

bandwidth assignments that promote economic opportunity for a wide variety of applicants.³⁰⁴ A spectrum cap is one of the most effective mechanisms we could employ to achieve these goals. More than provisions such as bidding credits and installment payments, which we have adopted to provide opportunities for new entrants in the wireless telephony marketplace, a spectrum cap set at an appropriate level will ensure that the licenses for any particular market are disseminated among diverse service providers. The *Cincinnati Bell* decision questioned whether the cellular/PCS spectrum limit actually advanced this statutory objective.³⁰⁵ We note, however, that following the first auction for broadband PCS licenses, the number of competitors in every local market in the country doubled, from 2 to 4 licensees. In addition, the C block auction resulted in another new competitor in each local market -- 493 licenses will soon be awarded to just under 90 small and entrepreneurial businesses. With the cellular/PCS spectrum limit in place, American consumers were guaranteed and received three new competitors to the two cellular incumbents. Accordingly, we affirm that the cellular/PCS spectrum cap fulfilled the mandate of section 309(j) and the 45 MHz cap will continue to serve those objectives in future auctions and the post-auction market.

103. The court in the *Cincinnati Bell* decision was also concerned that the cellular/PCS spectrum cap would "have a profound impact on businesses in an industry enmeshed in this country's telecommunications culture." It stated that "[t]he continued existence of some wireless communications businesses rests on their ability to bid on Personal Communications Service licenses" and that "Cellular providers foreclosed from obtaining Personal Communications Service licenses may ultimately be left holding the remnants of an obsolete technology."³⁰⁶ Upon further analysis, as discussed above, we have modified our rules in a way that provides cellular licensees additional flexibility to expand into or migrate to PCS technology. Under the old rule, they were limited to one 10 MHz block until the year 2000. The shift to a single 45 MHz spectrum cap will allow incumbent cellular operators to acquire up to two of the 10 MHz broadband PCS licenses (20 MHz) in the upcoming auction for the D, E and F blocks. As many commenters point out, an additional 20 MHz of spectrum will be sufficient to develop and provide new digital services. We note that cellular carriers have also been rapidly implementing digital and other new technologies³⁰⁷ with their current 25 MHz of spectrum and that even analog cellular systems are increasing subscribership and providing enhanced services.³⁰⁸

³⁰⁴ 47 U.S.C. § 309(j)(4)(C)(ii).

³⁰⁵ 69 F.3d at 764 (citing the results of the broadband PCS A and B block auction, in which 99 licenses issued were won by 19 companies).

³⁰⁶ 69 F.3d at 764.

³⁰⁷ See 47 C.F.R. § 22.901(d) (permitting cellular carriers to utilize alternate technologies, including PCS).

³⁰⁸ For example, Bell Atlantic NYNEX Mobile recently launched its Code Division Multiple Access ("CDMA") service in Trenton, New Jersey and Bucks County, Pennsylvania. *Bell Atlantic NYNEX Mobile Launches CDMA Service Using Lucent Technologies Equipment*, News Release, Mar. 25, 1996. Additionally,

104. While our analysis of the CMRS market under the DOJ/FTC Guidelines indicates that the 45 MHz spectrum cap is needed to ensure competition, it also shows that this cap adequately addresses our concerns about anticompetitive behavior. Indeed, our analysis of plausible market structures indicates that the concentration levels under the single 45 MHz spectrum cap would not be higher than the level that would be possible under all three of the existing caps.³⁰⁹ Thus, we conclude that the PCS and cellular/PCS spectrum caps are unnecessary.

105. We also believe that elimination of the cellular/PCS cross-ownership rule and the 40 MHz PCS spectrum cap in favor of the single 45 MHz CMRS spectrum cap has important advantages. Applying the single 45 MHz CMRS cap will give both cellular and PCS providers more flexibility to participate in a more competitive marketplace. A single 45 MHz cap will now enable cellular licensees to obtain 20 MHz of broadband PCS spectrum. We believe that with the advent of digital and other new technologies, 20 MHz of PCS spectrum will be more than sufficient to allow cellular licensees to develop new services in the CMRS market.³¹⁰ Furthermore, we disagree with APC that current marketplace conditions do not call for a change in our PCS rules. As APC notes, numerous new market entrants have emerged to bid aggressively on the 30 MHz PCS licenses.³¹¹ Given this source of new competition, we believe it is appropriate to relax our PCS ownership restrictions. The elimination of the cellular/PCS and PCS limits will give PCS providers greater flexibility to own interests in other providers and provide additional services and, hence, enhanced opportunities to compete. In addition, PCS providers will no longer be restricted to less than a 5 percent ownership interest in cellular and other PCS licensees in order to avoid attribution.³¹² Instead, they will be subject to the more liberal 20 percent attribution level for all CMRS.³¹³

106. We also note that the 1996 Act requires the Commission to determine in every even-numbered year (beginning with 1998) "whether any regulation is no longer necessary in the public interest as the result of meaningful economic competition between providers of such service" and to modify or repeal such regulation.³¹⁴ In an effort to streamline our regulations now, consistent with the spirit of the 1996 Act, and in light of the findings set

AirTouch has begun using its new CDMA technology in parts of its Los Angeles service area. *Airtouch Inaugurates Powerband Service in Largest U.S. Cellular Market*. News Release, May 14, 1996.

³⁰⁹ Compare Appendix I, Tables 2D-E and Tables 3A-B.

³¹⁰ See PersonalConnect Comments at 4; CCPR Comments at 4-5.

³¹¹ APC Reply Comments at 4.

³¹² See 47 C.F.R. §§ 24.204(d)(2)(i), 24.229(c)(2).

³¹³ See *infra* at ¶¶ 117-119.

³¹⁴ 47 U.S.C. § 161(a)(2).

forth above, we believe that simplifying our rules to include a single 45 MHz CMRS cap in place of the three separate spectrum caps is warranted. In addition, at the next biennial review of the Commission's regulations under the 1996 Act and in our annual reports on the state of competition in the CMRS market,³¹⁵ we will continue to evaluate the need for the 45 MHz spectrum cap in its present form.

107. We decline to alter the 10 percent overlap restriction for the CMRS cap as some commenters suggest. We continue to believe that an overlap of less than 10 percent of the population is sufficiently small that the potential for exercise of undue market power by the cellular operator is slight.³¹⁶ Given our decision to eliminate the cellular/PCS and PCS ownership limitations, we are also concerned that greater overlap might lead to anticompetitive practices. We will, however, expand the post-auction divestiture provisions of Section 20.6 to conform with the divestiture provisions that previously applied in our cellular/PCS cross-ownership rule, including the relaxed rule applicable to situations where the overlap exceeds 10 percent, but is less than 20 percent.³¹⁷ Thus, any party holding an attributable ownership interest in a CMRS licensee may be a party to a broadband PCS application if it certifies that, if necessary, it will come into compliance with the CMRS spectrum cap through our post-auction divestiture procedures.³¹⁸

B. The 20 Percent Attribution Standard

108. Background. Section 24.204(d)(2)(ii) of our rules provides that partnership and other ownership interests and any stock interest amounting to 20 percent or more of the equity or outstanding stock of a cellular licensee will be attributable for purposes of determining whether an entity is a cellular operator and subject to the cellular/PCS cross-ownership rule.³¹⁹ Section 24.204(d)(2)(ii) of our rules also provides that cellular ownership interests held by small businesses, rural telephone companies, and businesses owned by minorities or women are not attributable until they reach at least 40 percent.³²⁰ The Court in *Cincinnati Bell* held that our 20 percent cellular attribution rule was arbitrary on the ground that the rule does not bear a reasonable relationship to whether a party with a minority interest in a cellular licensee

³¹⁵ See 47 U.S.C. § 332(c)(1)(C).

³¹⁶ Amendment of the Commission's Rules to Establish New Personal Communications Services, *Second Report and Order*, Gen Docket 90-314, 8 FCC Rcd 7700, 7745 (1993) ("*PCS Second Report and Order*").

³¹⁷ 47 C.F.R. § 24.204(f)(A).

³¹⁸ See 47 C.F.R. § 20.6(e).

³¹⁹ 47 C.F.R. § 24.204(d)(2)(ii).

³²⁰ *Id.*

actually has the ability to control that licensee.³²¹

109. In the *Notice*, we requested comment on whether we should retain or modify our ownership attribution rule for cellular licensees interested in acquiring broadband PCS licenses. Given other issues raised in the *Notice*, we asked whether our approach should depend on whether we modify our cellular/PCS cross-ownership rule or, in the alternative, eliminate this rule and retain only our 45 MHz CMRS spectrum cap. We also asked whether we should, in any case, modify the 20 percent attribution standard applicable to the 45 MHz CMRS spectrum cap in light of the Sixth Circuit's opinion regarding this standard in connection with our cellular/PCS cross-ownership rule. We also proposed to modify the 40 percent attribution rules related to both the cellular/PCS cross-ownership and CMRS spectrum aggregation limit provisions for F block purposes, as we did for the C block, by removing the provisions that increase the attribution threshold to 40 percent if the holder of the ownership interest is a woman- or minority-owned business.

110. Comments. Many commenters assert that the 20 percent attribution standard should not be altered.³²² Vanguard argues that most of the principal cellular companies are now publicly traded and, therefore, a 20 percent interest held by a single shareholder clearly would create the possibility of at least *de facto* control.³²³ Cox opposes a "controlling interest" test because it would be ineffective, subject to undetectable manipulation, and difficult to enforce. Furthermore, Cox asserts that bright-line attribution rules traditionally have been used by the Commission as an effective and efficient means of identifying cognizable opportunities for influence and control, and in fact, the Commission has used a lower standard (*e.g.*, 5 percent) in other services.³²⁴ DCR argues that control is not the Commission's concern in determining what level of investment should be considered a cognizable interest. Rather, the Commission has traditionally been concerned with the potential for significant influence over management or operational decisions. Where that concern is especially significant, as it is here, the Commission has generally and reasonably opted for a more inclusive attribution rule.³²⁵ TDS contends that the attribution levels for all of the existing spectrum caps should remain the same in order to avoid uncertainty about

³²¹ *Cincinnati Bell*, 69 F.3d at 759-61.

³²² Conestoga Comments at 4; Vanguard Comments at 6; Alliance Comments at 9; Cox Reply Comments at 6; DCR Reply Comments at 12; TDS Reply Comments at 2; APC Reply Comments at 6; Sprint Reply Comments at 2-4; PCIA Reply Comments at 7-8.

³²³ Vanguard Comments at 6.

³²⁴ Cox Reply Comments at 7.

³²⁵ DCR Reply Comments at 12 (citing Review of the Commission's Regulations Governing Attribution of Broadcast Interests, *Notice of Proposed Rule Making*, 10 FCC Rcd 3606, 3616-20 (1994) ("*Attribution Notice*").

competitive entry opportunities and delay of service due to litigation.³²⁶ Conestoga, the Alliance, and Cox also support our proposal to adopt a 40 percent attribution standard for small businesses and rural telephone companies as we did for the C block.³²⁷

111. TEC, Mountain Solutions, and OmniPoint argue that a stricter 10 percent attribution standard, such as that promulgated by Congress in the definition of "affiliate" in the 1996 Act, should apply to the cellular/PCS cross-ownership rule.³²⁸ TEC and Mountain Solutions further argue that use of a statutory benchmark should prevent further court challenge.³²⁹ In contrast, however, CBT contends that nothing in the 1996 Act suggests that the 10 percent standard should be applied for attribution purposes in PCS licensing.³³⁰

112. Several commenters assert that a control test should be used for attribution purposes instead of a bright-line standard.³³¹ They argue, *inter alia*, that a bright-line standard does not effectively determine control in most cases and, instead, control must be determined under the specific facts of each case.³³² They assert that the Commission should consider a standard based on control in light of the Commission's previous failure to examine less restrictive alternatives to a bright-line rule.³³³ Western also argues that the Commission should focus primarily on those ownership interests that it has recognized in the context of cellular/PCS ownership restrictions as potentially having the most anticompetitive effect (*i.e.*, controlling interests).³³⁴

113. CBT contends that a single majority shareholder exception should apply to the existing attribution rule.³³⁵ Specifically, CBT suggests that no minority stock or limited partnership interest should be attributable if a single holder (or group of affiliated holders)

³²⁶ TDS Reply Comments at 2.

³²⁷ Alliance Comments at 9; Conestoga Comments at 4; Cox Reply Comments at 6-8.

³²⁸ TEC Comments at 15; Mountain Solutions Comments at 12; OmniPoint Reply Comments at 11. *See* 47 U.S.C. § 153(1).

³²⁹ TEC Comments at 15; Mountain Solutions Comments at 12.

³³⁰ Cincinnati Bell Telephone Co. Comments at 2 ("CBT").

³³¹ AT&T Comments at 10; BellSouth Comments at 11-12; US West Comments at 1; GTE Comments at 12; RTC Comments at 9; Western Comments at 22.

³³² GTE Comments at 12.

³³³ Western Comments at 23.

³³⁴ Western Reply Comments at 12-13.

³³⁵ CBT Comments at 4; CBT Reply Comments at 3-4. *See also* RTC Comments at 10-11; CTIA Comments at 15.

owns more than 50 percent of the outstanding stock or partnership equity or has voting control of the licensee's affairs.³³⁶ CBT also argues that no commenter has presented any new reason for or evidence supporting a 20 percent attribution rule.³³⁷

114. CTIA argues that the attribution level should be increased from 20 percent to a level between 30 and 35 percent. CTIA asserts that the danger of undue market power in a single firm is sharply constrained by the 45 MHz CMRS spectrum cap, under which a controlling shareholder is limited to a market share of 26.5 percent, a percentage well below the 35 percent threshold recognized to be necessary for undue market power.³³⁸ CTIA also supports adoption of a single majority shareholder exception to its suggested higher attribution level.³³⁹ AT&T and RTC suggest that if a control-based rule is not adopted, then a 40 percent threshold, as applied to small businesses and rural telephone companies in the C block, should apply because there is no evidence that this level has created opportunities for anticompetitive behavior.³⁴⁰

115. ICGC and ONE argue that the attribution rules adopted in the *Competitive Bidding Fifth Report and Order* should be reinstated. They contend that this approach will create meaningful opportunities for small businesses in accordance with Congressional intent.³⁴¹

116. GTE and DCR argue that any change to the attribution rule should be applied prospectively because retroactive application of any rule changes would be harmful to PCS licensees, would not serve the public interest, and would be contrary to federal law.³⁴² In contrast, CBT believes that because the old attribution rule was defective from the start, any licensing that took place under the old rule is of questionable validity and those aggrieved by the old rule should be allowed to obtain redress.³⁴³

117. Decision. Our decision to eliminate the 35 MHz cellular/PCS spectrum cap renders the issue of whether to modify the attribution standard of Section 24.204(d) of our

³³⁶ CBT Comments at 4.

³³⁷ CBT Reply Comments at 2.

³³⁸ CTIA Comments at 14.

³³⁹ *Id.* at 15.

³⁴⁰ AT&T Comments at 10; RTC Comments at 9-10.

³⁴¹ ICGC Comments at 1-3; ONE Comments at 1-3.

³⁴² GTE Comments at 13; DCR Reply Comments at 13.

³⁴³ CBT Reply Comments at 5.

rules moot.³⁴⁴ We reaffirm, however, the 20 percent attribution standard for the purpose of determining whether an entity is subject to the 45 MHz CMRS spectrum aggregation limit. We also conclude that the attribution standard for the 45 MHz spectrum cap should be made race- and gender-neutral such that a 40 percent attribution standard applies to all small businesses and rural telephone companies. We believe that extending the 40 percent threshold to noncontrolling investors in small businesses as we did for the C block licenses will promote additional investment in small business applicants and ensure broad participation in PCS by designated entities.³⁴⁵

118. We agree with Vanguard that a 20 percent interest held by a single entity would create a possibility of *de facto* control.³⁴⁶ Such an interest (whether 20 percent or less) that conveys to its holder actual working control (including investor control) is already attributable under our rules.³⁴⁷ We believe generally, however, that even an entity that does not have *de facto* or *de jure* control but owns a 20 percent or more interest in a licensee would have sufficient influence to reduce competition and should be subject to the CMRS spectrum aggregation limit.³⁴⁸ Historically, we have included for attribution purposes those ownership and other interests that convey a degree of control or "influence" to their holder sufficient to warrant limitation.³⁴⁹ "Influence" has been viewed as "an interest that is less than controlling, but through which the holder is likely to induce a licensee or permittee to take actions to protect the investment."³⁵⁰ We note that attribution rules for other services typically apply much lower ownership benchmarks of 5 to 10 percent. Both cable and broadcast use a 5 to 10 percent attribution level. In the broadcast multiple ownership context, for example, any interest amounting to 5 percent or more of the outstanding voting stock of a corporate broadcast licensee, cable television system or daily newspaper is attributable.³⁵¹ Interests held by certain passive investors are attributable if they amount to 10 percent or more of the

³⁴⁴ 47 C.F.R. 24.204(d); *see supra* ¶ 94.

³⁴⁵ *See Competitive Bidding Sixth Report and Order*, 11 FCC Rcd at 162.

³⁴⁶ Vanguard Comments at 6. *See also* Implementation of Sections 3(n) and 332 of the Communications Act - Regulatory Treatment of Mobile Services, *Third Report and Order*, GN Docket No. 93-252, 9 FCC Rcd 7988, 8114 (1994) (citing FASB Accounting Principals Board Opinion No. 18 (1970)).

³⁴⁷ 47 C.F.R. § 20.6(d)(1).

³⁴⁸ *See Cox Reply Comments* at 7; *DCR Reply Comments* at 12.

³⁴⁹ *See Attribution Notice*, 10 FCC Rcd at 3609. *See also* 47 C.F.R. § 20.6(d)(9) (attributing certain management agreements)

³⁵⁰ *Attribution Notice*, 10 FCC Rcd at 3609-10 (citing Amendment of Multiple Ownership Rules, 18 FCC Rcd 288, 292-93 (1953)).

³⁵¹ 47 C.F.R. § 73.3555, n. 2.

outstanding voting stock.³⁵² In the contexts of cable operator/broadcast network cross-ownership,³⁵³ cable national subscriber (horizontal) limits,³⁵⁴ cable channel occupancy (vertical) limits,³⁵⁵ and the MDS/cable cross-ownership limit,³⁵⁶ the attribution standards are identical to those used in broadcasting. We further note, as do some commenters, that the 1996 Act defines "affiliate" as a "person that . . . owns or controls, is owned or controlled by, or is under common ownership or control with, another person. . . [The] term 'own' means to own an equity interest (or the equivalent thereof) of more than 10 percent."³⁵⁷

119. We continue to believe that a higher benchmark of 20 percent should apply for purposes of the CMRS spectrum cap in order to encourage capital investment and business opportunities in CMRS. Given the changing technology and the variety of competing services that will be subject to this limitation, we believe that increased flexibility in our rules will enable CMRS providers to adapt their services to meet customer demand.³⁵⁸ Furthermore, we originally adopted a 20 percent attribution level in our cellular/PCS cross-ownership rules to allow partial owners of cellular licensees to participate in PCS, in light of several partial and often passive ownership interests that may have resulted from early settlements during the initial phase of cellular licensing.³⁵⁹ We continue to believe that cellular providers should be given ample opportunity to compete in the CMRS market, given the role that existing infrastructure and technologies can play in speeding the deployment of new technologies.³⁶⁰ Thus, we believe that maintaining a 20 percent attribution level for the CMRS cap will allow a wide variety of players (*i.e.*, PCS, cellular and SMR providers) to enter the marketplace while still preventing anticompetitive practices that would have harmful effects on consumers.

120. We disagree with commenters who suggest that only controlling interests should be attributable. Establishing a control test would require us to conduct frequent case-by-case determinations of control, which are time-consuming, fact-specific, and subjective. The bright line 20 percent attribution rule avoids these problems. Also, for the reasons discussed below,

³⁵² *Id.* See also *Attribution Notice*, 10 FCC Rcd at 3628-30 (where the Commission sought comment on whether the 10 percent attribution level should be raised).

³⁵³ 47 C.F.R. § 76.501, n. 2.

³⁵⁴ 47 C.F.R. § 76.503(f).

³⁵⁵ 47 C.F.R. § 76.504(h).

³⁵⁶ 47 C.F.R. § 21.912(c), n. 1.

³⁵⁷ 47 U.S.C. § 153(l).

³⁵⁸ See *CMRS Third Report and Order*, 9 FCC Rcd at 8010.

³⁵⁹ *PCS Second Report and Order*, 8 FCC Rcd at 7745.

³⁶⁰ See also CTIA Comments at 4-5; CCPR Comments at 5; Radiofone Comments at 4.

a single majority shareholder exception to the rule is not appropriate for all situations involving CMRS licensees and their owners, and so adoption of such an exception is not a suitable bright line substitute for 20 percent attribution. However, we adopt a less restrictive alternative and allow licensees with non-controlling minority investors with potentially conflicting CMRS ownership interests to seek waivers of the spectrum cap rule where the licensee is controlled by a single majority shareholder or controlling general partner.

121. We reject a control-based attribution test because significant, but non-controlling, investments have sufficient potential to affect the level of competition in the CMRS market. The CMRS spectrum cap ownership attribution rule, just as all other ownership attribution rules and similar statutory provisions, must take such interests into account. Economic theory predicts that where a CMRS licensee owns a substantial portion of one of its competitors, neither company has as strong an incentive to compete vigorously against its partner as it does with respect to an unrelated competitor. That is the case for several reasons. A company that is entitled to a substantial percentage of the profit generated by its competitor will be reluctant to undercut the competitor's price -- doing so would amount to taking money out of its own pocket. Rather than compete on price, both companies have an incentive to maintain a high price level by coordinated interaction. In any event, the minority shareholder, would have an incentive to stifle vigorous price competition. It would also have the capability of doing so, because a minority owner may exert influence over the company by challenging various business decisions, by conducting (or even just threatening) litigation, by refusing to provide additional capital, by insisting upon business audits, or by using other mechanisms by which minority owners protect their investments in closely held firms.

122. Theoretical analysis has demonstrated that partial ownership interests can create the very non-competitive markets that we want to avoid.³⁶¹ Even "silent financial interests" -- *i.e.*, non-controlling shares -- may affect the behavior of the partly owned company by causing the minority owner to take into account its behavior on the profits of its partly owned competitor. Indeed, as noted above, Congress was also apparently concerned about such competitive incentives when it defined ownership in the 1996 Act to mean an interest of ten percent.³⁶² The Communications Act also limits foreign ownership interests in CMRS licenses to 20 percent.³⁶³ Although these statutory ownership attribution criteria do not directly apply to our CMRS ownership attribution rules, they indicate that Congress believed that even non-controlling, minority ownership interests can convey significant influence to their holders. As discussed above, other Commission rules attribute ownership interests of as little as five

³⁶¹ Joseph Farrell & Carl Shapiro, *Asset Ownership and Market Structure in Oligopoly*, 21 RAND Journal of Economics 275, 285 (1990)

³⁶² See 47 U.S.C. § 153(1) (defining the terms "affiliate" and "own").

³⁶³ 47 U.S.C. § 310(b)(3); see also 47 C.F.R. § 20.5

percent.³⁶⁴

123. Moreover, in a market such as the CMRS market, reduced competitive incentives between co-owned firms have the additional danger of potentially reducing competition in the entire market. As discussed above, the CMRS market will be fairly concentrated to begin with -- it will have at most five or six competitors, yielding an HHI index in the moderately concentrated range (and one of those competitors will be a small business 40 percent of which might be owned by one of its competitors) -- and significant new entry into the market by new competitors will not be possible (at least in the short run). Theory predicts that in that situation, a reduction in competition between two of the participants in the market will in turn reduce competition among the remaining participants.³⁶⁵ That reduction in competition occurs because the market effectively becomes an even more concentrated oligopoly, in which *all* of the companies are better off keeping prices high and competing instead on such matters as corporate image.

124. We recognize that small businesses and rural telephone companies, as well as non-controlling investors in small businesses, may have non-attributable ownership of up to 40 percent under our rules. But these relaxed attribution rules present a situation entirely different from the 20 percent attribution rule. We have been charged expressly by Congress to ensure that small businesses, including businesses owned by women and minorities, and rural telephone companies are given meaningful opportunities to participate in the provision of wireless services.³⁶⁶ Our rules must also promote the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas.³⁶⁷ One of the most formidable barriers to such participation is the difficulty such businesses face in raising sufficient capital to compete in the highly capital-intensive wireless communications businesses. By increasing the attribution threshold for such designated entities and their investors, our goal was to make capital more readily available by reducing the number of investors such businesses must seek out. We also concluded that smaller entities that have some interests in cellular operations may be especially effective PCS competitors because of their cellular experience. This will help ensure that service is brought quickly to underserved areas and that designated entities become viable competitors. In

³⁶⁴ As we explained at the time we first adopted the PCS/cellular attribution rule, we decided to attribute ownership interests of 20 percent or more rather than 5 percent, due to the unique history of cellular licensing in which settlements of licensing disputes left many companies with non-controlling interests greater than 5 percent. We did not think it fair to exclude such companies from CMRS and so we raised the attribution threshold to 20 percent. *See supra* ¶ 119

³⁶⁵ Farrell & Shapiro, *supra* at 286. *See also* R.J. Reynolds & B.R. Snapp, "The Competitive Effects of Partial Equity Interests and Joint Ventures," *International Journal of Industrial Organization*, Vol. 4, at 141-153 (1986).

³⁶⁶ *See* 47 U.S.C. § 309(j)(3)(2), (4)(C)-(D).

³⁶⁷ *Id.* at 309(j)(3)(A).

particular, rural telephone companies and some small cellular companies, due to their existing infrastructure, are uniquely positioned rapidly to introduce PCS services into their service areas or adjacent areas.³⁶⁸

125. However, we did not exempt small businesses and rural telephone companies entirely from the cellular eligibility rules because such an exemption could foreclose competition from a new PCS entrant. In maintaining the 45 MHz spectrum cap, we remain concerned that there is potential for some of these parties to compete less vigorously in the nascent PCS industry. While we recognize that our relaxation of the rules in favor of the CMRS spectrum cap presents a risk of lower than optimal competition, we must balance competing public policies and we believe that this is the proper balance to fulfill our various statutory mandates under Section 309(j) of the Communications Act.

126. Further, we decline to adopt a single majority shareholder exception for the CMRS spectrum cap rule as suggested by CBT and CTIA.³⁶⁹ As discussed above, economic theory indicates that an entity holding less than a majority interest may influence the CMRS market in an anticompetitive manner. In such circumstances, it makes no difference whether there is another shareholder that exercises control since significant minority ownership that does not convey control still poses a serious danger of hindering competition in a concentrated market such as CMRS. These same concerns arise with respect to other emerging services, and legislative and regulatory initiatives through which competition is being introduced to market segments that may not be highly competitive do not include a single majority shareholder exception. For example, we did not adopt a single majority shareholder exception for purposes of attributing ownership in the context of cable cross-ownership with video programmers, Multichannel Multipoint Distribution Service ("MMDS" or "wireless cable"), and Satellite Master Antenna Television Service ("SMATV" or "private cable"). Although we recognized that a single majority shareholder exception was a component of the broadcast attribution rules, we found that more inclusive rules were necessary to curb the incentives of cable operators to influence the behavior of their programming affiliates to the detriment of competitors, to prevent cable operators from "warehousing potential competition," to encourage alternative providers of multichannel video service, and to promote the development of local competition to established cable operators.³⁷⁰ These objectives are similar to those set forth above in support of a 45 MHz CMRS spectrum cap and CMRS ownership attribution rules. We note as another example that, in safeguarding competition with the entry of the monopoly Bell Operating Companies into long distance, equipment manufacturing and alarm monitoring, Congress did not provide for a single majority

³⁶⁸ See *Memorandum Opinion and Order*, GEN Docket 90-314, 9 FCC Rcd 4957, 5007 (1994).

³⁶⁹ See CBT Comments at 4-6; CTIA Comments at 15

³⁷⁰ See, e.g., *Competition and Diversity in Video Programming Distribution and Carriage*, First Report and Order, MM Docket 92-265, 8 FCC Rcd 3359, 3360, 3370 (1993); *Cable Horizontal and Vertical Limits*, Report and Order and Further Notice of Proposed Rulemaking, MM Docket No. 92-264, 8 FCC Rcd 6828, 6841 (1993).

shareholder exception to the 1996 Act's new definition of "affiliate."³⁷¹

127. We further note that, although the broadcast rules contain a single majority shareholder exception, broadcast services are also subject to the Commission's "cross-interest" policy. This policy is administered on a case-by-case basis and prohibits individuals from having "meaningful" interests in two broadcast stations, or a daily newspaper and a broadcast station, or a television station and a cable television system, when both outlets serve "substantially the same area."³⁷² One "meaningful relationship" the policy covers involves an individual who has an attributable interest in one media outlet and a substantial nonattributable equity interest in another media outlet in the same market, including a minority stock interest in a corporation having a single majority shareholder.³⁷³ Thus, while under our rules a minority equity interest in a broadcast station is *generally* not attributable if there is a single majority stockholder, our cross-interest policy requires us to scrutinize such minority interests on a case-by-case basis to determine whether they "engender concerns about arms length competition and diversity in certain markets in which the interest holder also has an attributable interest in another outlet."³⁷⁴ If the Commission finds that such concerns do exist in a particular case, it may deem the minority interest a meaningful relationship and prohibit its acquisition.

128. The principal distinction, then, between our CMRS ownership attribution rules and our broadcast rules is the presumption we apply in assessing whether a minority equity interest in an entity with a single majority shareholder raises concerns such that the interest should nevertheless be attributed to the interest holder. Currently, in the broadcast context, we generally presume, under the single majority shareholder exception, that such interests should not be attributable, but under our cross-interest policy we still may find in individual cases that this presumption should not apply given the competition and diversity concerns the particular case may raise.³⁷⁵ In the CMRS context, for the reasons stated above, we believe as a general matter that there should be no single majority shareholder exception, but, as noted, we will allow non-controlling minority investors to seek waivers of the spectrum cap rule

³⁷¹ See, e.g., 47 U.S.C. §§ 153(1), 272, 273(d)(8).

³⁷² See Review of the Commission's Regulations Governing Attribution of Broadcast Interests, *Notice of Proposed Rule Making*, MM Docket 94-150, 10 FCC Rcd 3606, 3642-49 (1995) ("Broadcast Attribution Notice").

³⁷³ See Reexamination of the Commission's Cross-Interest Policy, Further Notice of Inquiry/Notice of Proposed Rule Making, 4 FCC Rcd 2035, 2036 n.11 (1989).

³⁷⁴ *Id.* at 2036.

³⁷⁵ We note that we have recently sought comment in our pending broadcast attribution proceeding on restricting the availability of the single majority shareholder exception to our attribution rules, and have also sought comment on whether we should eliminate the cross-interest policy and instead rely solely on our attribution rules as the means of attributing interests that raise concerns. Broadcast Attribution Notice at 3632, 3642-49.

where the licensee is controlled by a single majority shareholder or controlling general partner. In view of the competitive situation in the CMRS market, described above, we believe that this distinction between our CMRS and broadcasting rules and procedures is justified.

129. Hence, we believe that, as a general matter, minority stock interests and limited partnership interests should be deemed attributable CMRS ownership interests even if a single holder (or group of affiliated holders) owns more than 50 percent of the outstanding stock or partnership equity or has voting control of the CMRS licensee. Nevertheless, we believe that there may be limited circumstances where the existence of a single majority shareholder (or a single, controlling general partner) may mitigate the competitive impact of common ownership and the ability of the non-controlling interest holder to influence the licensee. Accordingly, we will implement two less restrictive measures as an alternative to attributing ownership in such cases.

130. First, as we previously did with our cellular/PCS cross-ownership rule, we will allow parties with non-controlling, attributable interests in CMRS licensees to have an attributable (or controlling) interest in another CMRS application that would exceed the 45 MHz spectrum cap so long as certain post-licensing divestiture procedures are followed.³⁷⁶ A “non-controlling attributable interest” is one where the holder has less than a 50 percent voting interest and there is an unaffiliated single holder of a 50 percent or greater voting interest. This will allow interest holders in licensees with a single majority shareholder to obtain another CMRS license (or attributable interest therein) through an auction or other means, subject to the interest holder coming into compliance with our divestiture provisions within 90 days of grant of the conflicting license.

³⁷⁶ See 47 C.F.R. § 24.204(f).

131. Second, we will consider requests for waivers of the CMRS spectrum cap that make an affirmative showing that an otherwise attributable ownership interest should not be attributed to its holder because:

- The interest holder has less than a 50 percent voting interest and there is an unaffiliated single holder of a 50 percent or greater voting interest;
- The interest holder is not likely to affect the local market in an anticompetitive manner;
- The interest holder is not involved in operations of the licensee and does not have the ability to influence the licensee on a regular basis; and
- Grant of a waiver is in the public interest because the benefits of such common ownership to the public outweigh any potential for anticompetitive harm to the market.

132. Finally, we agree with GTE and DCR that retroactive application of any cross-ownership or spectrum cap rule changes would be contrary to the public interest.³⁷⁷ PCS licensees that participated in the A, B, and C block auctions have already incurred enormous expenses to, *inter alia*, design their systems, relocate incumbent users of the spectrum, acquire cell sites, and establish marketing plans.³⁷⁸ Retroactive application of our rules would disrupt this burgeoning industry and delay service to the public. Furthermore, entities that may have been precluded from participating in past auctions for CMRS spectrum based on our prior rules may now acquire additional spectrum through future auctions, assignments of licenses, transfers of control or investments.³⁷⁹ Thus, we conclude that any changes to our spectrum cap and cross-ownership rules will apply prospectively.

IV. Ownership Disclosure Provisions

133. Background. In the *Notice*, we noted that, during the course of previous broadband PCS auctions, it had become evident that certain ownership disclosure requirements found in our general PCS competitive bidding rules were burdensome and difficult to

³⁷⁷ See GTE Comments at 9-10; DCR Reply Comments at 13 n.35.

³⁷⁸ See GTE Comments at 9.

³⁷⁹ The Commission not only plans to auction 30 MHz of broadband PCS spectrum in the D, E, and F blocks, but also has proposed to auction other broadband spectrum, such as cellular unserved areas and spectrum in the 800 MHz SMR pool. See, e.g., Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, *First Report and Order*, *Eighth Report and Order*, and *Second Further Notice of Proposed Rule Making*, 11 FCC Rcd 1463 (1995). Assignments and transfers are subject to Section 310(d) of the Communications Act and the Commission's licensee eligibility rules and anti-trafficking restrictions. We relax the latter restrictions herein.

administer both at the short-form and long-form application stages. Moreover, requiring the submission of partnership agreements proved sensitive because such agreements often contained strategic bidding information and other confidential data. Thus, we proposed to amend Section 24.813(a)(1) and Section 24.813(a)(2) of our rules to limit the information disclosure requirement with respect to outside ownership interests of applicants' attributable stockholders.³⁸⁰ We proposed to require only the disclosure of attributable stockholders' direct, attributable ownership in other businesses holding or applying for CMRS or Private Mobile Radio Services ("PMRS") licenses.³⁸¹ In addition, we proposed to amend Section 24.813(a)(4) to delete the requirement that partnerships file a signed and dated copy of the partnership agreement with their short-form and long-form applications.³⁸² We also sought comment on whether we should further reduce the scope of information required by our general PCS rules at either the short-form or long-form filing stage, and on the alternative approach of requiring applicants to make their ownership documentation available upon request during or after the auction.

134. The number of waiver requests filed by applicants seeking permission to demonstrate gross revenues and total assets without audited financial statements in the C block auction led us also to propose changes to Section 24.720(f) and Section 24.720(g) of the Commission's Rules. We proposed to permit each applicant that does not otherwise use audited financial statements to provide a certification from its chief financial officer that the gross revenue and total asset figures that it provides in its short-form and long-form applications are true, full, and accurate; and that the applicant does not have the audited financial statements that are otherwise required under our rules. We also asked interested parties to suggest other alternatives to the audited financial statement requirement, and we sought comment on whether an alternative -- the one we proposed or any other -- should be available to all F block applicants, or only to applicants that do not otherwise use audited financial statements. In addition, we also requested comment on whether applicants should continue to be allowed to rely on either fiscal years or calendar years in providing their gross revenues, or whether they should instead base their size calculations on the most recent four quarters so that the Commission receives the most current information available.

135. Comments. A majority of the commenters support making our ownership disclosure requirements less onerous.³⁸³ Many of those who support streamlined requirements also support our proposal to amend Sections 24.813(a)(1) and 24.813(a)(2) to require the disclosure of only attributable stockholders' direct, attributable ownership in other businesses

³⁸⁰ Notice at ¶ 81.

³⁸¹ *Id.*

³⁸² *Id.*

³⁸³ See PCS Coalition Comments at 18; U S West Comments at 1; Liberty Comments at 2-3; AirLink Comments at 17; Antigone Comments at 9; CTIA Comments at 3; NCMC Comments at 18; Mid-Plains Comments at 5; Western Comments at 33; Wireless 2000 Comments at 2; Western Reply Comments at 21-22.

holding or applying for CMRS or PMRS licenses.³⁸⁴ Devon asserts that applicants should not be required to identify all businesses in which an attributable investor has an interest greater than five percent if the business is unrelated to wireless communications services.³⁸⁵ Vanguard believes that more limited disclosure requirements should apply not only to "attributable stockholders," but also to officers, directors, and key management personnel.³⁸⁶ Sprint and NatTel both argue that F block applicants should be subject to the same ownership disclosure requirements as C block applicants.³⁸⁷ In this connection, Sprint contends that the requirements of Sections 24.813(a)(1), (2), and (4) of our rules should be waived for the short-form applications but that the information described in these provisions should be required in the long-form applications.³⁸⁸

136. BellSouth and Mr. Harvey Leong oppose changing the ownership disclosure requirements.³⁸⁹ Full disclosure, argues BellSouth, will permit the identification of fronts and help to ensure the participation of only eligible bidders. BellSouth also notes that the information required in Section 24.813 of our rules allows applicants to secure detailed information about other applicants necessary for the development of comprehensive auction strategies and contingency plans.³⁹⁰ TPCS suggests that a bidder should identify all of its investors in order to receive its license and be required to forfeit the license if irregularities are found.³⁹¹

137. Several commenters agree that the partnership agreement filing requirement should be eliminated.³⁹² The PCS Coalition believes that applicants should not have to disclose their partnership agreements if other information is provided that allows observers to accurately judge their size, affiliation, real parties in interest, ownership interests in CMRS licensees, and any agreements made concerning bidding strategy or future association with

³⁸⁴ See AirLink Comments at 17; Antigone Comments at 9; NCMC Comments at 18; Mid-Plains Comments at 5; Western Comments at 33; WPCS Comments at 8.

³⁸⁵ Devon Comments at 15

³⁸⁶ Vanguard Comments at 6.

³⁸⁷ NatTel Comments at 5; Sprint Comments at 6

³⁸⁸ Sprint Comments at 6. See also DCR Comments at 16.

³⁸⁹ BellSouth Comments at 15; Leong Comments at 4

³⁹⁰ BellSouth Comments at 15, n. 40.

³⁹¹ TPCS Comments at 3

³⁹² AirLink Comments at 17; Mid-Plains Comments at 5; Western Comments at 33.

other telecommunications providers.³⁹³

138. All commenters addressing the question support allowing applicants to demonstrate financial size without audited financial statements.³⁹⁴ Commenters differ, however, on the issue of whether data from the most recent four quarters should be used to determine financial eligibility. TEC argues that year-end data should be used because companies that use audited financial statements would not normally be audited on a quarterly basis and those that do not use auditors are unlikely to "close" their books quarterly.³⁹⁵ Accurate, verifiable data from the current fiscal year, TEC argues, would therefore be logistically difficult to obtain.³⁹⁶ NCMC, on the other hand, asserts that applicants should be able to base their gross revenue calculations on data from the most recent four quarters and their total assets on information available at the time the short form is filed.³⁹⁷ DCR requests clarification on how any rule changes would affect C block applicants.³⁹⁸ Finally, AirLink requests that we permit confidential information to be filed separately, either on paper or in a separate electronic filing accessible only by the Commission and the bidder, to prevent inadvertent release of confidential information.³⁹⁹

139. Decision. We adopt our proposal to amend Section 24.813(a)(1) and Section 24.813(a)(2) of our rules to limit the information disclosure requirement with respect to outside ownership interests of applicants' attributable stockholders. We will require only the disclosure of attributable stockholders' direct, attributable ownership in other businesses holding or applying for CMRS or PMRS licenses. We agree with the commenters that the more extensive ownership disclosure requirements in our general PCS competitive bidding rules are burdensome and difficult to administer.⁴⁰⁰ We believe that these more limited requirements will continue to ensure participation of only eligible bidders. We also adopt our proposal to amend Section 24.813(a)(4) to delete the requirement that partnerships file a signed and dated copy of their partnership agreement with their short-form and long-form applications. We have found this requirement to be overly burdensome and are concerned

³⁹³ PCS Coalition Comments at 18-19.

³⁹⁴ PCS Coalition Comments at 18; AirLink Comments at 17; Antigone Comments at 9; CTIA Comments at 3 n. 5; TEC Comments at 15; Vanguard Comments at 7; DCR Comments at 8; NatTel Comments at 5; NCMC Comments at 18; Western Comments at 35; Wireless 2000 Comments at 2; WPCS Comments at 7.

³⁹⁵ TEC Comments at 16; *see also* WPCS Comments at 8.

³⁹⁶ *Id.*

³⁹⁷ NCMC Comments at 18.

³⁹⁸ DCR Comments at 7-8.

³⁹⁹ AirLink Comments at 18.

⁴⁰⁰ *See* Antigone Comments at 9; Liberty Comments at 2-5.

that confidential or strategic bidding information could be unnecessarily disclosed through submissions of such agreements.

140. We also adopt the changes that we proposed to Section 24.720(f) and Section 24.720(g) of our rules. As a result, each applicant that does not otherwise use audited financial statements will be permitted to provide a certification from its chief financial officer that the gross revenue and total asset figures indicated in its short-form and long-form applications are true, full, and accurate; and, that the applicant does not have the audited financial statements that are otherwise required under our rules. We believe the requirement of using audited financial statements to be unnecessarily burdensome, especially for small businesses that do not normally rely on such statements.⁴⁰¹

141. Finally, we amend our rules to require that the information supplied by applicants for the F block is current. Specifically, an applicant's determination of average gross revenues will be based on the three most recently completed fiscal or calendar years. With regard to AirLink's concerns about inadvertent release of confidential data, we will require that confidential data be filed separately on paper. Similarly, any requests that information be treated as confidential will not be accepted electronically and must otherwise comply with our rules governing confidential treatment of documents.⁴⁰²

V. Auction Schedule

142. Background. We tentatively concluded in the *Notice* that we should auction the D, E, and F blocks concurrently, and we sought comment on conducting two separate simultaneous multiple round auctions -- one for the D and E block licenses and one for the F block licenses. In doing so, we noted that comments filed in response to an earlier inquiry into this issue indicated that simultaneous access to all the 10 MHz licenses is important to the plans of some prospective PCS providers and that auctioning the D and E licenses together in one auction and the F block licenses in a separate auction would accommodate the difference in eligibility requirements for the F block auction.⁴⁰³

143. Comments. Most commenters addressing this issue support auctioning the D, E,

⁴⁰¹ See TEC Comments at 15.

⁴⁰² See 47 C.F.R. § 0.459 (Commission procedures for confidential treatment of information). See also Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission, *Notice of Inquiry*, GC Docket No. 96-55, FCC 96-109 (April 15, 1996).

⁴⁰³ *Notice* at ¶ 84.

and F block licenses at the same time.⁴⁰⁴ However, the commenters differ as to whether we should conduct a single auction for all three blocks or two separate auctions as discussed in the *Notice*. Phoenix, TEC, PersonalConnect, BellSouth, Auction Strategy, Devon, NatTel, NextWave, NCMC and Omnipoint support a single auction.⁴⁰⁵ Their arguments in support of a single auction include: the D, E, and F block licenses are interdependent, which leads many applicants to seek to aggregate three licenses in a single market;⁴⁰⁶ a single auction would be less costly and less burdensome to administer for both bidders and the Commission;⁴⁰⁷ a single auction would help to ensure that the bids received for similar licenses will be more consistent than the bids received from the separately conducted A and B block auction and the C block auction;⁴⁰⁸ and, finally, a single auction would ensure that small businesses are given a legitimate opportunity to compete for not only F block licenses, but D and E block licenses as well.⁴⁰⁹

144. AT&T, Iowa, and Mountain Solutions support the use of a single, consolidated auction only under certain conditions.⁴¹⁰ AT&T contends that as long as the F block auction is not open to all bidders, it should be conducted separately.⁴¹¹ AT&T believes that F block bidders should be allowed to bid in the D and E block auctions, but should be required to file separate applications and upfront payments for the D and E block auction in order to ensure that they exhibit bona fide interest in those licenses and are not just attempting to inflate the

⁴⁰⁴ See PCS Coalition Comments at 16-17; AirLink Comments at 17; Antigone Comments at 7; Point Comments at 3; USIW Comments at 3-4; The Alliance Comments at 11; Phoenix Comments at 4; TEC Comments at 16-17; PersonalConnect Comments at 1-2; Vanguard Comments at 7; Conestoga Comments at 3; DCR Comments at 10; AT&T Comments at 6-7; BellSouth Comments at 16; Auction Strategy Comments at 4; Devon Comments at 16; GTE Comments at 13; Gulfstream Comments at 5; Iowa Comments at 6; Mountain Solutions Comments at 12; NatTel Comments 5-6; NextWave Comments at 2; NCMC Comments at 19; Omnipoint Comments at 6; Spectrum Resources, Inc. Comments at 1 ("Spectrum Resources"); PCIA Comments at 15; Wireless 2000 Comments at 2.

⁴⁰⁵ Phoenix Comments at 4; TEC Comments at 16-17; PersonalConnect Comments at 1-2; BellSouth Comments at 16; Auction Strategy Comments at 4; Devon Comments at 16; NatTel Comments at 5-6; NextWave Comments at 2; NCMC Comments at 19; and Omnipoint Comments at 6

⁴⁰⁶ Phoenix Comments at 4; BellSouth Comments at 16; Auction Strategy Comments at 4; NextWave Comments at 2.

⁴⁰⁷ NextWave Comments at 2; Devon Comments at 16

⁴⁰⁸ TEC Comments at 16-17; PersonalConnect Comments at 1-2; Auction Strategy Comments at 4.

⁴⁰⁹ PersonalConnect Comments at 1-2; Auction Strategy Comments at 4; NextWave Comments at 2.

⁴¹⁰ AT&T Comments at 6-7; Iowa Comments at 6-7; Mountain Solutions Comments at 12-13.

⁴¹¹ AT&T Comments at 6-7

prices paid for D and E block licenses.⁴¹² Iowa and Mountain Solutions would support a single auction if the Commission elects to set aside the D, E, and F blocks for small businesses only.⁴¹³

145. AirLink, GTE, and Conestoga believe that the Commission should conduct two separate, but concurrent, auctions for the D and E blocks and the F block.⁴¹⁴ AirLink argues that a single auction would be administratively complex.⁴¹⁵ GTE believes that separate auctions make the most sense considering the difference in eligibility rules and the possibility of delay caused by legal challenges to the F block auction or to the D and E block auction.⁴¹⁶

146. A number of other commenters oppose auctioning the D, E, and F blocks at the same time.⁴¹⁷ Sprint and New Dakota believe that the F block licenses should be auctioned after the D and E block licenses, which would give the F block bidders additional time to form partnerships with unsuccessful bidders in the D and E block auction, as well as with other entities, and the opportunity to gain valuable information concerning the values of 10 MHz licenses.⁴¹⁸ Sprint also argues that if the F block licenses were auctioned simultaneously with the D and E blocks, F block bidders could bid up the prices of the licenses in the D and E blocks in order to raise the costs of non-designated entities.⁴¹⁹ In contrast, WPCS and RAA believe that the F block should be auctioned before the D and E blocks to eliminate any "headstart" non-entrepreneurs already have and prevent "last chance" or "desperation" bidding, which would drive prices to unrealistically high levels.⁴²⁰ New Dakota and Radiofone assert that auctioning each of the blocks separately would give small businesses a better opportunity to compete for single 10 MHz licenses.⁴²¹ GWI and PCS One contend that a single auction effectively would be creating another 30 MHz auction, which would skew the financial

⁴¹² *Id.* at 7.

⁴¹³ Iowa Comments at 6-7; Mountain Solutions Comments at 12-13.

⁴¹⁴ AirLink Comments at 17; GTE Comments at 13; Conestoga Comments at 3.

⁴¹⁵ AirLink Comments at 17.

⁴¹⁶ GTE Comments at 13.

⁴¹⁷ Sprint Comments at 8; Radiofone Comments at 6; GWI Comments at 5-6; Mid-Plains Comments at 6; PCS One Comments at 2; RAA Comments at 7; New Dakota Comments at 4-5; WIDS Comments at 1; APC Reply Comments at 7, n.12.

⁴¹⁸ Sprint Comments at 8; New Dakota Comments at 4-5. *See also* APC Reply Comments at 7 n. 12.

⁴¹⁹ Sprint Comments at 8-9.

⁴²⁰ WPCS Comments at 8; RAA Comments at 7 and Reply Comments at 3. *See also* Columbia Comments at 2.

⁴²¹ New Dakota Comments at 3-4; Radiofone Comments at 6.

markets' view of the D, E, and F blocks at the expense of C block winners and foreclose participation by small businesses.⁴²² Mid-Plains urges the Commission to conduct sequential auctions because small businesses would be better able to assess the financial resources required in each subsequent auction as measured against the results of the previous auction.⁴²³

147. We received a number of other comments regarding the timing of the D, E, and F block auctions. Most of these comments urged us to conduct the auctions as expeditiously as possible in order to ensure that D, E, and F block licensees are not at a significant disadvantage in comparison to A, B, and C block licensees.⁴²⁴ Others claim that the Commission should ensure that there is a sufficient amount of time between the close of the C block auction and the commencement of the D, E, and F block auctions.⁴²⁵ U S West argues that if the Commission ultimately decides to use a single auction, it should preserve the option of conducting separate auctions so that a legal challenge to the auction of one license block does not delay the auction of the other license blocks.⁴²⁶

148. Decision. We agree with the majority of the commenters that we should auction the D, E, and F blocks at the same time. We also intend to auction the D, E, and F blocks in a single auction. We believe that auctioning the three blocks in one simultaneous multiple round auction will benefit bidders by reducing administrative inefficiencies and by providing maximum flexibility for bidders to choose between similar licenses. While some commenters oppose a single auction because it would be too complex, we believe that if we use uniform upfront payments, which we adopt for the three blocks in this Order, we will reduce the complexity of a single auction. We also believe that this method will expedite service to the public. Many of the commenters that oppose a single auction offer plans for sequencing the auctions. Such an approach, in our view, would delay the licensing of some of the 10 MHz blocks and, thus, delay service to the public. Although we believe that a single auction is the best option, we delegate authority to the Wireless Telecommunications Bureau to conduct one auction for the D and E blocks and one for the F block concurrently if such an approach is operationally necessary or otherwise furthers the public interest. While we believe that it is important to auction the D, E, and F block licenses at the same time, we also believe that it is vital to ensure that the public receives the benefit of these new services as quickly as possible.

⁴²² GWI Comments at 5-6; PCS One Comments at 2

⁴²³ Mid-Plains Comments at 6.

⁴²⁴ See Iowa Comments at 7; U S West Comments at 5-6; Gulfstream Comments at 5-6; KMTel Comments at 8; PCIA Reply Comments at 8-9.

⁴²⁵ See DCR Comments at 11; NatTel Comments at 6.

⁴²⁶ US West Comments at 7

VI. Other Issues

A. Limit on Licenses Acquired at Auction

149. Even though the issue was not raised in the *Notice*, several commenters suggest that we modify our limitation on the number of licenses that a single entity may acquire at auction to ensure wide distribution of entrepreneurs' block licenses. In the *Competitive Bidding Fifth Report and Order*, we imposed a limit on the number of licenses within the entrepreneurs' blocks that a single entity may win at auction. We took care not to impose a restriction that would prevent applicants from obtaining a sufficient number of licenses to create large and efficient regional services. We provided that a single entity may win no more than 10 percent of the licenses available in the entrepreneurs' blocks; these licenses may all be C block licenses or F block licenses or some combination of the two.⁴²⁷ In this proceeding, several commenters propose that we change this limitation to one based on population rather than on the number of licenses. AirLink proposes a population cap of 27 million.⁴²⁸ NCMC proposes a population cap of 20 percent of the population served by all C and F block licenses.⁴²⁹

150. We decline to modify our rule as requested by commenters. First, we believe that the results of the C block auction indicate that entrepreneurs' block licenses were disseminated to a large number of auction winners. In that auction, almost 90 entrepreneurs won 493 licenses. Second, bidding strategies in the C block auction and the business plans of many firms may have been formulated in reliance on this rule. We find no basis for modifying it here.

B. Partitioning and Disaggregation

151. Numerous commenters argue that the Commission's geographic partitioning provisions, which currently apply only to rural telephone companies,⁴³⁰ should be expanded to include broadband PCS licensees and spectrum disaggregation should be permitted in the near term.⁴³¹ Under the current rules, broadband PCS licensees may disaggregate licensed

⁴²⁷ 47 C.F.R. § 24.710.

⁴²⁸ AirLink Comments at 6-7. *See also* RAA Reply Comments at 3; PersonalConnect Reply Comments at 3.

⁴²⁹ NCMC Reply Comments at 8 n. 16.

⁴³⁰ *See* 47 C.F.R. § 24.714.

⁴³¹ *See* AT&T Comments at 11-12; ICGC Comments at 3-4; Integrated Voice Systems Comments at 2 ("IVS"); ONE Comments at 1; PCS One Comments at 2; Western Comments at 27; BellSouth Reply Comments at 7; TDS Reply Comments at 5-6; NextWave Reply Comments at 7-8; Cox Reply Comments at 4-5 n. 9; PersonalConnect Reply Comments at 4; Columbia Comments at 2; US West Reply Comments at 5; Western Reply Comments at 15.

broadband PCS spectrum after January 1, 2000, if they have met the five-year construction requirement.⁴³² Because the issues of partitioning and disaggregation exceed the scope of this proceeding, we will consider these issues in a separate proceeding.

C. Bid Withdrawal

152. Auction Strategy asserts that our procedures should be enhanced to reduce the possibility of mistaken bids.⁴³³ It suggests that the bid submission software should warn bidders whenever a bid is entered that exceeds the minimum bid by more than 10 bid increments. We agree with Auction Strategy's suggestion that we take further steps to reduce the possibility of mistaken bids. For the D, E, and F block auction, the Wireless Telecommunications Bureau will employ an additional procedure that will warn bidders of the possibility of a mistaken bid.

153. Auction Strategy also states that since we cannot distinguish honest mistakes from strategic mistakes, we should impose a penalty for mistaken bids and proposes a penalty for such bids. Our rules provide for a bid withdrawal payment that is equal to the difference between the withdrawn bid amount and the amount of the subsequent winning bid, if the subsequent winning bid is lower.⁴³⁴ No withdrawal payment is assessed if the subsequent winning bid exceeds the withdrawn bid.⁴³⁵ We recently addressed the issue of how this bid withdrawal payment applies to bids that are mistakenly placed and withdrawn in a decision involving two bidders in the 900 MHz SMR and broadband PCS C block auctions.⁴³⁶

154. In *Atlanta Trunking*, we stated that, while we believe that in some cases full application of the bid withdrawal payment provisions could impose an extreme and unnecessary hardship on bidders, it may be extremely difficult for the Commission to distinguish between "honest" erroneous bids and "strategic" erroneous bids. We held that in cases of erroneous bids, some relief from the bid withdrawal payment requirement appears necessary. Accordingly, we fashioned the following guidelines to be followed when addressing individual requests for waiver of withdrawal payments: If a mistaken bid is withdrawn in the round immediately following the round in which it was submitted, and the auction is in Stage I or Stage II, the withdrawal payment should be the greater of (a) two times the minimum bid increment during the round in which the mistaken bid was submitted

⁴³² 47 C.F.R. § 24.229(d).

⁴³³ Auction Strategy Comments at 5.

⁴³⁴ 47 C.F.R. § 24.704(a)(1)

⁴³⁵ See 47 C.F.R. §§ 1.2104(g)(1) and 24.704(a)(1)

⁴³⁶ Atlanta Trunking Associates, Inc. and MAP Wireless L.L.C. Requests to Waive Bid Withdrawal Payment Provisions. *Order*, FCC 96-203 (May 3, 1996) ("*Atlanta Trunking*"). See also Georgia Independent PCS Corporation Request to Waive Bid Withdrawal Payment Provision. *Order*, DA 96-706 (May 6, 1996).

or (b) the standard withdrawal payment calculated as if the bidder had made a bid at one bid increment above the minimum accepted bid. If the mistaken bid is withdrawn two or more rounds following the round in which it was submitted, the bidder should not be eligible for any reduction in the bid withdrawal payment. Similarly, during Stage III of an auction, if a mistaken bid is not withdrawn during the round in which it was submitted, the bidder should not be eligible for any reduction in the bid withdrawal payment. We believe that under this approach, the required bid withdrawal payment would be substantial enough to discourage strategic placement of erroneous bids without being so severe as to impose an untenable burden on bidders. Thus, we adopt this approach for the D, E, and F block auction.

VII. Conclusion

155. In this Order, we conclude that making our broadband PCS F block rules race- and gender-neutral will avoid the uncertainty and delay that could result from legal challenges to the special provisions for minority- and women-owned businesses in these rules. We also take steps to streamline our procedures and minimize the possibility of insincere bidding and bidder default. We also respond to the *Cincinnati Bell* remand issues. Finally, 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 and delegate authority to the Wireless Telecommunications Bureau to conduct two concurrent auctions if circumstances warrant.

VIII. Procedural Matters and Ordering Clauses

156. The Final Regulatory Flexibility Analysis, as required by Section 604 of the Regulatory Flexibility Act, is set forth in Appendix C Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 *et seq.* (1981).

157. IT IS ORDERED that the rule changes specified in Appendix B ARE ADOPTED and are EFFECTIVE 30 days after publication in the Federal Register.

158. IT IS FURTHER ORDERED that the Wireless Telecommunications Bureau is DELEGATED AUTHORITY to decide waiver requests pertaining to our F block competitive bidding rules; to modify the upfront payment for reauctioning C block licenses; and to decide whether or not to conduct multiple auctions for the D, E, and F block licenses.

159. This action is taken pursuant to Sections 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended. 47 U.S.C. §§ 154(i), 303(r) and 309(j).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
William F. Caton
Acting Secretary