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JTL COMMUNICATIONS CORPORATION

2265 West Sandalwood Drive
Meridian, Idaho 83642

DEC 22 1997

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

In the Matter of	)	
	)	
Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses	)	MM Docket No. 97-234
	)	
Reexamination of the Policy Statement on Comparative Broadcast Hearings	)	GC Docket No. 92-52
	)	
Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases	)	GEN Docket No. 90-264
	)	
NOTICE OF PROPOSED RULEMAKING	)	FCC 97-397

COMMENTS OF

JTL Communications Corporation
2265 West sandalwood Drive
Meridian, Idaho 83642

JTL Communications Corporation files these comments on December 16, 1997 regarding above captioned NOTICE OF PROPOSED RULEMAKING. A summary is placed at the end of our comments.

Please appreciate that we do not support auctions of the electromagnetic spectrum affecting mass media markets. There are several reasons for our objections.

Through the auction process, business are essentially paying a tax to the Federal Government for the privilege of engaging in a private enterprise activity. Paying a tax is bad enough, but having

023

to compete with our competitors at a government auction table, then turn around and compete again in the market place with the same people is disheartening.

The history of auctions conducted in the telecommunications arena indicate to us true small businesses with limited capitalization are essentially eliminated from the bidding climate. In this case, large organizations will be left to exert their influence in the mass media market, significantly reducing or eliminating diversity of thoughts and ideas in our society. In other words, what we hear and see will be controlled by a very few in each community.

As it is now, the ability of a new potential licensee to enter into a large or medium market is virtually eliminated because the choice spectrum has been already taken. Frequencies that are left are of a lesser value than those already in use, yet the implication is that they will cost more to get. Thus, a very upside down tax structure has been created.

Given, through mandate, you must auction broadcast frequencies, we note that in general you have done what we consider a good job sorting through the issues. Therefore, our comments on your Notice of Proposed Rulemaking, although few in number, are offered on specific paragraphs for your consideration. Even though we made comment on only a few paragraphs, we intended that the themes and ideas expressed will be applied to all paragraphs that include the issues we discuss. Because your paragraph numbering scheme changed in the document we downloaded from the Internet, we reprinted the reference paragraph in it's entirety with our comments noted in bold below.

For the paragraphs in sections I, II, III A, III B, III C 1, and III C 2 we offer the general comment that no matter what you do for what we can refer to as the transitional issues, perceived fairness will be difficult and possibly expensive to achieve. Therefore we recommend you use the simplest method allowed under the language promulgated in the Budget Act to clear the books on pending licenses and/or permits.

III C 3 - Paragraph 49: "We also ask for comment generally on whether we should adopt any special auction policies or procedures in the AM service or other services to accommodate section 307(b) of the Act, 47 U.S.C. § 307(b), which requires that the Commission distribute licenses among states and communities so as to "provide a fair, efficient, and equitable distribution of radio service." For example, should we have bidding credits for applicants offering service to significant "white" or

"grey" areas?"[1]

We recommend you do not adopt any special auction policies or procedures in the AM broadcast bands to applicants offering service to "white" or "grey" areas. Our comment has it's genesis in our belief that the Commission should be promoting the use of lower power stations to serve a community or region. We feel that special allowances for cases described in this paragraph will promote the installation of facilities with higher power than necessary to cover a licensed area. The result is a reduced opportunity for other entrepreneurs to enter the mass media arena on the same or adjacent frequencies in neighboring areas.

III C 3 - Paragraph 50: "Also, whether particular applications are subject to the proposed competitive bidding procedures will depend on whether the broadcast service involved is required to be auctioned under amended section 309(j)(1), rather than on the identity of the mutually exclusive applicants. Thus, we propose to treat non-profit applicants for commercial frequencies, including those who could qualify under 47 C.F.R. § 73.503 as a non-profit educational organization, no differently under the proposed filing and competitive bidding procedures than any other mutually exclusive applicant for commercial frequencies. With regard to the FM service in particular, we note that this proposal will not affect the current ownership and eligibility requirements for noncommercial facilities."

We agree with your recommendation to treat non-profits's the same as others. Non-profits should compete in market place just like everyone else. In our view, non-profits are not necessarily faced with the same financial handicaps as small/minority owned businesses. Therefore there should be not any kind of special break on spectrum that now has tax value for the Government of the U.S.

III C 3 - Paragraph 55 "We propose that, whatever type of bidding design we ultimately select for broadcast auctions, bidding would be remote rather than on-site, thereby providing bidders the flexibility to bid from any location. We ask for comment on whether to require bidders to bid electronically via computer, or whether to give bidders the option of bidding by telephone. Unlike telephonic assisted bidding, where a third party, the bid assistant, is always placed between the bidder and the system, remote electronic bidding places total control in the hands of the bidder. The flexibility to bid, check round results, check announcements, or make a suggestion in a seamless environment, from anywhere, has proven desirable for approximately 85% of the bidders in our

[1] A white area is an area that does not receive any service from a particular type of broadcast facility (e.g. a radio station or television station); a grey area is an area that receives only one such service.

auctions thus far. On the other hand, a telephonic bidding option would provide bidders a safeguard against power outages, computer breakdowns, or other unforeseen circumstances that might prevent them from bidding electronically. We also seek comment on whether requiring all bidders to bid electronically would be unduly burdensome to certain bidders (such as television translator associations) likely to participate in auctions for the secondary broadcast services. For example, telephonic bidding would afford bidders the flexibility to bid from any location without incurring the expense of electronic bidding."

We agree with your proposal to conduct remote bidding. Electronic-only bidding is acceptable with us. However, telephonic bidding should not be cast out simply because of your comment regarding people that may not have electronic bidding capability. Therefore, we recommend you include telephonic bidding as an option.

III C 3 - Paragraph 56:"*Upfront Payments, Reserve Prices, Minimum Opening Bids, and "Daisy Chains"*. We seek comment on several bidding-related issues. First, we propose that the Mass Media Bureau work in conjunction with the Wireless Telecommunications Bureau in setting the upfront payment, which will be announced by Public Notice before the time for filing short-form applications. An upfront payment is paid by prospective bidders prior to the auction. See 47 C.F.R. § 1.2106, requiring payment of the upfront payment after a prospective bidder files its short-form application. Requiring an upfront payment prior to the auction has proven a useful tool in ensuring that bidders are sincere, and we do not propose to depart from our Part 1 rules on upfront payments. However, we request comment on the appropriate amount, or method of determining an appropriate amount, of this upfront payment for bidders in broadcast auctions. In previous auctions, we have based the upfront payments upon the amount of spectrum and population (or "pops") covered by the licenses or permits for which parties intend to bid. We note that in the broadcast area there is other data, such as market size, market ratings, advertising rates and broadcast transactions, that might prove more useful than the MHZ-pop formula that we have used in valuing actionable licenses in other, less established telecommunications services. We seek comment on alternate valuation formulas that might be used to calculate upfront payments."

We believe that an up-front payment to bid on a frequency is not an onerous issue for someone serious about applying for a permit. We also concur that the Mass Media Bureau should work with the Wireless Telecommunications Bureau in setting METHODS of auction but not the initial upfront payment. The initial amount needs to be low to allow true small businesses the opportunity to at least participate through the initial rounds. We recommend you set the initial payment at the same amount as the permit costs are today. The ideas for this theme are based on our concept that the market place should set the starting amount and the

bidding steps at each round, especially for broadcast frequencies. The value of the spectrum being auctioned should be set by the bidders rather than a calculation that may or may not reflect current conditions for a specific frequency in a particular location. Market size, ratings, and advertising rates are dependent on the proposed broadcasting format and public acceptance, rather than the number of phone calls per hour possible on a given frequency. Moreover, the idea that the spectrum currently available in large and many medium sized communities has the same value as those already in use is flawed. A survey of many markets will no doubt show that the frequencies available in large and medium markets will be marginal performers at best. If it were any different, the frequency would have been gone long ago. Further, paying more for a new frequency than incumbent competitors had to pay is a disincentive for diversity on the broadcast bands. Please consider that in the Telecommunications arena, the frequencies auctioned were for the most part new. Everyone had an equal chance to compete for choice frequencies and areas. That is not the case for the broadcast bands. The choice areas and associated frequencies are gone. The cow has already escaped the barn, and now you are closing the door. The upfront payment must be low.

Specifically, we recommend you do not use the MHZ per pop system employed by the Wireless Telecommunications Bureau especially for AM. Using the MHZ per pop scheme for AM might mean that the bid amount could be a bargain or bust depending on where the proposed frequency was located on the band. For example, someone in the lower part of the band would pay half as much as someone in the upper end. (.6 MHZ vs 1.6 MHZ). Such a scheme would defeat your stated desire to populate the new upper (expanded) portion of the AM band. Therefore, using a MHZ per pop scheme will require a difficult formula to calculate the bid amount.

III C 3 - Paragraph 57: "In the Balanced Budget Act, Congress directed the Commission to prescribe methods by which a reasonable reserve price or a minimum opening bid will be established for any license that is to be assigned by competitive bidding unless the Commission determines that such reserve prices or minimum opening bids would be contrary to the public interest.[32] We therefore propose that the Mass Media Bureau work in conjunction with the Wireless Telecommunications Bureau to consider the use of reserve prices and minimum opening bids for actionable commercial broadcast licenses, which would be announced by Public Notice before the time for filing short-form applications, unless, as a result of the comments solicited herein, it is determined that a reserve price or minimum opening bid would not be in the public interest. In addition, we seek comment on the

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[32]See 47 U.S.C. § 309(j)(4)(F). A "reserve price" is a price below which a license subject to auction will not be awarded. A "minimum opening bid" is a minimum value below which bids will not be accepted in the first round of an auction.

methodology to be employed in establishing each of these mechanisms. We note the possibility of establishing minimum opening bids at the same level as upfront payments, as was done in connection with the auction for the 800 MHZ Specialized Mobile Radio service, and of using a MHZ-pop formula, as is proposed for the LADS auction.[33] We seek comment on alternative methods for estimating the value of the relevant licenses and thus for providing a basis for estimating reserve prices or minimum opening bids. Among the possible approaches to estimating license values are (1) using data on station transactions that are comparable in terms of station class and market characteristics, and (2) utilizing a financial model derived from data on the performance of operating stations (a) in the market that an applicant hopes to serve or (b) from a relevant comparable market. These methodologies might lead directly to estimated license values or they might yield MHZ-pop values for a particular class of licensees that could then be combined with information on each license to generate valuation estimates. We seek comment on these and any other methodologies that interested parties believe are appropriate."

We concur with your suggestion to set the opening bid amount at the same value as the up-front payment, given our comment above. Additionally, we do not support any other minimum bid scheme and recommend you don't either. Establishing a minimum bid means to us that you are setting the bottom end of the "tax" you will be charging to operate a business. Moreover, with the rapidity of the bidding process, and the small numbers likely to be involved in contested frequencies, there is no need to start at any other point other than essentially zero. If we must bid, that is establish our own tax, let us do it at our own pace without having to deal with an artificial floor. Again, refer to our theme in the paragraph above that the frequencies available for auction will not be as valuable as those already in use.

III C 3 - Paragraph 58: "We also seek comment on how the Commission should deal with any "daisy chains" presented in auctions of AM radio, PTV, or television or FM translator applications. Daisy chains occur when an application is mutually exclusive (*i.e.*, would cause interference) with a second application, which is mutually exclusive with a third application in the same or adjacent community, and so on, even though the first application may not be directly mutually exclusive with any

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[33]Public Notice, "Auction of 800 MHZ Specialized Mobile Radio Upper 10 MHZ Band," DA 97-2147 (released Oct. 6, 1997); 62 Fed. Reg. 55251 (Oct. 23, 1997) (establishing minimum opening bids that are subject to reduction and setting the initial amounts at the level of upfront payments). See also Public Notice, "Comment Sought on Reserve Prices or Minimum Opening Bids for LADS Auction," DA-97-2224 (released Oct. 17, 1997); 62 Fed. Reg. 55642 (Oct. 27, 1997) (proposing minimum opening bids for LADS auction and that the Commission have the discretion to lower the minimum opening bids as it deems appropriate).

application except the second.[34] Due to the possibility of daisy chains in AM radio, PTV, and television and FM translator auctions, there may be limited instances in these auctions where, depending on who becomes the winning bidder among a mutually exclusive group, another application (in addition to the auction winner) may become grantable, or another smaller mutually exclusive group will still exist and need to be resolved. We therefore ask for comment on appropriate methods for resolving any daisy chains in the auction context. Commenters may wish to address whether the methods used to resolve daisy chains in the lottery process (such as the holding of "sub-lotteries") are applicable in the auction context, or whether a different method or methods may be more suitable, such as the use of combinatorial bidding."

We agree that daisy chains are a problem. Our solution is to not do auctions for AM.

III C 3 - Paragraph 65, 66, 67 and 68: "Applicants for AM stations, PTV stations, and television and FM translators would file short-form applications specifying a frequency or channel upon which the applicant could operate in accordance with the Commission's existing interference standards for these services, which we do not propose to alter in any way.[35] To determine which AM, PTV, and television and FM translator applications are mutually exclusive for auction purposes, we expect to require applicants for these services to file, in addition to their short-form applications, the engineering data contained in the pertinent FCC Form (i.e., FCC Form 301, FCC Form 346 or FCC Form 349). Similarly, if we ultimately decide to use auctions to resolve mutually exclusive applications to make major changes in existing facilities, in those rare instances in which analog television licensees file such applications (such as a change in the community of license), we propose to require that applicants file both an FCC Form 175 and the engineering data contained in an FCC Form 301.

We anticipate that all broadcast and secondary broadcast applicants would file their FCC Form 175 applications electronically, and we request comment on the burden such an electronic filing requirement would place on applicants for the secondary broadcast services. See Part 1 NPRM, supra, ¶ 11, 12 FCC Rcd at 5714 ¶ 46 (proposing to require that all short-form applications be filed electronically beginning January 1, 1998). When necessary to be filed, we expect the

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[34]These daisy chains occur due to the contour overlap rules used to determine interference for AM, PTV, and television and FM translator applications. Because applicants apply for full service FM and television stations pursuant to allotment tables that specifically identify vacant channels, daisy chains do not generally occur in those services.

[35] *See, e.g.,* 47 C.F.R. §§ 73.37, 73.182 and 73.187 (AM interference rules); 47 C.F.R. §§ 74.703, 74.705, 74.707 and 74.709 (PTV and television translator interference rules); and 47 C.F.R. §§ 74.1203 and 74.1204 (FM translator interference rules).

engineering data contained in the FCC Form 301, FCC Form 346 or FCC Form 349 would be submitted in accordance with Section 73.3512 of the Commission's rules. We request comment on our proposal to require applicants filing during an auction window to submit FCC Form 175 applications, supplemented when necessary by appropriate engineering information. In particular, commenters should address whether this proposal requires applicants to file an appropriate, but not a burdensome, amount of information prior to an auction.

Pre-auction Processing. After the receipt of short-form applications in response to an announced filing window, the Commission would determine the mutually exclusive groups of applications for auction purposes. We tentatively conclude that, in cases where applicants have submitted engineering data in addition to the FCC Form 175, the Commission should not engage in pre-acceptance processing of such data, beyond the review necessary to determine mutual exclusivity for an auction. Under this approach, prior to any auction, we would examine the engineering data submitted by applicants *only* to the extent necessary to determine which applications are mutually exclusive with each other. Because, as described above, applicants for new FM stations must file for available, vacant allotments, as reflected on the Table of Allotments, additional engineering data is not necessary to determine mutual exclusivity, and the question of a pre-auction engineering review of the short-form application does not arise.

Under this approach, the Commission would not make determinations as to the ultimate acceptability or grantability of the applicants' technical proposals prior to the auction. For example, we could defer until after the auction questions as to whether an PTV applicant's proposal involved coordination problems with Mexico or Canada, or interference problems with existing full power stations, land mobile stations, or other PTV stations or television translators. The advantage of reviewing applications prior to an auction only to the extent necessary to determine mutual exclusivity is that it would save considerable Commission resources. Nonetheless, this approach has a significant downside in that it may result in applicants, whose technical proposals are unacceptable, participating and perhaps prevailing in an auction. Additionally, prospective bidders should be aware that a winning bidder whose complete long-form application (FCC Form 301, FCC Form 346 or FCC Form 349) cannot ultimately be granted for either legal or technical reasons may be subject to default payments under the Commission's general competitive bidding rules. See infra ¶ 74. See also 47 C.F.R. §§ 1.2104(g); 1.2107(b); 1.2109(c). Finally, our general competitive bidding rules provide that if the winning bidder is ultimately found to be unqualified to be a licensee, we would conduct another auction for the license at issue and this would require that we afford new parties an opportunity to file applications for the license. See 47 C.F.R. § 1.2109(c)."

Although you did not specifically ask for comments on these paragraphs, we would like

you to consider deleting the requirement for submission of engineering data with a short form, particularly for AM. Thanks to your web site, you can quickly determine, as we can, if there is a viable opportunity to operate a station on a particular AM frequency for a given set of coordinates by examining the day time groundwave restrictions. Also, through your web site, one can get an estimate of the type and class of station that will fit in a given circumstance. In any case, no matter what you do or how much engineering individuals complete, the daisy chain problem persists. Your thought to not have applicants fill out the long form because it is costly is valid. One of the primary reasons it's expensive is because of the engineering required.

We also would like to comment that the notion FM does not have a problem, may be misrepresenting the issue. Someone, called perhaps a brave sole, must perform an engineering analysis to get the table of allocations changed through rule making. The net result is that many others get to take advantage of the brave soles' generosity. That means that for the FM case, there is one person doing the engineering one time for the frequency as opposed to all potential bidders having to do engineering with the winner having to do engineering twice. If you want to be fair, consider performing the frequency allocation and construction permit auction at the same time for FM as you are proposing for AM. Moreover, please note that anyone, including you, can get a preliminary idea of the FM frequency availability for an area by again using your web site and data base if nothing else. That means there could be very little real difference in the submittals between FM and AM and the short form could be employed for both. In any case, we feel you have adequate safeguards built into paragraph 69 to manage submittals that are technically flawed. Having each bidder submit engineering for the same frequency that will most likely need to be updated for final submittal is not value added.

Finally, it's apparent that you essentially re-do the engineering for all applicants. We say this because how else would you know if an application is flawed now or in the future? Having engineering on each specific frequency completed at least two if not three times is an absolute waste of time, energy, and money. You are auctioning a set of frequencies, not us and we feel it's completely appropriate that you do the engineering analysis to see if there is a conflict. Having everyone doing their own engineering says that you want us to tell you if it's appropriate to auction your product, then you are going to tell us if we are correct, and finally if we are all in agreement, we might see the product on the auction block. It's like you using our watch to tell us what time it is, then arguing with us that we don't know how to read our watch because you have a better/different watch. You didn't need to ask us to begin with. Apart from increasing the wealth of the engineering community, we can see no value added

from duplicate engineering studies. We feel you have all the tools at your disposal to resolve ambiguities. If you don't, we suggest you get them. We would be happy to recommend some commercial software packages, and even some engineering firms who would be pleased to help you with this service. Again, we recommend you eliminate the need for "long form" engineering studies for frequencies to be considered on the auction block.

III C 3 - Paragraph 70: "Following the determination of mutual exclusivity among the applications filed in response to a window, we anticipate issuing public notices identifying the applicants in each group of mutually exclusive applications who would be eligible to bid on construction permits for the allotments or channels identified in their short-form applications. Such public notices would provide more detail on the time, place and method of competitive bidding to be used, as well as applicable bid submission and payment procedures, the deadline for submitting the upfront payments, the amounts of the upfront payments and any minimum opening bid or reserve price, all pursuant to the auction rules then in place. Of course, any application submitted in response to an announced window that is not mutually exclusive with any other application in the same service would not be subject to auction. The Commission anticipates that such non-mutually exclusive applications would be identified by public notice (possibly in the same public notice announcing the mutually exclusive groups), and a date established in the public notice for the filing of complete long-form applications (FCC Form 301, FCC Form 346 or FCC Form 349) by these non-mutually exclusive applicants. We request comment on requiring that non-mutually exclusive applicants file their long-form applications within 30 days after the date of any such public notice. We would then proceed to review the long-form applications."

Given our comments above, we suggest that you have all the resources necessary to determine mutual exclusivity. Therefore we consider in-depth engineering prior to auction is wasteful and not necessary. We concur that non-mutually exclusive applicants should proceed with the long form within 30 days of any public notice.

III C 3 I - POST AUCTION PROCEDURES PARAGRAPH 6: "We finally request comment on whether any existing requirements contained in the FCC Form 301, FCC Form 346 and FCC Form 349 applications may be eliminated. Specifically, we are proposing to eliminate the requirement that applicants certify they have a "reasonable assurance" that the specific sites proposed as the location of their transmitting antennas will be available.[36] We request comment on our proposal to delete the

[36] In other actionable services, such as the Multipoint Distribution Service, we have eliminated such requirements relating to the transmitter sites proposed by auction winners, and relied instead upon the enforcement of construction build-out requirements to ensure that auction winners construct their facilities and begin providing service to the public in a timely manner. *See* 47 C.F.R. §§ 21.15, 21.930.

"reasonable assurance" of site certification from the FCC Forms 301, 346 and 349, and to rely on strict enforcement of our existing construction requirements to ensure that winning bidders in future broadcast auctions construct their facilities in a timely manner. See 47 C.F.R. § 73.3598 (establishing two-year construction period for television stations and 18-month construction period for AM, FM and PTV stations, as well as television and FM translators). Given the relatively brief period of time that winning bidders will have to prepare and file their complete long-form applications following the close of future broadcast auctions, we believe that elimination of the "reasonable assurance" of site requirement may be appropriate."

We agree that the "reasonable assurance" statement should be removed.

III C 3 I - Paragraph 10: "*Small Businesses.* Our experience has been that most applicants for new broadcast stations are small businesses. Nevertheless, we seek comment on whether we should adopt bidding credits or other tools to ensure the participation of small businesses in the provision of these services. Commenters should address whether considerations regarding small businesses may differ for future auctions than auctions involving pending cases. We also seek comment on how we should define small business for any special provisions we may adopt. Specifically, in our Part 1 Rule Making, we note that, in various services, we have adopted small business size standards based on gross revenues ceilings of $3 million, $15 million, or $40 million.[37] We seek comment on which of these size categories for small businesses utilized in our prior auctions is most applicable for the broadcast services, or whether an alternative size standard would be more appropriate. As provided in 47 C.F.R. § 1.2110(b)(1), the definition of small business should take into consideration the characteristics and the capital requirements of providing broadcast service to the public and the requirements set forth in the Small Business Act."[38]

We agree that you should adopt special credits for small business. We recommend that you use the three million dollar ceiling for your definition of small business.

III C 3 I - Paragraph 12: "In Metro, applying an intermediate scrutiny standard, the Supreme Court

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[37]See Part 1 NPRM, 12 FCC Rcd at 5699 ¶ 19. In addition, for the broadband PCS C and F block auctions, we established size standards for "entrepreneurs" qualifying for installment payments and eligibility to bid. Specifically, we established a $75 million gross revenues standard for determining eligibility for installment payment plans, 47 C.F.R. § 24.711(b), and a $125 million gross revenues threshold, plus a $500 million total asset test, for determining entrepreneurs' block eligibility, 47 C.F.R. § 24.709(a).

[38]See also Part 1 NPRM, 12 FCC Rcd at 5700 ¶ 21, proposing that size standards adopted in the future be expressed in terms of gross revenues "not to exceed" particular amounts, and that existing standards be modified to conform to this standard, and that, consistent with the Small Business Act, 15 U.S.C. § 632(a), such standards be based on the applicant's average gross revenues over the preceding three years.

upheld the constitutionality of our treatment of minority ownership policies in comparative proceedings. Specifically, the Court identified broadcast diversity as an important governmental objective, 497 U.S. at 567, determined that our minority ownership policies were substantially related to achieving that objective, id. at 566, and attached "great weight" to the joint determination of Congress and the Commission that "the minority ownership policies are critical means of promoting broadcast diversity." Id. at 578. We recognize that in Adarand the Supreme Court subsequently established that policies that take race into account are reviewed under a strict (as opposed to intermediate) scrutiny standard.[39] We tentatively conclude that, to the extent that it complies with applicable constitutional standards, we should take steps to further our longstanding goal of increasing minority ownership of broadcast stations, as well as implementing the designated entity provisions of section 309(j)(4) of the Act. We ask for comment on how we can develop our policies, consistent with the standards set forth in Adarand. In particular, we ask for comment on what tools, such as bidding credits or others, might be used consistent with Adarand. In addition, we seek comment on whether we should limit any tools designed to increase minority ownership to those minority-owned businesses that are also small businesses."

We agree with your philosophy to encourage small business. Entry into the mass media market in all but the smallest markets are going to be difficult for any small business, especially one that is a first time entrant. We do not think you should limit the use of any tools designed to increase minority ownership to those minority-owned businesses that are also small businesses.

III C 3 I - Paragraph 13: *"Minority Eligibility Standards:* "If we adopt bidding credits or other special tools designed to further minority participation, we will need to develop eligibility criteria that will ensure that the scope of our program is appropriate. In this regard, we seek comment on what standards we might employ to specifically further our goal. We could, for example, specify that to qualify for any minority-based provisions, an applicant must be minority-controlled (i.e., minorities must have de facto as well as de jure control of the applicant and must own more than 50 percent of the equity on a fully diluted basis) and meet the eligibility requirements set forth in 47 C.F.R. § 1.2110(b)(2).[40] Additionally, to ensure that any minority policies are reserved for businesses in

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[39] Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

[40] Section 1.2110(b)(2) requires that minority owners must have a controlling interest in the applicant, must own on a fully diluted basis 50.1 percent of the equity, and in the case of corporate applicants, must hold at least 50.1 percent of the voting stock or in the case of partnerships, all general partners must be minorities (or entities 100 percent owned or controlled by minorities), and minorities must collectively own at least 50.1 percent of the partnership equity. We note here that the Office of Management and Budget recently modified Statistical Policy Directive No. 15, Race and Ethnic Standards for Federal Statistics and Administrative Reporting, see 62 Fed. Reg. 58782 (October

which minorities have a substantial financial stake, as well as de jure and de facto control, we could strictly define equity to require that minorities have the right to receive at least 50.1 percent of the annual distribution of any dividends paid on the voting stock and the right to receive dividends, profits, and other distributions from the business in proportion to their equity interests.[41] This would be similar to the eligibility standards for minority owned businesses adopted but never implemented for the broadband PCS auctions. Another alternative might be to adopt the "controlling principal" test for financial attribution that we have proposed in the Part 1 Rule Making, 12 FCC Rcd at 5702-03 ¶¶ 25-28, for all actionable services."[42]

We support the concept that minorities must have de facto and de jure control of the applicant and must own more than 50% of the equity on a fully diluted basis. We, as well as you, have heard of the less than forthright manner some companies get around the minority ownership rules. Some may be reading these comments now. We recommend you make it as bullet proof as you can. Perhaps make a rule that if you are a true small and/or minority owned business, you must be able to prove it. The litmus test would be to not be ashamed to do a testimonial on the national news to that effect. We also support the notion that the minorities receive the same amount of distribution of profits etc. as they have in ownership percentage.

III C 3 I - Paragraph 17: *"Diversification of Ownership.* We also seek comment on whether we should adopt bidding credits or other measures to promote diversification of ownership. As noted above, diversification of ownership is one of the two primary objectives of our current licensing

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30, 1997), from which our definition of "minority" set forth in Section 1.2110(b)(2) is derived. See Part 1 Order, 12 FCC Rcd at 5697 ¶ 15 & n.38. In that regard, we anticipate that the operative definition of "minority" at the time of the auctions proposed in this item will be that provided by 47 C.F.R. § 1.2110(b)(2) at the time the auction occurs.

[41] We note that these restrictions differ from the benchmarks used to attribute ownership of broadcast stations for purpose of our multiple ownership restrictions set forth in 47 C.F.R. § 73.3555, where the intent is to identify ownership interests in, or relationships to, a licensee potentially conferring the ability to influence or control the operations of a licensee, including core functions, such as programming. Notice of Proposed Rulemaking in MM Docket No. 94-150, et al. 10 FCC Rcd 3606, 3614 (1995); Attribution of Ownership Interests, 97 FCC 2d 997, 999, 1005 (1984), recon. 58 RR 2d 604 (1985), further recon. 1 FCC Rcd 802 (1986). For that purpose, ownership interests below 50% are attributed but nonvoting and other passive interests are generally disregarded. Our tentative view is that a more restrictive approach is warranted here to safeguard the integrity of our minority ownership policy by strictly limiting it to circumstances in which minority owners will have de facto and de jure control of the license.

[42] In the Part 1 Rule Making, 12 FCC Rcd at 5702-03 ¶¶ 25-28, the Commission proposed to use for financial attribution purposes the "controlling principal" test in place of the "control group" standard currently used in narrowband and broadband PCS. In this regard, we note the court's criticism in Bechtel II, 10 F.3d at 883, of the fact that comparative case law measures ownership for integration purposes in terms of voting share, rather than profit share.

system. Are our multiple ownership rules sufficient to promote diversification, or are additional measures warranted given our tentative conclusion to use auctions to resolve mutual exclusivity among pending commercial broadcast applications that are subject to section 309(l) and Congress' direction that we must do so for all other pending and virtually all future commercial broadcast applications? We note, moreover, that in the absence of such measures, group owners may, as a result of economies of scale, have a significant advantage in an auction over newcomers not owning any broadcast stations. We thus ask for comment on whether we should adopt some measure in the competitive bidding process that is specifically designed to promote diversification of ownership. We also urge commenters to think creatively about how we might promote diversification of ownership through the competitive bidding process. Would it be appropriate, for example, to devise an asset or revenue test that would determine eligibility for such credit? Should we strictly limit any such credit to applicants having no other media interests, or alternatively, should we follow our case law in comparative proceedings and distinguish among applicants based on the extent and location of any media interests? In the event we adopt bidding credits how should they be calculated? Should the credits be tiered based upon the number, size, and location of any media interests, with the highest credits awarded to applicants with no media interests, lesser credits to applicants with a single media interest outside the local market, and the least credits to applicants with multiple distant media interests or a single media interest within the service area? In addition, should we place special restrictions on the transferability of licenses awarded in this manner, in addition to the unjust enrichment provisions contained in Part 1 of the Commission's rules, so as to maximize the diversification impact of such measures?"

In our view, auctions are going to move you away from your stated goal of diversification of ownership. Your current rules must be strengthened to help new entrants into the business. Anything you can do to help the new entrant, perhaps bidding credits, waiving of fees and down payments, etc might be useful. Credits should be tiered based on number, size and location of media interests, with the highest credits awarded to applicants with no media interest, and so on.

III C 3 I - Paragraph 18: *"Bidding Credits.* To the extent we adopt any bidding credits for rural telephone companies, small businesses, minorities, women, non-group owners or others, we ask for comment on what those credits should be and whether, and to what extent, any such bidding credits should be tiered, as we have done in other auction contexts."[43]

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[43] See, e.g., Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Radio Service Spectrum Cap (Report and Order) 11 FCC Rcd 7824, 7848-49 ¶ 53 (1996) (15 percent bidding credit for very small businesses and 10 percent bidding credit for small businesses); Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the

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We strongly believe you should institute a liberal credit for minority, women owned, and small business. Given the limited capitalization of these organizations, the additional credits should give the ability to bid on an equal footing with the large corporations. We understand that under the Telecommunications Bureau scheme, 15% was allowed for very small businesses. We suggest at least 75% for very small businesses and 50% for small businesses, if not complete elimination of any and all minimum bid amounts. If the small business is minority owned, the credit should be larger. Also, we agree that additional credit should be allowed for non-group organizations. It's radical, but it might keep the door open to small business and be some allowance for lost diversity.

In summary, our comments have been based on the theme that the market place should set the value of the spectrum and not the Federal Government. This includes the minimum bid amount and the up-front payments. We also have attempted to expressed the idea that given the auction will take place, diversity will be irreparably harmed unless significant steps are not taken. Also, we asked you take bold steps to help small business, minority and women owned business and non-group businesses get licenses. Finally, we sought to persuade you to eliminate the bureaucratic entanglement suggested by the multiple engineering submittals which will do nothing but increase costs to business with no value added.

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Designated Filing Areas in the 896-901 MHZ and the 935-940 MHZ Bands Allotted to the Specialized Mobile Radio Pool (Second Order on Reconsideration and Seventh Report and Order), 11 FCC Rcd 2639, 2705-06 ¶ 164 (1995) (15 percent bidding credit for very small businesses and 10 percent bidding credit for small businesses).