penalized because they own or are otherwise affiliated with other businesses whose assets and revenues must be considered on a cumulative basis and aggregated for purposes of qualifying for the C block.[100] We observe also that the rule modification for the C block was adopted at a time when a number of minority-owned applicants had relied on the rule and had structured their business arrangements accordingly.[101] The D.C. Circuit found our modification of this rule to accommodate these applicants to be appropriate under the circumstances.[102] Commenters, however, have criticized this exception as contrary to our purpose of offering opportunities to small businesses because it opened the door to somewhat larger entities being able to participate as small businesses in the C block auction.

36. Upon further consideration, we are not convinced that the C block exception is needed under current circumstances, and we acknowledge the argument that the exception may qualify too many larger entities as small businesses. We believe the smaller 10 MHz F block licenses, in particular, will be attractive to smaller entities. In that regard, we believe that declining to adopt the C block exception for the F block advances opportunities for smaller firms that may be well suited to compete for 10 MHz broadband PCS licenses. As discussed below, we will offer "tiered" bidding credits to benefit varying sizes of small businesses planning to participate in the F block auction. For applicants that participated in the C block auction and relied on our affiliation exceptions in structuring themselves, we will consider requests to waive our rules to allow them to be eligible to participate in the F block

---

[97] CIRI Comments at 12; WPCS Comments at 2.

[98] PCIA Comments at 10.

[99] *Competitive Bidding Sixth Report and Order*, 11 FCC Rcd at 154-55.

[100] *Id.*

[101] *See Id.*

[102] *Omnipoint*, 78 F.3d at 631

auction. Finally, we will retain the exception to our affiliation rules for Indian tribes and Alaska Regional or Village Corporations.

3. Installment Payments

37. Background. Our existing F block rules provide for five different installment payment plans.[103] The first plan, 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.[104] The second plan, available to entities with gross revenues between $40 and $75 million, provides for interest-only payments for one year, with the principal and interest equal to the ten-year U.S. Treasury rate plus 2.5 percent amortized over the remaining nine years of the license term.[105] The third plan, available only to entities that qualify as a small business or consortium of small businesses, 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 eight years of the license term.[106] The fourth plan, available only to businesses owned by members of minority groups or women, provides for interest-only payments for three years and payments of principal and interest over the remaining seven years of the license term.[107] The final and most favorable plan, available only to small businesses owned by members of minority groups or women, provides for interest-only payments for six years and payments of principal and interest amortized over the remaining four years of the license term.[108]

38. We proposed in the *Notice* to eliminate the special provisions based on an applicant's status as a minority- or women-owned business in the event we found that the record was insufficient to sustain such provisions. We sought comment on whether we should provide for three installment payment plans based solely on financial size, as we did for the C block. We also requested comment on whether it is necessary to extend the most favorable C block payment terms to F block auction winners and, in particular, whether the six-year interest-only period serves the public interest, given that the amounts bid for the 10 MHz licenses most likely will be lower than those bid for 30 MHz licenses in the C block

---

[103] 47 C.F.R. § 24.716.

[104] 47 C.F.R. § 24.716(b)(1).

[105] 47 C.F.R. § 24.716(b)(2)

[106] 47 C.F.R. § 24.716(b)(3).

[107] 47 C.F.R. § 24.716(b)(4)

[108] 47 C.F.R. § 24.716(b)(5)

auction.[109]

39. Comments. The majority of commenters support the adoption of three installment payment plans as discussed in the *Notice*.[110] TDS advocates extending installment payments to rural telephone companies also.[111] PCSD, which qualified as a minority- and woman-owned small business in the regional narrowband PCS auction and won five licenses, states that it found in that auction that, between bidding credits and installment payments, only installment payments provided a financial benefit. According to PCSD, this was the case because the prices paid for licenses with bidding credits in the regional narrowband PCS auction were equal to or higher than the prices companies paid for equivalent licenses without the credits.[112] PCSD believes that entities acquiring F block licenses will need a reduced payment schedule, and that none of the installment payment periods should be modified.[113] Arguing that many bidders have reasonably expected that the F block licenses would be available on terms similar to those of the C block licenses, and have made business plans based on this expectation, DCR believes that the six-year interest-only payment period used for the most favorable C block auction installment payment plan should also be employed for the most favorable F block plan.[114] Airlink argues that a six-year deferral period is necessary for small businesses because most business plans show a six- to eight-year period before a PCS provider becomes cash flow positive.[115] Antigone contends that the C block installment payment provisions should be extended to the D, E, and F blocks. Antigone argues, however, that the Commission should allow optional partial pre-payments in increments of $100,000.[116]

40. PersonalConnect, a beneficiary of the installment plan rules as a C block designated entity, believes that our current installment payment rules encourage undesirable speculation and risk-taking since only 10 percent of the winning bid is paid -- as a down

---

[109] *See Notice* at ¶ 55.

[110] Sprint Comments at 3; Conestoga Comments at 3; NCMC Comments at 10; Vanguard Comments at 3; Devon Comments at 8; Mid-Plains Comments at 2-3; PCS One, Inc. Comments at 1-2 ("PCS One"); PCIA Comments at 13-14; WPCS Comments at 4; *see also* Leong Comments at 3 (recommending additional "very small business" category of licensees eligible for interest-only payments for eight years at 10-year T-note rate).

[111] Telephone and Data Systems, Inc. Reply Comments at 4 ("TDS").

[112] PCSD Comments at 7

[113] *Id.*

[114] DCR Comments at 8-9

[115] AirLink Reply Comments at 10.

[116] Antigone Comments at 8

payment -- in the first six years under the most favorable plan.[117] PersonalConnect suggests that shortening the period for interest-only payments to four years, in conjunction with increasing the down payment requirement to 25 percent, would dampen speculation while still providing opportunities for designated entities to win licenses.[118] AT&T argues that the Commission should eliminate the small business provisions from the F block rules, but if such provisions are retained a simplified installment payment plan with a shorter interest-only period should be adopted.[119]

41. Decision. Based on our review of the record, we amend our F block rules concerning installment payments as set forth in the *Notice*. Thus, all small businesses, including those owned by minorities and women, will be eligible for the most favorable installment plan. We conclude that extending this installment payment plan to all small businesses will give minority- and women-owned businesses an opportunity to participate in the provision of spectrum-based services. Moreover, this leveling up approach was upheld by the D.C. Circuit Court of Appeals for the C block auction.[120]

42. We also conclude, however, that we should amend our rules to shorten the period during which F block auction winners eligible for this plan may make interest-only payments. For the reasons discussed below, the most favorable plan will have a two-year interest-only payment period, rather than a six-year interest-only period. The plan will provide for installments at a rate equal to ten-year U.S. Treasury obligations applicable on the date the license is granted, with payments of principal and interest amortized over the remaining eight years of the license term. Principal will be repaid as part of equal quarterly payments of interest and principal (as with a standard mortgage amortization schedule).

43. Entrepreneurs that are not small businesses will be eligible for installment payments as provided in Sections 24.716(b)(1) and 24.716(b)(2) of our rules. These rules provide for installments at a rate equal to ten-year U.S. Treasury obligations applicable on the date the license is granted plus 3.5 percent, with payments of principal and interest amortized over the license term for eligible licensees with gross revenues exceeding $75 million in each of the two preceding years. Eligible licensees with gross revenues not exceeding $75 million in each of the two preceding years may make installment payments at a rate equal to ten-year U.S. Treasury obligations applicable on the date the license is granted plus 2.5 percent, with interest-only payments for the first year and payments of interest and principal amortized over the remaining nine years of the license term.

---

[117] PersonalConnect Communications, L.L.C. Comments at 3 ("PersonalConnect").

[118] *Id. But see* Advanced Comments at 2 (advocating interest-only payments for eight or nine years to entities in "targeted" areas with high unemployment and crime).

[119] AT&T Comments at 5-6; AT&T Reply Comments at 4.

[120] *Omnipoint*, 78 F.3d at 633-34.

44. We believe that a two-year interest-only period with an interest rate equal to the ten-year U.S. Treasury rate and principal amortized over the remaining eight years of the license term provides small businesses with the appropriate level of U.S. government assisted financing to overcome the difficulties faced in accessing capital to compete in the PCS marketplace. We agree with PersonalConnect's argument that reducing the interest-only period will dampen speculation while still providing small businesses with the ability to obtain the necessary funds for construction and initial operation of their systems.[121] However, we believe a two-year interest-only period more effectively achieves these objectives than the four-year period suggested by PersonalConnect.

45. Specifically, the two-year interest-only period in the most favorable installment payment plan for the F block will allow small businesses two full years during which they can devote resources to business development and infrastructure costs rather than license costs. Upon completion of these two years of interest-only payments, licensees should be capable of beginning to make principal payments. We believe that an interest-only period longer than two years is not necessary to help small businesses compete in the PCS marketplace, especially with 10 MHz licenses. We initially established tiered installment payment plans that provided a two-year interest-only period for small businesses and a five-year interest-only period for small businesses owned by minorities and/or women in order to allow these entities to concentrate their resources on infrastructure build-out.[122] We subsequently extended the interest-only period for small businesses owned by women and/or minorities to six years from the date of license grant because under the five year benchmark, principal payments would come due at the same time the designated entity was permitted to transfer the license and immediately following the first build-out requirement. By deferring payment of principal an additional year, we intended to assist the designated entity in avoiding an unwanted sale in order to avoid payment of principal.[123] In light of *Adarand*, we later extended the six-year interest-only provisions to all small business C block licensees.[124] The build-out requirements for 10 MHz licenses are more liberal than those for 30 MHz licenses, requiring only a one-fourth population coverage or showing of substantial service within the first five years, as compared to the one-third population coverage required of 30 MHz licenses.[125] Given these less burdensome requirements, we believe that a two-year interest-only period will provide sufficient assistance to F block licensees by giving them a substantial period to devote resources to constructing their systems, while also encouraging them to provide service to the public quickly.

---

[121] PersonalConnect Comments at 3.

[122] *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5593

[123] *Competitive Bidding Fifth Memorandum Opinion and Order*, 10 FCC Rcd at 459-60.

[124] *Competitive Bidding Sixth Report and Order*, 11 FCC Rcd at 158.

[125] 47 C.F.R. § 24.203.

46. We also believe that a two-year interest-only period (and other measures adopted herein) will deter speculation and insincere bidding. If licensees need to pay only a small percentage of their winning bid (10 percent for the C block and 20 percent for the F block) through year six of the license term, they will have a greater incentive to place speculative bids because the actual cost of the license is not recognized until late in the license term. We believe that shortening the interest-only period to two years will be likely to encourage bidding, business, and financial strategies based upon market forces rather than the financial terms of installment payment plans.

47. Finally, shortening the interest-only period to two years will not foreclose opportunities for small businesses to compete in PCS. The terms that the Commission is offering (two years interest-only, interest equal to the ten-year U.S. Treasury obligation, and financing on 80 percent of the license price) are extremely attractive compared to other terms small businesses may be able to obtain. This financing will result in significant capital cost savings and financial assistance to small businesses -- our original intent in offering installment financing.[126] Helping small businesses overcome the most significant hurdle to competition in the communications marketplace -- access to capital -- is a top priority of the Commission.[127] We believe the steps we have taken here further this objective. We note also that a two year interest-only period is consistent with terms we have offered in other auctions, notably MDS and 900 MHz SMR.[128]

48. We also conclude that we should amend the terms of our installment payments to provide for late payment fees. Therefore, when licensees are more than fifteen days late in their scheduled installment payments, we will charge a late payment fee equal to 5 percent of the amount of the past due payment. For example, if a $50,000 payment is due on June 1, then on June 16 $2,500 is due in addition to the payment. Without this late payment fee, licensees may not have adequate financial incentives to make installment payments on time. Licensees may therefore attempt to maximize their cash flow at the government's expense by paying late. The 5 percent payment we adopt here is an approximation of late payment fees applied in typical commercial lending transactions. Payments will be applied in the following order: late charges, interest charges, principal payments

4. Bidding Credits

49. Background. Under our F block rules a small business is granted a 10 percent bidding credit,[129] a business that is owned by members of minority groups or women is

---

[126] Implementation of Section 309(j) - Competitive Bidding, *Second Report and Order*, PP Docket 93-253, 9 FCC Rcd 2348, 2389 (1994) (*"Competitive Bidding Second Report and Order"*).

[127] *See, e.g., Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5584-85.

[128] *See* 47 C.F.R. § 21.960(b)(3)(iii) and 47 C.F.R. § 90.812(a)(2).

[129] 47 C.F.R. § 24.717(a)

granted a 15 percent bidding credit,[130] and a small business owned by members of minority groups or women is allowed to aggregate these bidding credits for a 25 percent bidding credit.[131] We proposed in the *Notice* to eliminate race- and gender-based bidding credits in our F block rules if we found that the record was insufficient to withstand judicial review. We also sought comment on whether we should extend a single bidding credit to all small businesses as we did for the C block and, if so, how big that credit should be. We asked whether, as an alternative, we should offer tiered bidding credits for small businesses of different sizes. We tentatively concluded 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 concluded that these lower expected values may attract smaller businesses, thus justifying a tiered bidding credit.[132]

50. Comments. AirLink, the NY Coalition, Sprint, Conestoga, DCR, NatTel, Mid-Plains, PCS One, Western, and WPCS assert that the bidding credit used in the C block auction -- a 25 percent bidding credit for all small businesses -- should also be used in the F block auction.[133] DCR argues that many bidders have reasonably expected that the F block licenses would be available on terms similar to those of the C block licenses and have made business plans based on this expectation.[134] PersonalConnect claims that the 25 percent bidding credit, as opposed to installment payments, is the essential feature which will allow designated entities to attract investors.[135]

51. NCMC, on the other hand, encourages the Commission to adopt a two-tiered bidding credit plan for small businesses participating in the F block auction, asserting that tiered bidding credits will advance Congress' goals of avoiding concentration of licenses and promoting the dissemination of licenses to a broad variety of applicants.[136] NCMC supports a 25 percent bidding credit for small businesses that have aggregate gross revenues under $15 million and a 15 percent bidding credit for small businesses with gross revenues between $15

---

[130] 47 C.F.R. § 24.717(b).

[131] 47 C.F.R. § 24.717(c).

[132] *Notice* at ¶ 47.

[133] AirLink Comments at 14; NY Coalition Comments at 5; Sprint Comments at 3; Conestoga Comments at 3; DCR Comments at 8; NatTel Comments at 3-4; Mid-Plains Comments at 3; PCS One Comments at 1; Western Comments at 30; WPCS Comments at 4. *See also* Ondas Comments at 2 (arguing in favor of a 40 percent bidding credit).

[134] DCR Comments at 8-9.

[135] PersonalConnect Comments at 3.

[136] NCMC Comments at 11.

million and $40 million.[137] PCIA also supports tiered bidding credits of 10, 15, and 25 percent, depending on the size of the small business.[138] ICGC and ONE suggest a tiered definition of small business such that firms with average annual gross sales of less than $5 million would receive a 40 percent bidding credit and firms with average annual gross sales of less than $11 million would receive a 25 percent bidding credit.[139] Mr. Harvey Leong asserts that businesses with less than $1 million in both revenues and assets should receive a 50 percent bidding credit.[140] Finally, Advanced argues that entities located in "targeted" areas, such as high unemployment or high crime areas, should receive a 25 percent bidding credit, while entities outside these areas should receive a 10 percent bidding credit.[141]

52. Devon urges the Commission to eliminate bidding credits and the related unjust enrichment provisions from the F block rules, asserting that the C block auction illustrates that they may discourage future participation of designated entities.[142] Devon contends that bidders with bidding credits have generally been forced to pay a premium gross price for PCS licenses, while the net price has been roughly equivalent to the market price, thereby eviscerating any discounting impact on the license values.[143] Devon further contends that the unjust enrichment provisions penalize designated entities by requiring the recapture of the bidding credit even when no enrichment has occurred.[144] Devon argues that within the entrepreneurs' block the installment payment plans provide adequate assurance that small businesses will be successful in obtaining licenses.[145]

53. Decision. Consistent with our concerns about avoiding litigation based on *Adarand*, we will eliminate the race- and gender-based aspects of our F block bidding credits. In place of these provisions, we adopt a two-tiered bidding credit for small businesses, as proposed by NCMC. We agree with NCMC that a two-tiered approach will promote dissemination of licenses to a broader variety of applicants than a 25 percent bidding credit for all small businesses, the approach we took for the C block. We believe that this tiered

---

[137] *Id.*

[138] PCIA Comments at 13.

[139] Integrated Communications Group Corp. Comments at 2 ("ICGC"); Opportunities Now Enterprises Inc. Comments at 1-3 ("ONE").

[140] Leong Comments at 3.

[141] Advanced Comments at 2.

[142] Devon Comments at 4.

[143] *Id.*

[144] *Id.* at 4-5.

[145] *Id.* at 5.