E. Ordering Clauses

110. Accordingly, IT IS ORDERED that Part 24 of the Commission's Rules IS AMENDED as specified in Appendix A, effective 60 days after publication in the Federal Register.

111. IT IS FURTHER ORDERED that the Petitions for Reconsideration of the *Second Memorandum Opinion and Order* in GN Docket 90-314 and ET Docket 92-100 filed by AirTouch Paging, PCIA, and the Puerto Rico Telephone Company, and the responses to the Petitions for Reconsideration filed by PageMart, Inc., Pegasus Communications, Inc., the Puerto Rico Telephone Company, and Radiofone Nation-wide Paging Services, Inc. ARE DISMISSED.

112. Authority for issuance of this *Report and Order and Further Notice of Proposed Rulemaking* is contained in Section 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).

F. Contacts for Information

113. For further information concerning this proceeding, contact Mark Bollinger or Alice Elder at (202) 418-0660 (Wireless Telecommunications Bureau, Auctions Division) or David Furth or Rhonda Lien at (202) 418-0620 (Wireless Telecommunications Bureau, Commercial Wireless Division).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A -- FINAL RULES

Part 24 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

Part 24 -- PERSONAL COMMUNICATIONS SERVICES

1. The authority citation for Part 24 continues to read as follows:

AUTHORITY: Secs. 4, 301, 302, 303, 309, and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. §§ 154, 301, 302, 303, 309 and 332, unless otherwise noted.

* * * * *

2. Section 24.132 is revised to read as follows:

§ 24.132 Power and antenna height limits.

* * * * *

Paragraphs (d) and (e) are revised as follows:

(d) MTA and regional base stations located between 200 kilometers (124 miles) and 80 kilometers (50 miles) from their licensed service area border are limited to the power levels in the following table:

Antenna HAAT in meters (feet) (see § 24.53 for HAAT HAAT calculation method)	Effective radiated power (e.r.p.) (watts)
183 (600) and below	3500
183 (600) to 208 (682)	3500 to 2584
208 (682) to 236 (775)	2584 to 1883
236 (775) to 268 (880)	1883 to 1372
268 (880) to 305 (1000)	1372 to 1000
305 (1000) to 346 (1137)	1000 to 729
346 (1137) to 394 (1292)	729 to 531
394 (1292) to 447 (1468)	531 to 387
447 (1468) to 508 (1668)	387 to 282
508 (1668) to 578 (1895)	282 to 206
578 (1895) to 656 (2154)	206 to 150
656 (2154) to 746 (2447)	150 to 109
746 (2447) to 848 (2781)	109 to 80
848 (2781) to 963 (3160)	80 to 58
963 (3160) to 1094 (3590)	58 to 42
1094 (3590) to 1244 (4080)	42 to 31
1244 (4080) to 1413 (4636)	31 to 22
Above 1413 (4636)	16

For heights between the values listed above, linear interpolation shall be used to determine maximum e.r.p.

(e) MTA, BTA and regional base stations located less than 80 kilometers (50 miles) from the licensed service area border must limit their effective radiated power in accordance with the following formula:

PW = 0.0175 x dkm**6.6666 x hm**-3.1997

PW is effective radiated power in watts.
dkm is distance in kilometers.
hm is antenna HAAT in meters; see § 24.53 for HAAT calculation method.

* * * * *

3. Section 24.320(e) is revised to read as follows:

§ 24.320 Definitions.

(a) * * * * *
(b) * * * * *
(c) * * * * *

(d) * * * * *

(e) *Members of Minority Groups. Members of minority groups* include Blacks, Hispanics, American Indians, Alaskan Natives, Asians and Pacific Islanders.

* * * * *

APPENDIX B -- PROPOSED RULES

Part 24 -- PERSONAL COMMUNICATIONS SERVICES

Part 24 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

Subpart C - Technical Standards

1. Add a new section 24.54, as follows:

§ 24.54 Construction Prior to License Grant.

Applicants may construct facilities prior to grant of their licenses, subject to the provisions of this section, but must not operate such facilities until the Commission grants a final license. If the conditions stated in this section are not met, applicants must not begin to construct facilities.

(a) *When applicants may begin construction.* An applicant may begin construction of a facility thirty-five (35) days after the date of the Public Notice listing the long form (FCC Form 600) application for that facility as acceptable for filing.

(b) *Notification to stop.* If the Commission for any reason determines that construction should not be started or should be stopped while an application is pending, and so notifies the applicant, orally (followed by written confirmation) or in writing, the applicant must not begin construction or, if construction has begun, must stop construction immediately.

(c) *Assumption of risk.* Applicants that begin construction pursuant to this section before receiving a final license grant do so at their own risk and have no recourse against the United States for any losses resulting from:

(1) Applications that are not granted;
(2) Errors or delays in issuing Public Notices;
(3) Having to alter, relocate, or dismantle the facility; or
(4) Incurring whatever costs may be necessary to bring the facility into compliance with applicable laws, or Commission rules and orders.

(d) *Conditions.* Except as indicated, all pre-grant construction is subject to the following conditions:

(1) The application is not mutually exclusive with any other application. Applicants whose FCC Form 600 applications have been accepted for filing will have satisfied this condition;
(2) The application does not include a request for a waiver of one or more Commission rules;

(3) The applicant complies fully with the antenna structure provisions of 47 C.F.R. §§ 24.416, 24.816, and for any construction or alteration that would exceed the requirements of § 17.7 of this chapter, the applicant has notified the appropriate Regional Office of the Federal Aviation Administration (FAA Form 7460-1), filed a request for antenna height clearance and obstruction marking and lighting specifications (FCC Form 854) with the Commission;

(4) The applicant has indicated in the application that the proposed facility would not have a significant environmental effect, in accordance with §§ 1.301 *et seq.*; and,

(5) Under applicable international agreements and rules in this part, individual coordination of the proposed channel assignment(s) with a foreign administration is not required.

* * * * *

Subpart D - Narrowband PCS

2. Section 24.103(d) is revised to read as follows:

§ 24.103 Construction requirements.

(a) * * * * *

(b) * * * * *

(c) * * * * *

(d) As an alternative to the coverage requirements in paragraphs (a), (b) and (c), the narrowband PCS licensee may demonstrate that, no later than five years after the initial grant of its narrowband PCS authorization, it provides substantial service to the narrowband PCS license area. "Substantial service" means service that is sound, favorable, and substantially above a level of mediocre service that would barely warrant renewal.

* * * * *

3. Section 24.129 is revised to read as follows:

Sec. 24.129 Frequencies.

The following frequencies are available for narrowband PCS. All licenses on channels indicated with an (**) will be eligible for bidding credits as set forth in Section 24.309(b) of this Part if competitive bidding is used to award such licenses.

(a) * * * * *

(b) * * * * *

(c) Seven frequencies are available for assignment on a nationwide, regional, and MTA basis as follows:

(1) Two 50 kHz channels paired with 50 kHz channels are available for assignment on a nationwide basis:

Channel 18: 940.35-940.40 and 901.35-901.40 MHz; and,
Channel 19: 940.40-940.45 and 901.40-901.45 MHz.**

(2) One 50 kHz channels paired with 12.5 kHz channels is available for assignment on an MTA basis as follows:

Channel 20: 930.75-930.80 and 901.8375-901.8500 MHz.**

(3) Two 50 kHz channels paired with 12.5 kHz channels are available for assignment on a regional basis as follows:

Channel 21: 930.80-930.85 and 901.8500-901.8625 MHz; and,
Channel 22: 930.85-930.90 and 901.8625-901.8750 MHz.**

(4) Two 50 kHz unpaired channels are available for assignment on an MTA basis as follows:

Channel 23: 940.90-940.95 MHz; and,
Channel 24: 940.95-941.00 MHz.**

(d) Two 50 kHz channels paired with 12.5 kHz channels are available for assignment on a nationwide and regional basis:

(1) One 50 kHz channel paired with a 12.5 kHz channel is available for assignment on a regional basis as follows:

Channel 25: 930.90-930.95 and 901.8750-901.8875 MHz;** and,

(2) One 50 kHz channel paired with a 12.5 kHz channel is available for assignment on a nationwide basis as follows:

Channel 26: 930.95-931.00 and 901.8875-901.9000 MHz.**

* * * * *

4. Section 24.130 is revised to read as follows:

§ 24.130 Paging response channels.

(a) The channels listed in paragraphs (b) and (c) of this section are available to all potential bidders. All qualified potential bidders are eligible to bid for any response channel in any MTA or regional license. Until two years after the date of initial license grant, winning bidders are limited to a maximum of two response channels within the same geographic area. Licenses for paging response channels are not counted toward the multiple ownership restrictions of Section 24.101.

(b) The following four 12.5 kHz unpaired channels are available for assignment on a MTA basis:

A: 901.9000-901.9125 MHz;
B: 901.9125-901.9250 MHz;
C: 901.9250-901.9375 MHz; and
D: 901.9375-901.9500 MHz.

(c) The following four 12.5 kHz unpaired channels are available for assignment on a regional basis:

E: 901.9500-901.9625 MHz;
F: 901.9625-901.9750 MHz;
G: 901.9750-901.9875 MHz; and
H: 901.9875-902.0000 MHz.

* * * * *

Subpart F - Competitive Bidding Procedures for Narrowband PCS

5. Section 24.309 is revised to read as follows:

§ 24.309 Designated entity provisions

(a) Designated entities entitled to preferences in the narrowband PCS service are small businesses and very small businesses as defined in § 24.320(b).
(b) Designated entities that are winning bidders for narrowband PCS licenses will be eligible for certain special provisions as follows:
(1) *Installment payments.*
Each winning bidder that qualifies as a small business, a very small business or a consortium of small businesses, as defined in § 24.320, and is a winning bidder for licenses may pay the remaining 90 percent of the net auction price for the license in quarterly installment payments made each year pursuant to § 1.2110(e) of this Chapter. Payments shall include both principal

and interest amortized over the term of the license. A license issued to an eligible small business that elects installment payments will be conditioned on the full and timely performance of the license holder's quarterly payments. The additional following terms apply:
(i) An eligible licensee qualifying as a very small business under Section 24.320(b)(2) may make interest-only payments for two years. Interest will accrue at the Treasury note rate plus an additional 1.5 percent. Payments of interest and principal shall be amortized over the remaining eight years of the license term.
(ii) An eligible licensee qualifying as a small business under Section 24.320(b)(1) may make interest-only payments for two years. Interest will accrue at the Treasury note rate plus an additional 2.5 percent. Payments of interest and principal shall be amortized over the remaining eight years of the license term.

(2) *Bidding Credits.* A winning bidder that qualifies as a small business or a consortium of small businesses, as defined in § 24.320(b)(2), may use a bidding credit of 10 percent to lower the cost of its winning bid. A winning bidder that qualifies as a very small business or a consortium of very small businesses, as defined in § 24.320(b)(1) may use a bidding credit of 15 percent to lower the cost of its winning bid.

(c) *Short-Form Application Certification; Long-Form Application Disclosure.*
(1) All applicants for licenses under the designated entity provisions set forth in this section shall certify on their short-form applications (FCC Form 175) that they are eligible for those preferences pursuant to this section.
(2) In addition to the requirements in subpart I, all designated entity applicants that are winning bidders shall, in an exhibit to their long-form applications--
(i) Disclose separately and in the aggregate the gross revenues, computed in accordance with § 24.320, for each of the following: the applicant; the applicant's affiliates; the applicant's attributable investors, affiliates of its attributable investors, and, if a consortium of small businesses, the members of the joint venture;
(ii) List and summarize all agreements or other instruments (with appropriate references to specific provisions in the text of such agreements and instruments) that support the applicant's eligibility as a small business, including the establishment of *de facto* and *de jure* control; such agreements and instruments include articles of incorporation and bylaws, shareholder agreements, voting or other trust agreements, franchise agreements, and any other relevant agreements (including letters of intent), oral or written; and
(iii) List and summarize any investor protection agreements, including rights of first refusal, supermajority clauses, options, veto rights, and rights to hire and fire employees and to appoint members to boards of directors or management committees.

(d) *Audits.*
(1) Applicants and licensees claiming eligibility under this section shall be subject to random audits by the Commission.
(2) Consent to such audits is part of the certification included in the short- form application (FCC Form 175). Such consent shall include consent to the audit of the applicant's or

licensee's books, documents and other material (including accounting procedures and practices) regardless of form or type, sufficient to confirm that such applicant's or licensee's representations are, and remain, accurate. Such consent shall include inspection at all reasonable times of the facilities, or parts thereof, engaged in providing and transacting business, or keeping records regarding licensed narrowband PCS service and shall also include consent to the interview of principals, employees, customers and suppliers of the applicant or licensee.

(e) *Definitions.* The terms affiliate, consortium of small businesses, gross revenues, small business and very small business used in this section are defined in § 24.320.

(f) * * * * *

* * * * *

6. A new Section 24.310 is added, to read as follows:

§ 24.310 Eligibility for Licenses under Designated Entity Provisions

(a) *General Rule.* Authorizations will be granted upon proper application if:
(1) The applicant is qualified under the applicable laws and the regulations, policies and decisions issued under those laws;
(2) There are frequencies available to provide satisfactory service; and
(3) The public interest, convenience or necessity would be served by a grant.

(b) *Records Maintenance.* All applicants, including those that are winning bidders, shall maintain at their principal place of business an updated file of ownership, revenue and asset information, including any documents necessary to establish eligibility under this section or under the definition of *small business.* Licensees (and their successors in interest) shall maintain such files for the term of the license. Applicants that do not obtain the license(s) for which they applied shall maintain such files until the grant of such license(s) is final, or one year from the date of the filing of their short-form application (Form 175), whichever is earlier.

(c) *Audits.*
(1) Applicants and licensees claiming eligibility under this section or shall be subject to audits by the Commission, using in- house and contract resources. Selection for audit may be random, on information, or on the basis of other factors.
(2) Consent to such audits is part of the certification included in the short- form application (FCC Form 175). Such consent shall include consent to the audit of the applicant's or licensee's books, documents and other material (including accounting procedures and practices) regardless of form or type, sufficient to confirm that such applicant's or licensee's representations are, and remain, accurate. Such consent shall include inspection at all reasonable times of the facilities, or parts thereof, engaged in providing and transacting

business, or keeping records regarding licensed narrowband PCS service and shall also include consent to the interview of principals, employees, customers and suppliers of the applicant or licensee.

(d) *Definitions.* The terms *affiliate, consortium of small businesses, gross revenues, publicly traded corporation with widely dispersed voting power, small business, very small business and total assets* used in this section are defined in § 24.320.

* * * * *

7. A new Section 24.311 is added, to read as follows:

§ 24.311 Geographic Partitioning and Spectrum Disaggregation; Unjust Enrichment; Construction Requirements

(a) *Eligibility*
(1) Parties seeking approval for partitioning and disaggregation shall request an authorization for partial assignment of license pursuant to § 24.439.

(b) *Technical Standards*

(1) *Partitioning.* In the case of partitioning, requests for authorization for partial assignment of a license must include, as attachments, a description of the partitioned service area and a calculation of the population of the partitioned service area and the licensed geographic service area. The partitioned service area shall be defined by coordinate points at every 3 seconds along the partitioned service area unless an FCC recognized service area is utilized (i.e., Major Trading Area, Basic Trading Area, Metropolitan Service Area, rural Service Area or Economic Area) or county lines are followed. The geographic coordinates must be specified in degrees, minutes, and second to the nearest second of latitude and longitude and must be based upon the 1927 North American Datum (NAD27). Applicants may supply geographical coordinates based on the 1983 North American Datum (NAD83) in addition to those required (NAD27). In the case where an FCC recognized service area or county lines are utilized, applicants need only list the specific area(s) (through use of FCC designations or county names) that constitute the partitioned area.

(2) *Disaggregation.* Spectrum maybe disaggregated in any amount.

(3) *Combined Partitioning and Disaggregation.* The Commission will consider requests for partial assignments of licenses that propose combinations of partitioning and disaggregation.

(c) *Unjust Enrichment*
(1) *General.* Designated entities using installment plans and/or bidding credits to obtain narrowband license(s) and partition the license(s) or disaggregate their spectrum to entities not meeting the eligibility standards for installment payments, will be subject to the following

unjust enrichment provisions:
(2) *Apportioning Unjust Enrichment Payments.* Unjust enrichment payments for partitioned license areas shall be calculated based upon the ratio of the population of the partitioned license area to the overall population of the license area and by utilizing the most recent census data. Unjust enrichment payments for disaggregated spectrum shall be calculated based upon the ratio of the amount of spectrum disaggregated to the amount held by the licensee.

(d) *Installment Payments.*
(1) *Apportioning the Balance on Installment Payment Plans.* When a winning bidder elects to pay for its license through an installment payment plan pursuant to §§ 1.2110(e) or 24.309(1), and partitions its licensed area or disaggregates spectrum to another party, the outstanding balance owed by the licensee on its installment payment plan (including accrued and unpaid interest) shall be apportioned between the licensee and partitionee or disaggregatee. Both parties will be responsible for paying their proportionate share of the outstanding balance to the U.S. Treasury. In the case of partitioning, the balance shall be apportioned based upon the ratio of the population of the partitioned area to the population of the original license area calculated on the latest available census data. In the case of disaggregation, the balance shall be apportioned based on the ration of the amount of spectrum disaggregated to the amount of spectrum allocated to the license area.

(2) *Parties Not Qualified For Installment Payment Plans.*
(i) When a winning bidder elects to pay for its license through an installment payment plan, and partitions its license or disaggregates spectrum to another party that would not qualify for an installment payment plan or elects not to pay for its share of the license through installment payments, the outstanding balance owed by the licensee (including accrued and unpaid interest) shall be apportioned according to 24.311(d)(1).

(ii) The partitionee or disaggregatee shall, as a condition of the approval of the partial assignment application, pay its entire *pro rata* amount within 30 days of Public Notice conditionally granting the partial assignment application. Failure to meet this condition will result in a rescission of the grant of the partial assignment application; *or*

(iii) The licensee shall be permitted to continue to pay its *pro rata* share of the outstanding balance and shall receive new financing documents (promissory note, security agreement) with a revised payment obligation, based on the remaining amount of time on the original installment payment schedule. These financing documents will replace the licensee's existing financing documents which shall be marked "superseded" and returned to the licensee upon receipt of the new financing documents. The original interest rate, established pursuant to § 1.2110(e)(3)(i) at the time of the grant of the initial license in the market, shall continue to be applied to the licensee's portion of the remaining government obligation.

(iv) A default on the licensee's payment obligation will only affect the licensee's portion of the market.

(3) *Parties Qualified For Installment Payment Plans.*
(i) Where both parties to a partitioning or disaggregation agreement qualify for installment payments, the partitionee or disaggregatee will be permitted to make installment payments on its portion of the remaining government obligation.
(ii) Each party will be required, as a condition to approval of the partial assignment application, to execute separate financing documents (promissory note, security agreement) agreeing to pay their *pro rata* portion of the balance due (including accrued and unpaid interest) based upon the installment payment terms for which they qualify under the rules. The financing documents must be returned to the U.S. Treasury within thirty (30) days of the Public Notice conditionally granting the partial assignment application. Failure by either party to meet this condition will result in the automatic cancellation of the grant of the partial assignment application. The interest rate, established pursuant to § 1.2110(e)(3)(i) at the time of the grant of the initial license in the market, shall continue to be applied to both parties' portion of the balance due. Each party will receive a license for their portion of the partitioned market.
(iii) A default on an obligation will only affect that portion of the market area held by the defaulting party.
(iv) Partitionees or disaggregatees that qualify for installment payment plans may elect to pay some of their *pro rata* portion of the balance due in a lump sum payment to the U.S. Treasury and to pay the remainder in installments as set forth in 24.309(1).

(e) *Construction Requirements.*
(1) *Requirements for Partitioning.* Parties seeking authority to partition must meet one of the following construction requirements:

(i) The partitionee may certify that it will satisfy the applicable construction requirements set forth in § 24.103 for the partitioned license area; *or*
(ii) The original licensee may certify that it has or will meet its construction requirements, as set forth in 24.103, for the entire license area. In that case, the partitionee must only satisfy the requirements for "substantial service," as set forth in § 24.103, for the partitioned license area by the end of the original ten-year license term of the licensee.
(iii) Applications requesting partial assignments of license for partitioning must include a certification by each party as to which of the above construction options they select.
(iv) Partitionees must submit supporting documents showing compliance with the respective construction requirements within the appropriate construction benchmarks set forth in § 24.103.
(v) Failure by any partitionee to meet its respective construction requirements will result in the automatic cancellation of the partitioned license without further Commission action.

(2) *Requirements for Disaggregation.* Parties seeking authority to disaggregate must submit with their partial assignment application a certification signed by both parties stating which of the parties will be responsible for meeting the construction requirements for narrowband PCS

as set forth in § 24.103. Parties may agree to share responsibility for meeting the construction requirements. Parties that accept responsibility for meeting the construction requirements and later fail to do so will be subject to license forfeiture without further Commission action.

* * * * *

8. Section 24.320 is revised, to read as follows:

§ 24.320 Definitions.

(a) *Scope.* The definitions in this section apply to §§ 24.309-24.315 of this subpart, unless otherwise specified in those sections.

(b) *Small Business; Consortium of Small Businesses.*
(1) A *small business* is an entity that together with its affiliates, persons or entities that hold attributable interests in such entity, and their affiliates, has average gross revenues that are not more than $40 million for the preceding three years; or
(2) A *very small business* is an entity that, together with its *affiliates*, persons or entities that hold attributable interests in such entity, and their *affiliates*, has average gross revenues that are not more than $15 million for the preceding three years.
(3) *Attribution and Aggregation of Gross Revenues* .
(i) For purposes of determining whether an entity meets either the $15 million or $40 million average annual gross revenues size standard set forth in paragraphs (b)(1)and (b)(2) of this section, the gross revenues of the entity, its affiliates, persons or entities holding interests in the entity and their affiliates shall be considered on a cumulative basis and aggregated.
(ii) Where an applicant (or licensee) is a consortium of small businesses, the gross revenues of each small business shall not be aggregated.
(4) A *small business consortium* is a conglomerate organization formed as a joint venture between mutually-independent business firms, each of which individually satisfies either definition of a small business in paragraph (b)(1) of this section. In a consortium of small businesses, each individual member must establish its eligibility as a small business, as defined in this section.
(5) A *very small business consortium* is a conglomerate organization formed as a joint venture between mutually-independent business firms, each of which individually satisfies either definition of a very small business in paragraph (b)(2) of this section. In a consortium of small businesses, each individual member must establish its eligibility as a small business, as defined in this section.

(c) *Business Owned by Members of Minority Groups and/or Women.* A business owned by members of minority groups and/or women is an entity owned by members of minority groups and/or women in which minorities and/or women who are U.S. citizens control the applicant, have at least 50.1 percent equity ownership and, in the case of a corporate applicant, a 50.1 percent voting interest. For applicants that are partnerships, every general

partner either must be a minority and/or woman (or minorities and/or women) who are U.S. citizens and who individually or together own at least 50.1 percent of the partnership equity, or an entity that is 100 percent owned and controlled by minorities and/or women who are U.S. citizens. The interests of minorities and women are to be calculated on a fully-diluted basis; agreements such as stock options and convertible debentures shall be considered to have a present effect on the power to control an entity and shall be treated as if the rights thereunder already have been fully exercised. However, upon a demonstration that options or conversion rights held by non-controlling principals will not deprive the minority and female principals of a substantial financial stake in the venture or impair their rights to control the designated entity, a designated entity may seek a waiver of the requirement that the equity of the minority and female principals must be calculated on a fully-diluted basis.

(d) *Gross Revenues. Gross revenues* shall mean all income received by an entity, whether earned or passive, before any deductions are made for costs of doing business (*e.g.*, cost of goods sold), as evidenced by audited quarterly financial statements for the relevant period.

(e) * * * * *

(f) *Affiliate.*
(1) *Basis for Affiliation.* An individual or entity is an affiliate of an applicant or of a person holding an attributable interest in an applicant (both referred to herein as "the applicant") if such individual or entity:
(i) Directly or indirectly controls or has the power to control the applicant, or
(ii) Is directly or indirectly controlled by the applicant, or
(iii) Is directly or indirectly controlled by a third party or parties that also controls or has the power to control the applicant, or
(iv) Has an "identity of interest" with the applicant.
(2) *Nature of control in determining affiliation.*
(i) Every business concern is considered to have one or more parties who directly or indirectly control or have the power to control it. Control may be affirmative or negative and it is immaterial whether it is exercised so long as the power to control exists.
Example for paragraph (g)(2)(i). An applicant owning 50 percent of the voting stock of another concern would have negative power to control such concern since such party can block any action of the other stockholders. Also, the bylaws of a corporation may permit a stockholder with less than 50 percent of the voting to block any actions taken by the other stockholders in the other entity. Affiliation exists when the applicant has the power to control a concern while at the same time another person, or persons, are in control of the concern at the will of the party or parties with the power of control.
(ii) Control can arise through stock ownership; occupancy of director, officer or key employee positions; contractual or other business relations; or combinations of these and other factors. A key employee is an employee who, because of his/her position in the concern, has a critical influence in or substantive control over the operations or management of the concern.
(iii) Control can arise through management positions where a concern's voting stock is so

widely distributed that no effective control can be established.

Example for paragraph (g)(2)(iii). In a corporation where the officers and directors own various size blocks of stock totaling 40 percent of the corporation's voting stock, but no officer or director has a block sufficient to give him or her control or the power to control and the remaining 60 percent is widely distributed with no individual stockholder having a stock interest greater than 10 percent, management has the power to control. If persons with such management control of the other entity are persons with attributable interests in the applicant, the other entity will be deemed an affiliate of the applicant.

(3) *Identity of interest between and among persons.* Affiliation can arise between or among two or more persons with an identity of interest, such as members of the same family or persons with common investments. In determining if the applicant controls or is controlled by a concern, persons with an identity of interest will be treated as though they were one person.

Example 1. Two shareholders in Corporation Y each have attributable interests in the same narrowband PCS application. While neither shareholder has enough shares to individually control Corporation Y, together they have the power to control Corporation Y. The two shareholders with these common investments (or identity of interest) are treated as though they are one person and Corporation Y would be deemed an affiliate of the applicant.

Example 2. One shareholder in Corporation Y, shareholder A, has an attributable interest in a narrowband PCS application. Another shareholder in Corporation Y, shareholder B, has a nonattributable interest in the same narrowband PCS application. While neither shareholder has enough shares to individually control Corporation Y, together they have the power to control Corporation Y. Through the common investment of shareholders A and B in the narrowband PCS application, Corporation Y would still be deemed an affiliate of the applicant.

(i) *Spousal Affiliation.* Both spouses are deemed to own or control or have the power to control interests owned or controlled by either of them, unless they are subject to a legal separation recognized by a court of competent jurisdiction in the United States.

(ii) *Kinship Affiliation.* Immediate family members will be presumed to own or control or have the power to control interests owned or controlled by other immediate family members. In this context "immediate family member" means father, mother, husband, wife, son, daughter, brother, sister, father- or mother-in-law, son- or daughter-in-law, brother- or sister-in-law, step-father, or -mother, step-brother, or -sister, step-son, or -daughter, half brother or sister. This presumption may be rebutted by showing that

(A) The family members are estranged,

(B) The family ties are remote, or

(C) The family members are not closely involved with each other in business matters.

Example for paragraph (g)(3)(ii). A owns a controlling interest in Corporation X. A's sister-in-law, B, has an attributable interest in an narrowband PCS application. Because A and B have a presumptive kinship affiliation, A's interest in Corporation X is attributable to B, and thus to the applicant, unless B rebuts the presumption with the necessary showing.

(4) *Affiliation through stock ownership.*

(i) An applicant is presumed to control or have the power to control a concern if he or she owns or controls or has the power to control 50 percent or more of its voting stock.

(ii) An applicant is presumed to control or have the power to control a concern even though

he or she owns, controls or has the power to control less than 50 percent of the concern's voting stock, if the block of stock he or she owns, controls or has the power to control is large as compared with any other outstanding block of stock.

(iii) If two or more persons each owns, controls or has the power to control less than 50 percent of the voting stock of a concern, such minority holdings are equal or approximately equal in size, and the aggregate of these minority holdings is large as compared with any other stock holding, the presumption arises that each one of these persons individually controls or has the power to control the concern; however, such presumption may be rebutted by a showing that such control or power to control, in fact, does not exist.

(5) *Affiliation arising under stock options, convertible debentures, and agreements to merge.* Stock options, convertible debentures, and agreements to merge (including agreements in principle) are generally considered to have a present effect on the power to control the concern. Therefore, in making a size determination, such options, debentures, and agreements will generally be treated as though the rights held thereunder had been exercised. However, neither an affiliate nor an applicant can use such options and debentures to appear to terminate its control over another concern before it actually does so.

Example 1 for paragraph (g)(5). If company B holds an option to purchase a controlling interest in company A, who holds an attributable interest in an narrowband PCS application, the situation is treated as though company B had exercised its rights and had become owner of a controlling interest in company A. The gross revenues of company B must be taken into account in determining the size of the applicant.

Example 2 for paragraph (g)(5). If a large company, BigCo, holds 70% (70 of 100 outstanding shares) of the voting stock of company A, who holds an attributable interest in a narrowband PCS application, and gives a third party, SmallCo, an option to purchase 50 of the 70 shares owned by BigCo, BigCo will be deemed to be an affiliate of company A, and thus the applicant, until SmallCo actually exercises its options to purchase such shares. In order to prevent BigCo from circumventing the intent of the rule which requires such options to be considered on a fully diluted basis, the option is not considered to have present effect in this case.

Example 3 for paragraph (g)(5). If company A has entered into an agreement to merge with company B in the future, the situation is treated as though the merger has taken place.

(6) *Affiliation under voting trusts.*

(i) Stock interests held in trust shall be deemed controlled by any person who holds or shares the power to vote such stock, to any person who has the sole power to sell such stock, and to any person who has the right to revoke the trust at will or to replace the trustee at will.

(ii) If a trustee has a familial, personal or extra-trust business relationship to the grantor or the beneficiary, the stock interests held in trust will be deemed controlled by the grantor or beneficiary, as appropriate.

(iii) If the primary purpose of a voting trust, or similar agreement, is to separate voting power from beneficial ownership of voting stock for the purpose of shifting control of or the power to control a concern in order that such concern or another concern may meet the Commission's size standards, such voting trust shall not be considered valid for this purpose regardless of whether it is or is not recognized within the appropriate jurisdiction.

(7) *Affiliation through common management.* Affiliation generally arises where officers,

directors, or key employees serve as the majority or otherwise as the controlling element of the board of directors and/or the management of another entity.
(8) *Affiliation through common facilities.* Affiliation generally arises where one concern shares office space and/or employees and/or other facilities with another concern, particularly where such concerns are in the same or related industry or field of operations, or where such concerns were formerly affiliated, and through these sharing arrangements one concern has control, or potential control, of the other concern.
(9) *Affiliation through contractual relationships.* Affiliation generally arises where one concern is dependent upon another concern for contracts and business to such a degree that one concern has control, or potential control, of the other concern.
(10) *Affiliation under joint venture arrangements.*
(i) A joint venture for size determination purposes is an association of concerns and/or individuals, with interests in any degree or proportion, formed by contract, express or implied, to engage in and carry out a single, specific business venture for joint profit for which purpose they combine their efforts, property, money, skill and knowledge, but not on a continuing or permanent basis for conducting business generally. The determination whether an entity is a joint venture is based upon the facts of the business operation, regardless of how the business operation may be designated by the parties involved. An agreement to share profits/losses proportionate to each party's contribution to the business operation is a significant factor in determining whether the business operation is a joint venture.
(ii) The parties to a joint venture are considered to be affiliated with each other.

(g) *Publicly Traded Corporation with Widely Dispersed Voting Power.* A *publicly traded corporation with widely dispersed voting power* is a business entity organized under the laws of the United States:
(1) Whose shares, debt, or other ownership interests are traded on an organized securities exchange within the United States;
(2) In which no person
(i) Owns more than 15 percent of the equity; or
(ii) Possesses, directly or indirectly, through the ownership of voting securities, by contract or otherwise, the power to control the election of more than 15 percent of the members of the board of directors or other governing body of such publicly traded corporation; and
(3) Over which no person other than the management and members of the board of directors or other governing body of such publicly traded corporation, in their capacities as such, has *de facto* control.
(4) The term *person* shall be defined as in section 13(d) of the Securities and Exchange Act of 1934, as amended (15 U.S.C. 78(m)), and shall also include investors that are commonly controlled under the indicia of control set forth in the definition of *affiliate* in paragraph (h) of this section.

(h) *Attributable Interests.* Partnership and other ownership interests and any stock interest amounting to 5 percent or more of the equity, or outstanding stock, or outstanding voting stock of a licensee or applicant will be attributable.

APPENDIX C

Comments and Replies Filed in Response to *Competitive Bidding Third MO&O/Further Notice*

Comments (September 16, 1994)
AirTouch Paging (AirTouch)
American Paging, Inc. (American Paging)
Association of Independent Designated Entities (AIDE)
Blooston, Mordkofsky, Jackson & Dickens (BMJ&D)
Essence Communications, Inc. (Essence)
Lieto, David J. (Lieto)
Mobile Telecommunications Technologies Corp. (Mtel)
Paging Network, Inc. (PageNet)
PageMart, Inc. (PageMart)
Puerto Rico Telephone Company (PRTC)
Personal Communications Industry Association (PCIA)
San Juan Pacific Management (SJPM)
Small Business Administration (SBA)
Women of Wireless (WOW)

Reply Comments (October 3, 1994)
Blooston, Mordkofsky, Jackson & Dickens (BMJ&D)
Essence Communications, Inc. (Essence)
Minority Media and Telecommunications Council (MMTC)
Paging Network, Inc. (PageNet)

Comments Filed in Response to Public Notice Seeking Additional Comment on Commission's Narrowband PCS Entrepreneurs' Blocks Proposals

Comments (January 13, 1995)
AirTouch Paging (AirTouch)
American Paging, Inc. (American Paging)
Eatelcorp, Inc. (Eatel)
Mobile Telecommunication Technologies Corp. (Mtel)
Pagemart, Inc.
PCS Development Corporation (PCSD)
Personal Communications Industry Assoc. (PCIA)
USIMTA/USIPCA

Reply Comments (January 23, 1995)
Mobile Telecommunication Technologies Corp. (Mtel)
Pagemart, Inc. (Pagemart)
PCS Development Corporation (PCSD)

APPENDIX D

INITIAL REGULATORY FLEXIBILITY ANALYSIS
Further Notice of Proposed Rulemaking

As required by the Regulatory Flexibility Act, *see* 3 U.S.C. § 603, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the policies and rules proposed and adopted in the *Further Notice* section of this *Report and Order and Further Notice of Proposed Rulemaking* (*FNPRM*). Written public comments are requested on the IRFA and must be filed by the deadlines for comments on the *Report and Order and Further Notice of Proposed Rulemaking,* provided above in paragraph 109.

A. Reason for Action:

This *FNPRM* was initiated to secure comment on proposals for revising rules for narrowband PCS. Such changes to the rules for the narrowband PCS service would promote efficient licensing and enhance the service's competitive potential in the Commercial Mobile Radio Service marketplace. The adopted and proposed rules are based on the competitive bidding authority of Section 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(j), which authorized the Commission to use auctions to select among mutually exclusive initial applications in certain services, including narrowband Personal Communications Services (PCS).

B. Objectives of this Action:

The Omnibus Budget Reconciliation Act of 1993 (Budget Act), Pub. L. No. 103-66, Title VI, § 6002, and the subsequent Commission actions to implement it are intended to establish a system of competitive bidding for choosing among certain applications for initial licenses, and to carry out statutory mandates that certain designated entities, including small businesses, are afforded an opportunity to participate in the competitive bidding process and in the provision of narrowband PCS services.

C. Legal Basis:

The proposed action is authorized under the Budget Act and in 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).

D. Reporting, Recordkeeping, and Other Compliance Requirements:

The proposals under consideration in this *FNPRM* include the possibility of new reporting and recordkeeping requirements for a number of small business entities, as follows. We request comment on these proposals.

1. Service Area Reallocation. The Commission proposes revising its current channelization plan to ensure that it provides sufficient opportunities for all interested parties, including small businesses, to establish a viable narrowband PCS system. The Commission is concerned that such opportunities may not be meaningful if a single Basic Trading Area (BTA)[1] is not a sufficiently large service area for implementation of narrowband PCS. The Commission has previously stated that the larger Major Trading Area licenses (MTAs)[2] will provide for more reasonable and homogeneous license areas for the provision of PCS. In addition, the Commission reiterates that local participation in narrowband PCS could occur through franchising or partitioning arrangements with nationwide and regional PCS licensees, thus affording more opportunities to serve smaller areas. As a result, the Commission tentatively concludes that it will redesignate certain narrowband PCS frequencies for larger service areas and will thus provide additional opportunities for designated entities, including small businesses. The Commission proposes that the remaining narrowband PCS channel blocks will be redesignated as follows: (1) MTA licenses on channel blocks 18 and 19, and BTA licenses on channel block 26, will be redesignated as nationwide licenses; (2) MTA licenses on channel blocks 21 and 22, and BTA licenses on channel block 25, will be redesignated as regional licenses; and (3) the four BTA response channels (E, F, G and H) will be redesignated as regional channels. The Commission does not anticipate any additional reporting or recordkeeping requirements from this proposal.

2. Response Channel Redesignation. The Commission tentatively concludes that the paging response channels should be reallocated for use in larger service areas. The Commission agrees with commenters who argue that reallocating some of the response channels for use in larger service areas will facilitate the upgrade of existing paging networks, and enhance narrowband PCS systems. The Commission therefore proposes to redesignate the four 12.5 kHz unpaired response channels currently licensed as BTA channel blocks as regional channel blocks,[3] and retain the four MTA paging response channels. Additionally,

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[1] Rand McNally is the copyright owner of the MTA/BTA listings, which list the BTAs contained in each MTA and the counties within each BTA, as embodied in Rand McNally's Trading Areas System MTA/BTA Diskette, and geographically represented in the Rand McNally 1992 Commercial Atlas and Marketing Guide (the "MTA map"), 123rd Edition at pp. 38-39. The conditional use of Rand McNally's copyrighted material by interested persons is authorized under a blanket license agreement dated February 10, 1994, which covers certain services, including PCS. Rand McNally organizes the 50 states and the District of Columbia in 47 MTAs and 487 BTAs. For PCS licensing purposes, we adopted service areas that separated Alaska from the Seattle MTA and added five insular areas: Puerto Rico, U.S. Virgin Islands, Guam, Northern Mariana Islands and American Samoa. In 1994, the number of BTAs was changed to 493 because Puerto Rico was reconfigured into 2 BTA-like service areas. *See* Amendment of the Commission's Rules to Establish New Narrowband PCS, *Second Memorandum Opinion and Order*, GEN Docket 90-314, 9 FCC Rcd 4519, 4523, ¶ 18 (1994) (*PCS Second MO&O*).

[2] *See* n.1, *supra*.

[3] The five regions for licensing of narrowband PCS consist of the following MTAs: Region 1 (Northeast): Boston-Providence, Buffalo-Rochester, New York, Philadelphia, and Pittsburgh; Region 2 (South): Atlanta, Charlotte-Greensboro-Greenville-Raleigh, Jacksonville, Knoxville, Louisville-Lexington-Evansville, Nashville, Miami-Fort

the Commission does not redesignate response channels to an entrepreneurs' block. Instead, as discussed in the *Further Notice of Proposed Rulemaking* accompanying this *Report and Order*, the Commission proposes to open eligibility for these channels to all applicants, not just incumbent paging licensees. The Commission does not anticipate any additional reporting or recordkeeping requirements from this proposal.

3. Construction Requirements. The proposals in the *FNPRM* include the possibility of imposing reporting and recordkeeping requirements for new narrowband PCS licensees to establish compliance with the coverage requirements, if such requirements are adopted.

4. Geographic Partitioning and Spectrum Disaggregation. The proposals in the *FNPRM* include the possibility of imposing reporting and recordkeeping requirements for small businesses seeking licenses through the proposed partitioning and disaggregation rules. The information requirements would be used to determine whether the licensee is a qualifying entity to obtain partitioned or disaggregated spectrum. This information will be a one-time filing by any applicant requesting such a license. The information will be submitted on the FCC Forms 490 (or 430 and/or 600 filed as one package under cover of the Form 490) which are currently in use and have already received OMB clearance. The Commission estimates that the average burden on the applicant is three hours for the information necessary to complete these forms. The Commission estimates that 75 percent of the respondents, which may include small businesses, will contract out the burden of responding. The Commission estimates that it will take approximately 30 minutes to coordinate information with those contractors. The remaining 25 percent of respondents, which may include small businesses, are estimated to employ in-house staff to provide the information. Applicants, including small businesses, filing the package under cover of FCC Form 490 electronically will incur a $2.30 per minute on-line charge. On-line time would amount to no more than 30 minutes. The Commission estimates that 75 percent of the applicants may file electronically. The Commission estimates that applicants contracting out the information would use an attorney or engineer, with an average cost of $200 per hour, to prepare the information.

5. Construction Prior to Grant of Licenses for Narrowband and Broadband PCS. The proposals in the *FNPRM* include the possibility of changing existing Commission pre-licensing construction requirements for narrowband PCS. The proposal in the *FNPRM* would allow long-form applicants to begin construction of facilities at their own risk, regardless of whether any petitions to deny have been filed. The Commission does not anticipate any additional reporting or recordkeeping requirements from this proposal.

Lauderdale, Richmond-Norfolk, Tampa-St. Petersburg-Orlando, Washington-Baltimore, Puerto Rico and the United States Virgin Islands; Region 3 (Midwest): Chicago, Cincinnati-Dayton, Cleveland, Columbus, Des Moines-Quad Cities, Detroit, Indianapolis, Milwaukee, Minneapolis-St. Paul, and Omaha; Region 4 (Central): Birmingham, Dallas-Fort Worth, Denver, El Paso-Albuquerque, Houston, Kansas City, Little Rock, Memphis-Jackson, New Orleans-Baton Rouge, Oklahoma City, San Antonio, St. Louis, Tulsa, and Wichita; Region 5 (West): Honolulu, Los Angeles-San Diego, Phoenix, Portland, Salt Lake City, San Francisco-Oakland-San Jose, Seattle, Spokane-Billings and Alaska; and American Samoa, Guam, and the Northern Mariana Islands.

6. Small Business Definition. The *FNPRM* proposes a two-tiered definition to define small businesses: (1) a small business is a business with average gross revenues for each of the preceding three years that do not exceed $40 million, and (2) a very small business is one which has less than an average of $15 million in gross revenues in each of the last three years. Qualifying entities will be eligible for bidding credits and installment plans. In order to qualify as small business under either tier, an entity must demonstrate that its gross revenues fall within the proposed thresholds. The information will be submitted on the FCC Form 600, which is currently in use and which has received OMB clearance. Such entities will also need to maintain supporting documentation at their principal place of business.

7. Ownership Disclosure Requirements. The proposals in the *FNPRM* include the possibility of changing the ownership disclosure requirements for all applicants. The information requirements would be used to determine whether the licensee is a qualifying entity under the Commission's ownership rules. The proposals include relaxing the disclosure requirements, such as the required submittal of partnership agreements, which would reduce the administrative burdens associated with the auction process. The Commission also seeks comment on whether a separate schedule to FCC Form 175 should be designated, which would formalize the disclosure requirements to the current FCC Form 175. The proposal in the *FNPRM* would decrease the amount of information that a narrowband PCS applicant would be required to file. This information will be a one-time filing by any applicant requesting such a license. The information will be submitted on the FCC Forms 600 and FCC Form 175, which are currently in use and have already received OMB clearance.

E. Federal Rules Which Overlap, Duplicate or Conflict With These Rules: None.

F. Description, Potential Impact, and Number of Small Entities Involved:

The *FNPRM* would establish certain narrowband PCS spectrum blocks for bidding by smaller entities as well as larger entities, and would provide installment payments and bidding credits to certain eligible entities bidding within those blocks. The Commission is required to estimate in its Final Regulatory Flexibility Analysis the number of small entities to which a rule will apply, provide a description of such entities, and assess the impact of the rule on such entities. To assist the Commission in this analysis, commenters are requested to provide information regarding how many total entities, existing and potential, would be affected by the proposed rules in the *FNPRM*. In particular, the Commission seeks estimates of how many such entities will be considered small businesses.

Geographic Partitioning and Spectrum Disaggregation. The partitioning and disaggregation rule changes proposed in this proceeding will affect all small businesses which avail themselves of these rule changes, including small businesses currently holding narrowband PCS licenses who choose to partition and/or disaggregate and small businesses who may acquire licenses through partitioning and/or disaggregation.

The Commission is required to estimate in its Final Regulatory Flexibility Analysis the

number of small entities to which a rule will apply, provide a description of such entities, and assess the impact of the rule on such entities. To assist the Commission in this analysis, commenters are requested to provide information regarding how many total entities, existing and potential, would be affected by the proposed rules in the *FNPRM*. In particular, the Commission seeks estimates of how many such entities will be considered small businesses. As explained in the Final Regulatory Flexibility Analysis for the *Second Report and Order*, the Commission is utilizing the SBA definition applicable to radiotelephone companies, *i.e.*, an entity employing less than 1,500 persons.[4] The Commission seeks comment on whether this definition is appropriate for narrowband PCS licensees in this context. Additionally, the Commission requests each commenter to identify whether it is a small business under this definition. If a commenter is a subsidiary of another entity, this information should be provided for both the subsidiary and the parent corporation or entity.

The Commission estimates that the approximately 30 current regional narrowband PCS licensees and 11 nationwide narrowband PCS licensees could take the opportunity to partition and/or disaggregate a license or obtain an additional license through partitioning or disaggregation.[5] New entrants could obtain narrowband PCS licenses through the competitive bidding procedure, and take the opportunity to partition and/or disaggregate a license or obtain an additional license through partitioning or disaggregation. Additionally, entities that are neither incumbent licensees nor geographic area licensees could enter the market by obtaining a narrowband PCS license through partitioning or disaggregation. The Commission cannot estimate how many licensees or potential licensees could take the opportunity to partition and/or disaggregate a license or obtain a license through partitioning and/or disaggregation, because it has not yet determined the size or number of narrowband PCS licenses that will be granted in the future. Given the fact that nearly all radiotelephone companies have fewer than 1,000 employees, and that no reliable estimate of the number of future narrowband PCS licensees can be made, the Commission assumes for purposes of this IRFA that all of the licenses will be awarded to small businesses. It is possible that a significant number of the potential licensees who could take the opportunity to partition and/or disaggregate a license or who could obtain a license through partitioning and/or disaggregation will be small businesses.

G. Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives:

In the FNPRM the Commission seeks comment on whether coverage requirements should be imposed for all narrowband PCS licensees. Any significant alternatives presented in the comments will be considered. Coverage requirements for narrowband PCS licensees, if adopted, would probably not affect small businesses.

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[4] 13 C.F.R. § 121.201, Standard Industrial Classification Code 4812.

[5] *See Visitors Auction Guide*, Broadband Personal Communications Services, December 5, 1995 at Tab VIII.

With respect to partitioning, the Commission tentatively concludes that unjust enrichment provisions should apply when a licensee has benefitted from the small business provisions in the auction rules and partitions a portion of the geographic license area to another entity that would not qualify for such benefits. The alternative to applying the unjust enrichment provisions would be to allow an entity who had benefitted from the special bidding provisions for small businesses to become unjustly enriched by partitioning a portion of their license area to parties that do not qualify for such benefits. The Commission also seeks comment on whether spectrum disaggregation would be feasible for narrowband PCS, and how much spectrum a narrowband PCS licensee should be permitted to disaggregate.

The *FNPRM* proposes certain provisions for smaller entities designed to ensure that such entities have the opportunity to participate in the competitive bidding process and in the provision of narrowband PCS services. Any significant alternatives presented in the comments will be considered.

IRFA Comments: We request written public comment on the foregoing Initial Regulatory Flexibility Analysis. Comments must have a separate and distinct heading designating them as responses to the IRFA and must be filed by the deadlines provided in paragraph 109 of this *Report and Order/Further Notice of Proposed Rulemaking*.