45. We also seek comment on whether, in addition to adopting a substantial service option, we should modify our existing narrowband PCS coverage benchmarks. One option would be to conform these requirements to our newly adopted requirements for geographic area paging. For example, the initial population coverage benchmark for narrowband PCS MTA licensees is 25 percent at five years, while the benchmark for MTA-based paging is two-thirds coverage at five years. We note that this may reflect differences in technology in the two services or that paging channels already are substantially built out by incumbents, whereas narrowband PCS licensees are only beginning their buildout process. At ten years, MTA-based narrowband PCS licensees must achieve 75 percent population coverage or cover 150,000 square kilometers, whereas paging licensees are not subject to any further coverage benchmark after five years. We seek comment on whether the existing benchmarks for MTA-based narrowband PCS licensees are appropriate compared to our paging requirements. Commenters should also discuss applicable coverage requirements for regional and nationwide narrowband PCS licensees.[138]

46. We also seek comment on whether we should eliminate all coverage requirements for narrowband PCS. As wireless competition evolves, narrowband PCS is likely to face significant competition not only from other narrowband CMRS providers, including paging and 220 MHz licensees, but also from broadband CMRS providers who have the ability to use a portion of their spectrum to offer "narrowband" services such as paging and messaging. Commenters should address whether market forces alone will provide sufficient incentives for narrowband PCS licensees to construct facilities and provide valuable new services to the public. In this regard, we note that build-out requirements may encourage the provision of service to areas that would not necessarily receive service expeditiously solely through the operation of market forces. In addition, build-out requirements may also prevent stockpiling or warehousing of spectrum by allowing licenses to be recovered and made available to entities more willing and able to provide service expeditiously. On the other hand, simply requiring construction by itself does not ensure that licenses are put to use in an efficient and procompetitive manner. Moreover, construction requirements alone may not be effective to ensure the provision of service to rural areas, because they can have the unintended consequence of causing licensees to build first in urban areas where the mandatory benchmarks could be met most cheaply, and thus may actually slow the development of service to rural areas.

47. We are obligated under Section 309(j) of the Communications Act to take

[138] There is no counterpart to regional narrowband PCS in our paging rules; therefore, we do not have specific paging coverage requirements for comparison in this instance. We also have not adopted coverage requirements for nationwide paging licensees, but note that under our former rules, 929 MHz nationwide were required to build at least 300 sites, and 931 MHz nationwide licensees were required to construct in at least 15 markets. 47 C.F.R. 22.527(b)(5) (1987). We sought comment in the *Paging Second Report and Order* on whether nationwide paging licensees should be subject to buildout requirements similar to those applicable to narrowband PCS. *Paging Second Report and Order*, FCC 97-59 at ¶ 209.

sufficient measures to "ensure prompt delivery of service to rural areas."[139] Because narrowband PCS has already been licensed on a nationwide and regional basis, and other competing services such as paging are widely available throughout the U.S, including rural areas, imposing coverage requirements with the specific intent of promoting rural service may be unnecessary. In addition, our decisions relating to partitioning and disaggregation in narrowband PCS should increase the potential for service to rural or underserved areas.[140] We seek comment on the potential impact of eliminating coverage benchmarks on service to rural or underserved areas. Commenters should address whether the auction and service rules that we are adopting and proposing here constitute effective safeguards and performance requirements for narrowband PCS licensing.

C. Auction Design

48. The *Competitive Bidding Third Report and Order* established simultaneous multiple round auctions as the methodology for awarding narrowband PCS licenses.[141] In light of the experience gained from the nationwide narrowband PCS auction, we later revised or clarified provisions governing minimum opening bids, activity rules, pre-auction procedures, the release of bidder information, and collusion.[142] We generally reaffirm the auction methodology adopted for narrowband PCS, but seek comment on whether modifications should be made to the overall auction design adopted for narrowband PCS. Additionally, having now completed thirteen auctions under the competitive bidding authority granted by Congress and recently having initiated a rule making to revise our general auction rules,[143] we revisit in this *Further Notice* certain provisions governing the general bidding procedures for narrowband PCS that we believe require revision.

1. Activity Rules

49. Background. In order to ensure that simultaneous multiple round auctions close within a reasonable period of time and to increase the information conveyed by bid prices during the auction, it is necessary to impose an activity rule to prevent bidders from waiting

[139] 47 U.S.C. § 309(j)(4)(B).

[140] *See CMRS Flex Report and Order*, *supra*, n.124; *see generally* Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Service Licensees, *Report and Order and Notice of Proposed Rulemaking*, WT Docket No. 96-148 and GN Docket No. 96-113, FCC 96-474 (rel. Dec. 20, 1996) (summarized in 62 Fed. Reg. 00,696) (*Partitioning and Disaggregation Report and Order*).

[141] *Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2948, ¶ 18.

[142] *See generally Competitive Bidding Third MO&O/Further Notice*, 10 FCC Rcd 175.

[143] *See Part One NPRM*, FCC 97-60.

until the end of the auction before participating.[144] We determined in the *Competitive Bidding Third Report & Order* that the Milgrom-Wilson activity rule would be used in conjunction with a simultaneous stopping rule to award narrowband PCS licenses.[145]

50. We determined in the *Competitive Bidding Third Report and Order* that a waiver procedure would apply, whereby bidders would be permitted five automatic waivers from the activity rule during the course of an auction.[146] In the *Competitive Bidding Third MO&O/Further Notice* we modified the waiver procedure for the narrowband PCS auctions and allowed one automatic waiver during each stage of an auction, or one automatic waiver during a number of bidding rounds specified by Public Notice. We noted that while proactive waivers would keep the bidding open, under no circumstances would an automatic waiver prevent an auction from closing.[147]

51. With respect to broadband PCS auctions, we initially determined that only proactive waivers, and not automatic waivers, would keep an auction open.[148] In that context, however, we later modified the rule by retaining the discretion to keep an auction open even if no new acceptable bids and no proactive waivers are submitted in a single round.[149] We observed that this would facilitate the rapid completion of the auction by permitting the Commission to use larger bid increments, thereby speeding the auction pace without risking a

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[144] *Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2955, ¶ 36.

[145] *Id.* at 2956, ¶ 40. Under the three-stage Milgrom-Wilson approach, bidders are encouraged to participate in early rounds by limiting their maximum participation to some multiple of their minimum participation level. Bidders are required to declare their maximum eligibility in terms of MHz-pops, and make an upfront payment equal to $0.02 per MHz-pops. That is, bidders will be limited to bidding on licenses encompassing no more than the number of MHz-pops covered by their upfront payment. The term "MHz-pops" is defined as the number of megahertz of the spectrum block multiplied by the population of the relevant service area. This measurement may also be referred to as "bidding units." The bidding units/MHz-pops measurement is used to describe the activity rules, stage transition rules, and bid increment rules.

[146] *Id.* A waiver permits a bidder to maintain its eligibility at the same level as in the round for which the waiver is submitted, regardless of the bidder's level of bidding activity in that round. A proactive waiver is submitted by the bidder during the bid submission period. In contrast, an automatic waiver is applied by the auction system software if a bidder's activity level is below the required level and it has waivers remaining.

[147] *Competitive Bidding Third MO&O/Further Notice*, 10 FCC Rcd at 182, ¶ 14.

[148] Implementation of Section 309(j) - Competitive Bidding, *Fourth Memorandum Opinion and Order*, PP Docket No. 93-253, 9 FCC Rcd 6858, 6861, ¶ 15 (1994) (*Competitive Bidding Fourth Memorandum Opinion and Order*).

[149] Implementation of Section 309(j) - Competitive Bidding, *Memorandum Opinion and Order*, PP Docket No. 93-253, 9 FCC Rcd 7684, 7685, ¶ 3 (1994).

premature auction close.[150]

52. Discussion. We propose for narrowband PCS that we retain the same discretion as we have in the broadband PCS auctions to keep an auction open even if no new acceptable bids and no proactive waivers are submitted in a single round. We tentatively conclude that this provision will allow the completion of the narrowband PCS auction in a timely and efficient manner. We seek comment on whether this modification of our activity and stopping rules is appropriate.

2. License Grouping

53. Background. In the *Competitive Bidding Third Report and Order* we determined that choosing which licenses to auction simultaneously requires a judgment about the degree of interdependence of the licenses, *i.e.*, the extent to which the amount the bidders are willing to pay for one license depends on the price of another.[151] We auctioned the nationwide narrowband PCS licenses in a simultaneous multiple round auction.[152] We then auctioned the five regional blocks (30 licenses) together in one simultaneous multiple round auction.[153] We decided to conduct a third simultaneous multiple round auction for all of the 50/50 kHz paired, 50/12.5 kHz paired, and the 50 kHz unpaired MTA licenses (357 licenses) and, after the MTA licenses are auctioned, to conduct another simultaneous multiple round auction for the 50/12.5 kHz paired BTA licenses (986 licenses).[154]

54. Comments. USIMTA/USIPCA states that auctioning the BTAs last would give the larger companies a head start in providing PCS to the public. USIMTA/USIPCA suggests that the Commission auction BTA licenses before auctioning the MTA licenses.[155]

55. Discussion. In light of the channel reallocation we propose herein (*see supra* at ¶¶ 29-32), we tentatively conclude that we will conduct one auction for the remaining narrowband PCS spectrum that has been allocated. We reserve the right, however, to auction each category (*i.e.*, nationwide, regional, MTA) of the channels adopted separately. As a

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[150] *Id.*

[151] *Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2951, ¶ 26.

[152] *Competitive Bidding Third MO&O/Further Notice*, 10 FCC Rcd at 178, ¶ 4. This auction was the first instance where we used a simultaneous multiple round auction design and our provisions for designated entities.

[153] *Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2951, ¶ 27.

[154] *Id.* at 2951, ¶¶ 27-28.

[155] USIMTA/USIPCA Comments at 7-8. The comments regarding this issue were filed in response to our request for comments on the entrepreneurs' block proposal, despite the fact that we did not seek comment on the issue at that time.

result of our proposal, we consider the issue raised in USIMTA/USIPCA's argument that BTAs should be auctioned before MTAs to be moot. We seek comment on this proposal. We also seek comment on whether we should auction certain categories together if we decide to conduct more than one auction for the remaining narrowband PCS spectrum (*e.g.*, nationwide and regional).

3. Auction Design for Response Channels

56. Background. There are 204 MTA 12.5 kHz unpaired response channel licenses and 1,968 BTA 12.5 kHz unpaired response channel licenses. In the *Competitive Bidding Third Report and Order* we decided to auction the 12.5 kHz unpaired MTA and BTA response channel licenses in a single round sealed bid auction because we determined the value of the licenses to be low relative to the cost of conducting more complex auctions.[156] Moreover, because only incumbent paging licensees are eligible to bid on these licenses, we believed that sealed bid auctions would help to reduce the chances of collusion among the limited number of bidders.[157] However, petitioners[158] convinced us that paging response channel licenses may have more interdependency and higher value than was apparent at the time of our decision in the *Competitive Bidding Third Report and Order*.[159] In addition, we stated in the *Competitive Bidding Third MO&O/Further Notice* that the nationwide narrowband auction demonstrated simultaneous multiple round auctions are easier and less expensive to implement than anticipated.[160] Thus, we deferred our decision regarding auction design for the paging response channels.[161]

57. Discussion. We propose to auction the paging response channels in one simultaneous multiple round auction but reserve the option of auctioning these channels with the remaining narrowband PCS licenses. We now have the experience necessary to conduct a large simultaneous multiple round auction in an administratively efficient manner. In addition, in balancing the advantages of simultaneous multiple round bidding with the greater complexity that this method entails, we believe that it is the most appropriate auction methodology for these auctions, because of the high value of most narrowband PCS licenses and the significant interdependence between spectrum blocks and geographic regions. We note also that the potential reallocation of the MTA and BTA channels and paging response

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[156] *Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2952, ¶ 29.

[157] *Id.*

[158] *See* Paging Network, Incorporated and Tri-State Radio Company Comments.

[159] *Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2952, ¶ 29.

[160] *Competitive Bidding Third MO&O/Further Notice*, 10 FCC Rcd at 181, ¶ 9.

[161] *Id.*

channels discussed above, makes a single simultaneous multiple round auction even more administratively feasible. We seek comment on this proposal.

4. Auction Design for Reserved Spectrum

58. We seek comment on the manner in which we should auction the one MHz of reserved spectrum. Specifically, we seek comment on whether we should use our current narrowband PCS rules, as set forth in Part 24, or whether other rules should be adopted to auction this spectrum. In addition, we seek comment on whether or not we should auction the reserve spectrum in conjunction with other narrowband spectrum. We additionally seek comment on whether there should be any special provisions for small businesses, and if so, whether to adopt the small business size definition and the special provisions proposed herein. (See ¶¶ 61-64, *infra.*)

D. Treatment of Designated Entities

1. Overview of *Adarand Constructors, Inc. v. Peña*

59. Background. We have employed in our narrowband PCS auction rules a wide range of special provisions and eligibility criteria designed to meet the statutory objectives of providing opportunities to small businesses, rural telephone companies, and businesses owned by members of minority groups and women, collectively known as "designated entities."[162] Notably, the special provisions adopted for designated entities in the two narrowband PCS auctions completed thus far produced varied results. In the nationwide narrowband PCS auction, we provided a 25 percent bidding credit for businesses owned by members of minority groups and/or women.[163] No designated entities won licenses in this auction. Although other factors could have caused this result, the bidding credit of 25 percent proved insufficient to assist designated entities in obtaining nationwide narrowband PCS licenses when no other provisions were provided. We considered the results of the nationwide narrowband auction when contemplating the provisions that would govern the regional narrowband PCS auction and raised the bidding credit to 40 percent for businesses owned by members of minority groups and/or women.[164] In addition, we implemented an installment payment plan for businesses owned by members of minority groups and women.[165] Designated entities were more successful in the regional narrowband PCS auction, winning all

[162] *See generally* 47 U.S.C. §§ 309(j)(3)-(4).

[163] *Competitive Bidding Third Report and Order,* 9 FCC Rcd at 2970, ¶ 72.

[164] *Competitive Bidding Third MO&O/Further Notice,* 10 FCC Rcd at 201, ¶ 58.

[165] *See* Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Order on Reconsideration,* 9 FCC Rcd 5306 at ¶ 8 (1994) (*Order on Reconsideration*). Installment payment plans already were provided for small businesses bidding on regional licenses.

of the licenses for which a bidding credit was provided for designated entities. In total, designated entities won 11 of the 30 licenses offered in the regional narrowband auction. Specifically, four of the nine winners in the entire auction were designated entities that qualified as small businesses owned by members of minority groups and/or women.

60. At the time our narrowband PCS rules were adopted an intermediate scrutiny standard of review was applied to federal race- and gender-based programs.[166] In *Adarand*, 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 a strict scrutiny standard of review. This standard requires such classifications to be narrowly tailored to further a compelling governmental interest.[167] In *VMI*, the Supreme Court reviewed a state program containing gender classification and held it was unconstitutional under an intermediate scrutiny standard of review.[168] This standard requires that "[p]arties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action."[169] Under this test, the government must show "at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'"[170] While the Supreme Court has not directly addressed constitutional challenges to federal gender-based programs since *Adarand* and *VMI*,[171] our review of the relevant broad language in *VMI* indicates that the Court does not differentiate between federal and state official actions in its equal protection analysis.[172] Similarly, the *Adarand* decision definitively eliminated any

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[166] *Metro Broadcasting v. FCC*, 497 U.S. 547, 564-65 (1990).

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

[168] *United States v. Commonwealth of Virginia*, __U.S. __, 116 S.Ct. 2264 (1996).

[169] *VMI*, 116 S. Ct. at 2274 (citing *J.E.B. v. Alabama ex rel. T. B.*, 511 U.S. 127, 136-37 & n.6 (1994) and *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

[170] *Id.* at 2275 (quoting *Mississippi Univ. for Women*, 458 U.S. at 724 (quoting *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 150 (1980)).

[171] *But see Lamprecht v. FCC*, 958 F.2d 382, 391, 393 n.3 (D.C. Cir. 1992), a pre-*Adarand/VMI* decision in which Justice Thomas (a member of the D.C. Circuit panel to which the case was presented) invokes the "exceedingly persuasive justification" standard in striking down a federal gender-preference policy. As the dissent in *Lamprecht* confirmed, Justice Thomas applied "the more exacting scrutiny of Justice O'Connor's dissent [in *Metro*, 497 U.S. at 602-31]," *id.* at 404 (Mikva, C.J., dissenting), which formed the core of Justice O'Connor's majority opinion in *Adarand*.

[172] "Since [*Reed v. Reed*, 404 U.S. 71 (1971)], the Court has repeatedly recognized that *neither federal nor state government* acts compatibly with the equal protection principle when a law or official policy denies . . . equal opportunity . . . ." *VMI*, 116 S. Ct. at 2275 (emphasis added); "To summarize the Court's current directions for cases of *official* classification based on gender: . . . the reviewing court must determine whether the proffered justification is 'exceedingly persuasive.'" *Id.* (emphasis added). *See also Heckler v. Mathews*, 458 U.S. 728, 744-45 (1984)

distinction between federal and state race-based programs in setting its strict scrutiny standard of judicial review.[173] Therefore, we conclude that any gender-based preference maintained in the narrowband PCS auction rules would need to meet the *VMI* intermediate scrutiny standard of review.

61. Discussion. The *Adarand* decision potentially affects three race- and gender-based measures in our narrowband PCS auction rules and proposals.[174] First, our attribution rules enable an applicant in which women or minorities hold 50.1 percent of the equity while another investor holds 49.9 percent of the equity to obtain special status as a business owned by minorities or women.[175] Second, businesses owned by minorities or women and small businesses owned by minorities or women receive larger bidding credits than other designated entities.[176] Finally, the *Competitive Bidding Third MO&O/Further Notice* proposes that small businesses owned by minorities or women receive the most favorable installment payment options available.[177] The purpose of these provisions was to address the lack of access to capital problem that our record showed women and minorities face.[178]

62. We tentatively conclude that the present record in support of our race-based narrowband PCS rules lack sufficient evidentiary support to withstand strict scrutiny. We seek comment on our tentative conclusion and whether our provisions promote a compelling governmental interest and, more particularly, whether compensating for discrimination in lending practices and in practices in the communications industry constitutes such an interest. We also ask interested parties to comment on nonremedial objectives that could be furthered by the minority-based provisions of our rules and whether they could be considered compelling governmental interests, such as increased diversity in ownership and employment

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(reviewing a federal statute containing gender classification under the same standard the Court used to review the state statute in *Mississippi Univ. for Women*); *Califano v. Westcott*, 443 U.S. 76, 85 (1979) (same).

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

[174] In the *Competitive Bidding Third Report and Order*, we also adopted a tax certificate program for minority and women-owned businesses under 26 U.S.C. § 1071. 9 FCC Rcd at 2976, ¶ 81. Congress subsequently repealed Section 1071. H.R. 831, 104th Cong. 1st Sess. § 2. As a result of this action by Congress, the specific tax certificate provision in our narrowband rules is void.

[175] *Competitive Bidding Third MO&O/Further Notice*, 10 FCC Rcd at 198, ¶¶ 49-50.

[176] *Id.* at ¶ 58.

[177] *Competitive Bidding Third MO&O/Further Notice*, 10 FCC Rcd at 219-20, ¶¶ 94-97. In this reconsideration of the *Competitive Bidding Third Report and Order*, we proposed that businesses owned by women and/or minorities would be able to make interest-only payments for three years (as opposed to only the first two years for all other small businesses).

[178] *See Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2971-72, ¶¶ 75-76; *see also Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5579-80.

in the communications industry or increased industry competition. In commenting, we ask parties to submit statistical data, personal accounts, studies, or any other data relevant to the entry of specific racial groups into the field of telecommunications. Examples of relevant evidence could include discrimination against minorities trying to obtain FCC licenses; discrimination against minorities seeking positions of ownership or employment in communications or related businesses; discrimination against minorities attempting to obtain capital to start up a telecommunications enterprise, including terms and conditions; and discrimination against minorities operating telecommunications businesses, including treatment by vendors and suppliers.

63. With respect to our gender-based provisions, we seek comment on whether there are remedial or nonremedial goals that would satisfy the "important governmental objective" requirement of the intermediate scrutiny standard. Are our gender-based rules "substantially related" to the achievement of such objectives? Just as we requested above, in addressing evidence to support the narrowband race-based provisions, we ask parties to submit statistical data, personal accounts, studies, or any other data relevant to the entry of women into the field of telecommunications. We are also interested in supplementing the current record to support race- and gender-based provisions in our other rules. In this regard, the Commission 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.[179] The record created in response to this *R&O/Further Notice* will also be incorporated into that docket.

64. Based on our tentative conclusions, we propose to offer only race- and gender-neutral provisions for narrowband PCS. We propose that bidding credits and installment payments should be made available to small businesses -- including those owned by minorities and women.

2. Eligibility for Bidding Credits and Installment Payments

a. Small Business Definition

65. Background. In the *Competitive Bidding Second Memorandum Opinion & Order*, we stated that we would define eligibility requirements for small businesses on a service-specific basis, taking into account the capital requirements and other characteristics of each particular service.[180] In the recently adopted *Part One NPRM*, we proposed to continue this practice.[181] Once small business eligibility requirements are defined, however (*i.e.*, on a service specific basis) we proposed in the *Part One NPRM* to adopt uniform schedules of

[179] *See generally, Market Entry Notice of Inquiry, supra,* n.5.

[180] *Competitive Bidding Second Memorandum Opinion & Order*, 9 FCC Rcd at 7269, ¶ 145.

[181] *Part One NPRM*, FCC 97-60 at ¶¶ 32-40.

bidding credits and installment payments that would determine the level of benefits provided to small businesses. For the regional narrowband PCS and broadband PCS auctions, we believed that build-out and operational costs would be high and adopted a small business threshold of $40 million.[182] More recently, we have adopted a "tiered" approach for determining small business eligibility. For instance, for the 900 MHz SMR service we adopted a two-tiered system for determining eligibility for bidding credits, reduced down payments, and installment payment plans.[183]

66. Discussion. We propose to limit eligibility for bidding credits and installment payments to small businesses. We propose a "two-tiered" approach in defining small businesses, based on a $40 million and $15 million definition.[184] Currently, we have a $40 million small business definition. Businesses with gross revenues of not more than $40 million may have significantly greater difficulty in obtaining capital than larger enterprises.[185] At the same time, a company with $40 million in revenue is sufficiently large that it could survive in a competitive wireless communications market.[186] We believe that "small businesses," as defined by our proposal, will be at a disadvantage in competing against large companies. Accordingly, we propose to enhance special provisions for small businesses by creating an additional category, very small business entities, with a $15 million threshold.

67. We seek comment on these proposals. Specifically, are $40 million and $15 million appropriate thresholds? Are such tiers necessary to ensure that small businesses, including those owned by minorities and women, have the opportunity to participate in providing service on an MTA, regional, and nationwide basis? Should the thresholds be higher or lower, based on the types of companies that are likely to benefit from the special provisions proposed below? Also, should different definitions of small businesses be used for different channel blocks? For example, should the threshold for nationwide licenses be higher than the threshold for regional licenses?

b. Attribution

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[182] Specifically, for the purposes of narrowband PCS, we defined a small business as any firm, together with affiliates and certain large investors, with average gross revenues for the three preceding years of less than $40 million. *Competitive Bidding Third MO&O/Further Notice*, 10 FCC Rcd at 196, ¶ 46; *see also Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5608, ¶ 175 (establishing $40 million threshold for broadband PCS).

[183] *See 900 MHz Second Order on Reconsideration*, 11 FCC Rcd at 2700, ¶ 153.

[184] In response to our proposal for entrepreneurs' blocks in the *Competitive Bidding Third MO&O/Further Notice*, parties varied in their suggestions regarding the appropriate financial threshold for eligibility. *See* USIMTA/USIPCA Comments at 2; PCSD Reply Comments; AIDE Comments at 6.

[185] *See Competitive Bidding Third MO&O/Further Notice*, 10 FCC Rcd at 195-96, ¶ 45.

[186] *Id.*

68. Background. To ensure that only *bona fide* small businesses avail themselves of the special provisions provided to them, the narrowband PCS rules require us to consider the gross revenues of the applicant, its affiliates, and all "attributable" investors in the applicant on a cumulative basis. The attribution rules established for narrowband PCS count the gross revenues of all investors in, and affiliates of, an applicant on a cumulative, fully-diluted basis for purposes of determining whether the $40 million gross revenue threshold for small businesses has been exceeded.[187] In addition, an applicant will not qualify as a small business if any one attributable investor in, or affiliate of, the entity has $40 million or more in personal net worth.[188] There are two exceptions, however. First, applicants that meet the definition of a small business may form consortia of small businesses that, on an aggregate basis, exceed the gross revenue cap.[189] Second, if the applicant forms a "control group," the gross revenues, personal net worth, and affiliations of any investor in the applicant are not considered so long as the investor holds 25 percent or less of the applicant's passive equity, is not a member of the applicant's control group, and the control group holds at least 25 percent of the applicant's equity.[190]

69. We also established in the *Competitive Bidding Third MO&O/Further Notice* a relaxed attribution standard for women- and minority-owned businesses. Under this standard, the gross revenues or net worth of any single investor in a minority- or woman-owned small business applicant that is not a member of the applicant's control group is not attributable unless it holds more than 49.9 percent of the passive equity of the applicant. The control group must (1) own at least 50.1 percent of the applicant's equity, (2) retain control and hold at least 50.1 percent of the voting stock, and (3) consist entirely of minorities and/or women or entities 100 percent owned and controlled by minorities and/or women.[191] The gross revenues and net worth of each member of the control group and each member's affiliates are counted toward the gross revenue threshold or the individual $40 million individual net worth limitation, regardless of the size of the member's total interest in the applicant.[192] These provisions were intended to address the special problems of women and minorities in obtaining financing due, in part, to discriminatory lending practices by private financial institutions.

70. Discussion. We propose replacing the "control group" structure established for

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[187] *Competitive Bidding Third MO&O/Further Notice*, 10 FCC Rcd at 196, ¶ 47.

[188] *Id.* at 196, ¶ 46; *see also* 47 C.F.R. § 24.320(b)(2)(iv)(a).

[189] 47 C.F.R. § 24.320(b)(2)(iii).

[190] *Id.*; *see also* 47 C.F.R. § 24.320(b)(2)(iv)(a).

[191] *Competitive Bidding Third MO&O/Further Notice*, 10 FCC Rcd at 198, ¶ 49.

[192] *Id.*

narrowband PCS in the *Competitive Bidding Third Memorandum Opinion and Order* with simpler structural and control requirements. Consistent with our proposal adopted in the *Part One NPRM*, we propose that in order to determine whether an applicant qualifies as a small business in the narrowband PCS auction, we will consider the gross revenues of the small business applicant, its affiliates, and certain investors in the applicant.[193] Specifically, for purposes of determining small business status, we will attribute the gross revenues of all controlling principals in the small business applicant as well as the gross revenues of affiliates of the applicant. We also choose not to impose specific equity requirements on the controlling principals that meet our small business definition.

71. We will still require, however, that in order for an applicant to qualify as a small business, qualifying small business principals must maintain "control" of the applicant. The term "control" would include both *de facto* and *de jure* control of the applicant. For this purpose, we would borrow from certain SBA rules that are used to determine when a firm should be deemed an affiliate of a small business.[194] Typically, *de jure* control is evidenced by ownership of 50.1 percent of an entity's voting stock. *De facto* control is determined on a case-by-case basis. An entity must demonstrate at least the following indicia of control to establish that it retains *de facto* control of the applicant: (1) the entity constitutes or appoints more than 50 percent of the board of directors or partnership management committee; (2) the entity has authority to appoint, promote, demote and fire senior executives that control the day-to-day activities of the licensees; and (3) the entity plays an integral role in all major management decisions.[195] While we are not imposing specific equity requirements on the small business principals, the absence of significant equity could raise questions about whether the applicant qualifies as a *bona fide* small business. The existence of special small business provisions requires us to adopt the provisions set forth herein in order to prevent their improper use. Accordingly, we seek comment on whether we should count the gross revenues and assets only of controlling principals in the applicant to determine small business eligibility. We also seek comment on whether there is a more appropriate attribution standard for determining size.

72. We also propose to eliminate the $40 million individual net worth limitation currently applicable in our narrowband PCS rules. We eliminated the personal net worth limits for broadband PCS.[196] In that context, we determined that the obstacles faced by minorities and minority-controlled businesses in raising capital are not necessarily confined to minorities with limited personal net worth. Rather than eliminating the personal net worth

[193] *See Part One NPRM,* FCC 97-60 at ¶¶ 19-29. *See also Paging Second Report and Order,* FCC 97-59 at ¶¶ 178-181.

[194] *See* 13 C.F.R. § 121.401.

[195] *See Competitive Bidding Fifth Memorandum Opinion and Order*, 10 FCC Rcd at 447, ¶ 80.

[196] *Id.* at 421, ¶ 30.

limits for minorities only, however, we eliminated the requirement for all applicants because such limits are difficult to apply and enforce.[197] We seek comment on whether the individual net worth limitation should be eliminated for narrowband PCS.

3. Bidding Credits

73. Background. Bidding credits allow eligible designated entities to receive a payment discount for their winning bid in an auction. In the *Competitive Bidding Third Report and Order*, we determined that women and minorities would receive a 25 percent bidding credit for three nationwide channels, two regional channels, three MTA channels, and one BTA channel.[198] After considering the outcome of the nationwide narrowband auction in which no designated entities won licenses, we increased the bidding credit on the designated regional licenses from 25 percent to 40 percent.[199] In addition, we proposed in the *Competitive Bidding Third MO&O/Further Notice* to provide bidding credits in the proposed entrepreneurs' blocks that would give small businesses a 10 percent bidding credit, women and minority-owned businesses a 15 percent credit, and small businesses owned by women and minorities an aggregate credit of 25 percent.[200]

74. Discussion. Taking into account the recent *Adarand* decision and our decision to redesignate the remaining narrowband channel blocks into larger license areas, we propose to eliminate the bidding credit scheme adopted in the *Competitive Bidding Third Report and Order* and subsequently modified in the *Competitive Bidding Third MO&O/Further Notice*. We propose instead to extend a bidding credit to all small businesses on a "tiered" basis, consistent with our proposals in the *Part One NPRM*.[201] Therefore, we propose that small businesses with gross revenues of not more than $15 million for the preceding three years be entitled to a 15 percent credit and small businesses with gross revenues of not more than $40 million for the preceding three years be entitled to a 10 percent bidding credit. Bidding credits for small businesses will not be cumulative. Thus, a $15 million small business will be eligible for only a 15 percent credit, not a 25 percent credit.

75. We recognize that this proposal would enhance the competitiveness of small businesses, which will receive a bidding credit that they did not receive previously. We tentatively conclude, however, that extending the bidding credit to small businesses will achieve the objectives of Congress by providing small businesses, including women-owned

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[197] *Id.*

[198] *Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2970, ¶ 72.

[199] *Competitive Bidding Third MO&O/Further Notice*, 10 FCC Rcd at 201, ¶ 58.

[200] *Id.* at 216, ¶ 87.

[201] *See Part One NPRM*, FCC 97-60 at ¶ 40.

and minority-owned small businesses, with a meaningful opportunity to obtain licenses in the narrowband PCS auction. We tentatively conclude that the redesignation of channel blocks into larger geographic license areas would increase the value of the licenses by allowing larger firms to bid on licenses that will enable wide-area service. As a result, we believe that small businesses would require additional bidding enhancements in order to participate in the auction.

76. We further recognize that this bidding credit would be less than the bidding credit previously made available to minority- and women-owned businesses in the *Competitive Bidding Third Report and Order* and the *Competitive Bidding Third MO&O/Further Notice* (*i.e.*, 25 percent for selected nationwide and 40 percent for selected regional licenses). However, we believe that a lower bidding credit, combined with the installment payments (*see* discussion *infra* at ¶¶ 79-82) will provide sufficient opportunities for small businesses to compete for some of the licenses. Furthermore, tiered bidding credits are narrowly tailored to the varying abilities of businesses to access capital. Thus, we believe that tiering will account for the fact that smaller businesses, which often include businesses owned by minorities and women, have more difficulty accessing capital and thus need a more substantial bidding credit.

4. Payment Matters

77. Background. The current narrowband PCS rules provide installment payments for small businesses and businesses owned by members of minority groups and/or women bidding for any of the BTA, MTA, or regional narrowband PCS licenses.[202] The terms and conditions of the installment payments follow those set forth in our general Part 1 rules, entitling eligible licensees to pay their winning bid amount in installments over the term of the license, with interest charges to be fixed at the time of licensing at a rate equal to the rate for ten-year U.S. Treasury obligations. Qualified licensees would make interest-only payments during the first two years of the license term.[203]

78. In light of the *Adarand* decision, for other services we have adopted a "tiered" approach to implementing installment payment plans, which is based solely on the financial status of licensees. Most recently, in the *Paging Second Report and Order,* we adopted bidding credits and an installment payment plan for entities qualifying as small businesses.[204] In the *Broadband PCS Report and Order*, we adopted a tiered installment plan for the D, E,

[202] *Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2978, ¶ 86; *Order on Reconsideration*, 9 FCC Rcd 5306 at ¶ 8.

[203] *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5593, ¶¶ 138-39.

[204] *See Paging Second Report and Order* FCC 97-59 at ¶¶ 165-187.

and F block broadband PCS licenses, but limited the interest payment period to two years.[205] In the earlier *900 MHz Second Order on Reconsideration/Seventh Report and Order*, we adopted a tiered installment payment plan for 900 MHz SMR licensees.[206]

79. Discussion. We tentatively conclude that quarterly installment payments are appropriate for small businesses acquiring licenses for narrowband PCS. Installment payments will provide financial assistance to all small businesses. By allowing payment in installments, the government is in effect extending credit to licensees, thus reducing the amount of private financing needed prior to the auction. Such government financing will promote participation by small businesses that, because of their size and lack of access to capital, need such incentives to participate in new spectrum opportunities such as narrowband PCS.

80. The installment payment plan we propose today is consistent with the plans set out in the proposed schedule in the *Part One NPRM*.[207] Small businesses with gross revenues that do not exceed $40 million for the preceding three years would be permitted to pay interest only for the first two years of the license term at the Treasury note rate plus 2.5 percent. Very small businesses with gross revenues that do not exceed $15 million for the preceding three years would be able to make interest-only payments for two years at the Treasury note rate with an additional 1.5 percent. The rate for U.S. Treasury obligations will be determined by taking the coupon rate of interest on the ten-year U.S. Treasury notes most recently auctioned by the Treasury Department before licenses are conditionally granted. In both cases (*i.e.*, small businesses with gross revenues that do not exceed $40 million and do not exceed $15 million), payment of principal and interest will be amortized over the remaining eight years of the license term and be payable in equal, quarterly payments. Timely payment of all quarterly installments would be a condition of the license grant, and failure to make such timely payment could ultimately be grounds for revocation of the license. We seek comment on this proposal. We also seek comment on alternative installment payment plans.[208]

81. Consistent with our recent proposal in the *Part One NPRM*, we seek comment on whether we should adopt a late payment fee on any installment payment that is overdue.[209]

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[205] Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, *Report and Order*, WT Docket No. 96-59, GN Docket No. 90-314, FCC 96-278, 11 FCC Rcd 7824, ¶¶ 41-48 (1996) (*Broadband PCS Report and Order*).

[206] *900 MHz Second Order on Reconsideration*, 11 FCC Rcd at 2706, ¶ 169.

[207] *Part One NPRM*, FCC 97-60 at ¶ 36.

[208] *See generally, Market Entry Notice of Inquiry, supra*, n.5.

[209] *See Part One NPRM*, FCC 97-60 at ¶ 70.

Payments would be applied in the following order: late charges, interest charges, principal payments. Thus, a licensee who makes payment after the due date but does make payment sufficient to pay the late fee, interest, and principal (only if principal is due), will be deemed to have failed to make full payment and will be subject to license cancellation pursuant to the Commission's rules. We tentatively conclude that such a late payment provision is necessary to ensure that licensees have an adequate financial incentive to make installment payments on time. We note that licensees would continue to have 90 days before a payment is deemed delinquent but a late payment fee would be assessed during this period. We also note that in the *Part One NPRM* we proposed that where a winning bidder misses the second down payment deadline and fails to remit the required payment (plus the applicable late fee) by the end of the late payment period, it would be declared in default and subject to applicable default payments.[210] We seek comment on the applicability of this proposal within the context of narrowband PCS.

82. Under Section 1.2110(e)(4)(ii) of the Commission's rules, interest that accrues during a grace period will be amortized over the remaining term of the license.[211] Amortizing interest in this way has the effect of changing the amount of all future payments and requiring the Commission, or its designee, to generate a new payment schedule for the license. Changing the amount of the installment payment has, in turn, created uncertainty about the interest schedule, and increased the administrative burden by requiring formulation of a new amortization schedule. In order to avoid potential problems associated with changing the amount of installment payments and consistent with our proposal in the *Part One NPRM*, we propose to require all current licensees who avail themselves of the grace period to pay all fees, all interest accrued during the grace period, and the appropriate scheduled payment with the first payment made following the conclusion of the grace period.[212] We seek comment on this proposal.

5. Unjust Enrichment, Holding Period and Transfer Restrictions

83. Background. Under our current rules for narrowband PCS, licensees that receive bidding credits and installment payments, and choose to transfer their licenses to entities not eligible for these benefits, are subject to certain restrictions. Entities seeking to transfer a license acquired through a bidding credit are required to repay the amount of the bidding credit on a graduated basis until six years after the license grant.[213] Similarly, if a small business making installment payments seeks to transfer a license to a non-small business entity during the term of the license, it must pay the remaining principal balance as a

[210] *Id.* at ¶ 61.

[211] 47 C.F.R. § 1.2110(e)(4)(ii).

[212] *See Part One NPRM*, FCC 97-60 at ¶¶ 71-74.

[213] *Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2975-76, ¶80.

condition of the license transfer. The ineligible transferee would not have the benefit of installment payments.[214]

84. We later sought comment on revising these provisions in the *Competitive Bidding Third MO&O/Further Notice*. With regard to bidding credits, we proposed that if, within the original 10 year term, a licensee applies to assign or transfer control of a license to an entity that is not eligible for as high a level of bidding credit, then the assignor would be required to pay to the U.S. Treasury the difference between the bidding credit obtained by the assignor and the bidding credit for which the acquiring party would qualify as a condition of transfer. Similarly, a sale to an entity that would not qualify for bidding credits would entail full repayment of the original bidding credit as a condition of transfer.[215] With regard to installment payments, we proposed to retain the unjust enrichment provisions adopted in the *Competitive Bidding Third Report and Order* and clarified these provisions, noting that if an entity seeks to assign or transfer control of a license to an entity that does not qualify for as favorable an installment payment plan, the installment payment plan for which the acquiring entity qualifies would become effective immediately upon transfer. Thus, a higher interest rate and earlier payment of principal may begin to be applied.[216]

85. In the *Competitive Bidding Third MO&O/Further Notice*, we also proposed that entrepreneurs' block licensees be prohibited from voluntarily assigning or transferring control of their licenses for a period of three years from the date of grant.[217] We asked commenters whether, for the next two to seven years of the license term, we should permit the licensee to assign or transfer control of its authorization only to an entity that satisfies the entrepreneurs' blocks entry criteria. During this limited transfer period, licensees would continue to be bound by the financial eligibility requirements, and a transferee or assignee who receives an entrepreneurs' block license during this period would remain subject to the transfer restrictions for the balance of the holding period.[218] We recognized that in order to provide significant opportunities for entrepreneurs and small businesses, applicants require flexibility. We were concerned, however, that such flexibility would undermine the more fundamental objective to ensure that designated entities retain *de facto* and *de jure* control of their companies. Thus, we proposed a holding and limited transfer period to address this concern.[219]

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[214] *Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2979, ¶ 89. This approach also was adopted for the 900 MHz SMR service. *See 900 MHz Second Order on Reconsideration*, 11 FCC Rcd at 2707-8, ¶¶ 173-74.

[215] *Competitive Bidding Third MO&O/Further Notice.*, 10 FCC Rcd at 217, ¶ 91.

[216] *Id.* at 220, ¶ 98.

[217] *Id.* at 214-15, ¶ 85.

[218] *Id.*

[219] *Id.*

86. Discussion. We now seek further comment on the applicability of unjust enrichment, assignment, and transfer restrictions to our proposed narrowband PCS rules, as they apply to designated entities. We tentatively conclude that the unjust enrichment provisions already applicable to narrowband PCS will ensure that large businesses do not become the unintended beneficiaries of provisions intended to benefit small firms. We thus propose unjust enrichment restrictions as applied to bidding credits and installment payments, similar to the existing restrictions for narrowband PCS. Specifically, we propose that if a small business that has received bidding credits or is making installment payments seeks to transfer a license to a non-small business entity during the term of the license, it will be required to reimburse the government for the amount of the bidding credit plus interest or the remaining principal balance on the license, respectively, as a condition of the license transfer. We seek comment on this proposal. We also seek comment on whether we should eliminate the service-specific unjust enrichment rule for narrowband PCS in favor of the rule proposed in our *Part One NPRM*, which conforms with our broadband PCS unjust enrichment rules.[220] Furthermore, in light of our decision not to establish an entrepreneurs' block for narrowband PCS, we tentatively conclude that it is not necessary to propose holding and transfer restrictions for the licenses. We seek comment on this tentative conclusion.

6. Partitioning

87. Background. We recently adopted a detailed framework for revising the geographic partitioning and spectrum disaggregation rules for broadband PCS.[221] In particular, we modified our rules to (1) allow broadband PCS licensees in the non-entrepreneurs' blocks to partition any portion of their license area or disaggregate any portion of their spectrum post-auction to entities that are eligible to be a broadband licensee, (2) allow entrepreneurs' block licensees to partition and/or disaggregate during the first five years of the license term any portion of their licensed geographic area and/or spectrum post-auction to entities that qualify as "entrepreneurs" and are eligible to be broadband PCS licensees, (3) establish license term provisions that permit partitioned license holders (partitionees) to hold partitioned licenses for the duration of the original ten year license term, and (4) establish flexible construction requirements to ensure expedient access to broadband PCS service in partitioned areas. We concluded that these rules would facilitate the efficient use of the broadband PCS spectrum, increase competition, and expedite the provision of broadband PCS service to areas that may not otherwise receive broadband PCS or other wireless services in the near term.[222]

88. Discussion. In light of our proposal to redesignate narrowband PCS MTA and

[220] *Part One NPRM*, FCC 97-60 at ¶ 43.

[221] *See Partitioning and Disaggregation Report and Order*, FCC 96-474.

[222] *Id.* at ¶ 1.

BTA channel blocks to create larger service areas (*see* discussion *supra* at ¶¶ 29-32), we believe that a partitioning proposal for narrowband PCS is warranted. We propose a geographic partitioning scheme similar to that adopted for broadband PCS. Under this proposal, anyone eligible to be a narrowband PCS licensee (*i.e.,* "qualifying entity") would be allowed to acquire a partitioned license. This more liberal partitioning policy would allow spectrum to be used more efficiently, speed service to underserved areas, and increase competition.[223] We seek comment on this proposal. Specifically, we seek comment on whether a partitioning scheme should be available to all qualifying entities, or limited to rural telephone companies as in the initial broadband PCS rules.

89. We propose to allow all narrowband PCS licensees to partition at any time to any entity eligible for an narrowband PCS license. We note that small businesses and others may face certain barriers to entry into the provision of spectrum-based services which, we believe, may be addressed by changes in our partitioning rules. We tentatively conclude that providing narrowband PCS licensees with the flexibility to partition their geographic service areas would create smaller areas that could be licensed to small businesses, including those entities which previously may not have had the resources to participate successfully in spectrum auctions. We also tentatively conclude that partitioning may provide a funding source that would enable licensees to construct their systems and provide the latest in technological enhancements to the public.[224] We seek comment on these tentative conclusions. In particular, commenters are invited to address whether the partitioning scheme will help eliminate market entry barriers for small businesses pursuant to Section 257 of the Communications Act.[225]

90. We further propose that a partitionee be authorized to hold its license for the remainder of the original ten-year license term. We tentatively conclude that this term is appropriate because a licensee, through partitioning, should not be able to confer greater rights than it was awarded under the terms of its license grant.[226] We solicit comment on this proposal.

91. We seek comment on what should be the respective obligations of the participants in a partitioning arrangement. First, with respect to scope of narrowband PCS partitioned areas, we tentatively conclude that a flexible approach, similar to the one we adopted for broadband PCS, is appropriate for narrowband PCS licenses. Therefore, we propose to permit partitioning of narrowband PCS licenses based on any geographic area defined by the parties to a partitioning arrangement. We seek comment on this proposal, and in particular on

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[223] 47 C.F.R. § 257.

[224] *See Partitioning and Disaggregation Report and Order,* FCC 96-474.

[225] 47 U.S.C. § 257.

[226] *See* 47 C.F.R. § 24.15 (establishing 10-year licensing term for PCS).

whether this proposal is consistent with our licensing of narrowband PCS spectrum, and whether there are any technical or other issues unique to narrowband PCS that might impede the adoption of a flexible approach to defining partitioned license areas.

92. Second, with respect to construction requirements, we seek comment as to which party should be held responsible for satisfying outstanding construction requirements. In this *Further Notice,* we have proposed construction requirements for geographic narrowband PCS licensees at the five-year and ten-year benchmarks, including a "substantial service" benchmark. In the *Partitioning and Disaggregation Report and Order*, we adopted two construction options for partitioning broadband PCS licensees which give the parties the flexibility to choose how to apportion the responsibility to build out the partitioned license areas. We tentatively conclude that a similar approach is appropriate for the narrowband PCS context. Thus, we propose two options for meeting the applicable narrowband PCS construction requirements in a partitioning arrangement: (1) the partitionee can certify that it will satisfy the same construction requirements as the original licensee with the partitionee meeting the requirements in its partitioned area and the partitioner being responsible for satisfying the requirements in the area it has retained; or (2) the original licensee can certify that it has already met or will meet its five-year construction requirement and that it will meet the 10-year requirement for the entire market involved. We also propose to require that the parties to such partitioning arrangements file supporting documentation showing compliance with the applicable construction requirements. We seek comment on these proposals. We also seek comment on whether, and if so, how the option of partitioning could be extended to incumbent narrowband PCS licensees as well.

93. Consistent with our rules for broadband PCS, we propose to establish separate installment payment and default obligations for the small business licensees and partitionees.[227] When a licensee paying its winning bid through installment payments partitions to a party that would qualify for installment payments, the partitionee will be permitted to make installment payments of its *pro rata* portion of the remaining government obligation. The payments will be based on the ratio of the population of the partitioned area to the population of the entire license area calculated on the latest available census data. Partitionees that do not qualify for installment payments will be required to pay their entire *pro rata* share with 30 days of the Public Notice conditionally granting the partitioning transaction. We request comment on our proposals.

94. We also propose that in cases where a licensee that has qualified as a small business has received a bidding credit partitions a portion of its licenses to an entity that would not meet the eligibility standards for a bidding credit, we will require that the licensee reimburse the government for the amount of the bidding credit calculated on a proportional basis based on the ratio of the population. If a small business licensee that received a bidding credit partitions to an entity that would qualify for a lower bidding credit, we will require that

[227] *See Partitioning and Disaggregation Report and Order,* FCC 96-474 at ¶¶ 31-36.

the licensee reimburse the government for the difference between the amount of the bidding credit obtained by the licensee and the bidding credit for which the partitionee is eligible calculated on a proportional basis based upon the ratio of population of the partitioned area. We request comment on our proposal.

95. We also seek comment on the type of unjust enrichment requirements that should be placed as a condition for approval of an application for a partial transfer of a license owned by a qualified small business to a non-small business entity. We tentatively conclude that these unjust enrichment provisions would include accelerated payment of bidding credits, unpaid principal, and accrued unpaid interest, and would be applied on a proportional basis. We seek comment on how such unjust enrichment amounts should be calculated, especially in light of the difficulty of devising a methodology or formula that will differentiate the relative market value of the opportunities to provide service to various partitioned areas within a geographic or market area. We seek comment on whether we should consider the price paid by the partitionee in determining the percentage of the outstanding principle balance to be repaid.

7. Disaggregation

96. We seek comment on the feasibility of spectrum disaggregation for narrowband PCS. Commenters should provide technical justifications and other relevant support in responding to this issue. Commenters should address whether minimum disaggregation standards are necessary for narrowband PCS services. Commenters should also address whether we should permit nationwide licensees to disaggregate spectrum.

97. We also seek comment on what the respective obligations of the participants in a disaggregation transfer should be, and whether each party should be required to guarantee a proportionate amount of the disaggregator's original auctions-related obligation in the event of default or bankruptcy by any of the parties to the disaggregation transfer. We seek comment on whether the disaggregator (the original licensee) should have an continuing obligation with respect to the entire initial license. Alternatively, should the parties have available a choice of options, ranging from an accelerated payment based on purchase price to a guarantee for a larger payment by one party in the event another party defaults? Parties are invited to comment on whether the disaggregating parties should be able to determine which party has a continuing obligation with respect to the original license area.

98. We propose to allow all small business licensees to disaggregate to similarly qualifying parties as well as parties not eligible for small business provisions. We tentatively conclude that if we permit a qualified small business licensee to disaggregate to a non-small business entity, the disaggregating licensee should be required to repay any benefits it received from the small business special provisions on a proportional basis. This would include accelerated payment of bidding credits, unpaid principal, and accrued unpaid interest. We seek comment on how such repayment amounts should be calculated. We also seek comment on whether we should consider the price paid by the disaggregatee in determining

the percentage of the outstanding principal balance to be repaid.

99. We tentatively conclude that if we permit a small business licensee to disaggregate to another qualified small business that would not qualify for the same level of bidding credit as the disaggregating licensee, the disaggregating licensee should be required to repay a portion of the benefit it received. We seek comment on how that amount should be calculated. Finally, we seek comment on what provisions, if any, we should adopt to address the situation of a small business licensee's disaggregation followed by default in payment of a winning bid at auction.

E. Ownership Disclosure Requirements

100. Background. The rules for narrowband PCS currently require applicants to disclose on their short-form applications (FCC Form 175) and long-form applications (FCC Form 600) certain ownership information. Section 24.413(a) of our rules provides that parties filing the short-form application to participate in the narrowband PCS auction and auction winners filing the long-form application shall include in an exhibit, *inter alia,* (1) a list of its subsidiaries, if any,[228] (2) a list of its affiliates, if any,[229] and (3) in the case of partnerships, the name and address of each partner, each partner's citizenship and the share or interest participation in the partnership, and a signed and dated copy of the partnership agreement.[230]

101. The broadband PCS rules similarly contained ownership disclosure requirements for both the short-form and long-form applications.[231] We waived the five percent ownership disclosure requirements, however, for the broadband PCS A, B, and C block auctions.[232] In

[228] "Subsidiary" means any business five percent or more whose stock, warrants, options or debt securities are owned by the applicant or an officer, director, stockholder or key management personnel of the applicant. 47 C.F.R. § 24.413(a)(1).

[229] "Affiliate" means any business which holds a five percent or more interest in the applicant, or any business in which a five percent or more interest is held by another company which holds a five percent interest in the applicant. 47 C.F.R. § 24.413(a)(2).

[230] 47 C.F.R. § 24.413(a).

[231] *See* 47 C.F.R. §§ 24.813(a)(1), (2), (4).

[232] *See* Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Order*, PP Docket No. 93-253, DA No. 94-1198 (rel. Oct. 25, 1994) (waiving certain ownership disclosure and partnership agreement disclosure requirements of 47 C.F.R. § 24.813(a) for short-form applications to be filed for A and B block licenses) ("*Waiver Order I*"); Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Order*, PP Docket No. 93-253, DA No. 95-507 (rel. Mar. 22, 1995) (waiving certain ownership disclosure for long-form applications to be filed for A and B block licenses) ("*Waiver Order II*"); Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Order*, PP Docket No. 93-253, DA No. 95-1130 (rel. May 19, 1995) (waiving certain ownership disclosure and partnership agreement disclosure requirements of 47 C.F.R. § 24.813(a) for short-form applications to be filed for C block licenses) ("*Waiver Order III*").

that context, we reasoned that requiring applicants to list all businesses in which each attributable stockholder owns at least 5 percent would necessitate reporting of interests in firms with no relation to the services for which licenses are being auctioned, and for many companies, particularly investment firms with diverse holdings, might be extremely burdensome. We therefore waived Sections 24.813(a)(1) and 24.813(a)(2) of the rules. Disclosure of direct, attributable ownership interests in other CMRS licensees or applicants, however, is still required under Section 20.6 of the Commission's rules. Similarly, we waived the requirement that partnerships submit a signed and dated copy of partnership agreements with the short-form application.[233] In waiving this requirement, we noted that partnership agreements often discuss strategic business objectives and financial and business obligations, including bidding strategies, which might be highly sensitive.

102. Discussion. We propose to modify the ownership disclosure requirements for narrowband PCS as we modified those requirements for broadband PCS through waiver. Consistent with our proposal for a uniform ownership disclosure requirement in our general competitive bidding rules, we tentatively conclude that relaxing the disclosure requirements in this regard serves the public interest by reducing the administrative burdens associated with the auction process.[234] We seek comment on this proposal. Furthermore, we seek comment on whether a separate schedule to the FCC Form 175 should be designed, which would formalize the ownership disclosure requirements for the short-form application that are presently reported in separate exhibits to the FCC Form 175.

F. Construction Prior to Grant of Licenses for Narrowband and Broadband PCS

103. Background. In the *Third Report and Order* in GN Docket No. 93-252, we determined that all commercial mobile radio service applicants should be subject to the same rules governing the construction of facilities prior to grant of pending applications.[235] We later clarified that such rules would extend to successful broadband PCS bidders that had filed a long-form application.[236] Thus, 35 days after the date of the Public Notice announcing the Form 600 applications accepted for filing, PCS applicants listed therein may, at their own risk, commence construction of facilities, provided that 1) no petitions to deny the application have been filed; 2) the application does not contain a request for a rule waiver; 3) the

[233] *See Waiver Order III*, at ¶ 6 (waiving partnership agreement disclosure requirement for short-form applications for C block licenses); *Waiver Order I*, at ¶ 5 (waiving partnership agreement disclosure requirement for short-form applications for A and B block licenses).

[234] *See Part One NPRM*, FCC 97-60 at ¶¶ 51-52.

[235] *CMRS Third Report and Order*, 9 FCC Rcd at 8153. There, we extended the pre-grant construction rule applicable to Part 22 licensees to all CMRS providers. *See* 47 C.F.R. § 22.143.

[236] *See Public Notice*, "Personal Communications Service Information, Broadband," Report No. CW-95-02 (rel. Apr. 12, 1995).

applicant complies fully with the antenna structure provisions of 47 C.F.R. §§ 24.416, 24.816, including FAA notification and Commission filing requirements; 4) the application indicates that the facilities for which construction is commenced would not have a significant environmental effect (*see* 47 C.F.R. §§ 24.413(f), 24.813(f)); and 5) international coordination of the facility for which construction is commenced is not required.[237]

104. Discussion. We propose to modify our pre-licensing construction requirements for both broadband and narrowband PCS in order to expedite service to the public.[238] Specifically, we propose that long-form applicants may begin construction of facilities at their own risk regardless of whether petitions to deny have been filed. In adopting pre-grant construction rules for CMRS applicants in general, we favored a more liberal approach, urged by the industry's comments that granting applicants authority to engage in pre-grant construction could advance the date on which the public receives service.[239] We continue to believe that liberal pre-grant construction rules could speed the deployment of services to the public. We also believe that applicants that begin construction pursuant to these provisions before receiving a final license grant do so at their own risk and, thus, they assume the risk that their licenses may not be granted as a result of pending petitions to deny. We propose to retain the remaining restrictions, however, in light of the specific public interest considerations they promote. We seek comment on these tentative conclusions and proposals.

VI. CONCLUSION

105. We believe that the rules and proposals set forth for narrowband PCS in this *Report and Order and Further Notice of Proposed Rulemaking* will promote the public policy goals set forth by Congress. We conclude that we will auction three nationwide licenses, three regional licenses and three MTA licenses in each geographic area. In addition, eight response channels, four designated as regional licenses and four designated as MTA licenses, will be offered by auction.

VII. PROCEDURAL MATTERS

A. Regulatory Flexibility Act

106. The Final Regulatory Flexibility Analysis, pursuant to the Regulatory Flexibility Act, 5 U.S.C. Section 604, is contained in Appendix E. The Initial Regulatory Flexibility Analysis, pursuant to the Regulatory Flexibility Act, 5 U.S.C. Section 603, is contained in Appendix D. Written public comments are requested on the Initial Regulatory Flexibility

[237] *Id.*

[238] *Part One NPRM*, FCC 97-60 at ¶ 104.

[239] *CMRS Third Report and Order*, 9 FCC Rcd at 8152-53, ¶ 376.

Analysis These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Further Notice of Proposed Rulemaking*, but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Secretary shall send a copy of this *Report and Order and Further Notice of Proposed Rulemaking*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with the Regulatory Flexibility Act. *See* 47 U.S.C. § 603(a).

B. Ex Parte Rules -- Non-Restricted Proceeding

107. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

C. Initial Paperwork Reduction Act of 1995 Analysis

108. This *Further Notice* contains either a proposed or modified information collection. As part of its continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget ("OMB") to take this opportunity to comment on the information collections contained in this *Report and Order and Further Notice*, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due at the same time as other comments on this *Further Notice*; OMB comments are due 60 days from the date of publication of this *Further Notice* in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

D. Comment Dates

109. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before June 18, 1997, and reply comments on or before July 7, 1997. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center of the Federal Communications Commission, Room 239, 1919 M Street, N.W., Washington, D.C. 20554.