for narrowband PCS, the Commission tentatively concluded that it is not necessary to propose holding and transfer restrictions for the licenses.[158]

56. Discussion. Certain commenters support the proposed application of the general Part 1 unjust enrichment provisions to all narrowband PCS transactions, including partitioning and disaggregation arrangements.[159] We believe that when a small business entity applies to transfer or partition its license or disaggregate spectrum, unjust enrichment rules are necessary in order to ensure that non-small business entities cannot take indirect advantage of our small business incentives. Yet, we no longer need to establish a separate unjust enrichment requirement because we have adopted a uniform requirement in Part 1, Subpart Q, of our rules for all services.[160] Accordingly, we will use the Part 1 unjust enrichment provisions for narrowband PCS.[161] The Part 1 unjust enrichment rules address assignments and transfers between entities qualifying for different tiers of bidding credits. These rules are similar to unjust enrichment rules adopted for the 800 MHz SMR auction for determining the actual proportion of bidding credits to be refunded and reducing the amount of unjust enrichment payments due on transfer, partition or disaggregation based upon the amount of time the initial license has been held. We note that because we now offer bidding credits only to small businesses, our unjust enrichment rules will apply to any case where a licensee that qualified for a bidding credit seeks to transfer or partition to an entity that is not a small business. In addition, our revised attribution rules will apply in determining small business status. Finally, we will not adopt a holding period or transfer restrictions for narrowband PCS licenses that would be in addition to our unjust enrichment rules.

F. Partitioning and Disaggregation

1. Partitioning

57. Background. In the *Narrowband PCS R&O/Further Notice*, the Commission proposed a geographic partitioning scheme similar to that adopted for broadband PCS.[162] Specifically, the Commission proposed to allow all narrowband PCS licensees to partition at any time to any entity eligible for a narrowband PCS license, and it proposed to permit partitioning of narrowband PCS licenses based on any geographic area defined by the parties to a partitioning arrangement. The Commission further proposed that a partitionee be authorized to hold its license for the remainder of the original ten-year license term.[163] The Commission sought comment on whether the partitioning scheme would help eliminate market entry barriers for small businesses pursuant to Section 257 of the Communications Act.[164]

58. The Commission also proposed to give parties to a partitioning arrangement two options for meeting the applicable narrowband PCS construction requirements: Under the first proposed option, the partitionee may certify that it will satisfy the same construction

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158 *Id.*

159 Celpage Comments at 14; Metrocall Comments at 12.

160 *See Part 1 Third Report and Order*, 13 FCC Rcd at 406-07, ¶¶ 52-53.

161 *See* 47 C.F.R. § 1.2111.

162 *Narrowband PCS R&O/Further Notice*, 12 FCC Rcd at 13014-15, ¶¶ 88-89.

163 *Id.* at 13015-16, ¶¶ 89-91.

164 *Id.* at 13015, ¶ 89.

requirements as the original licensee, with the partitionee meeting the requirements in its partitioned area and the partitioner responsible for satisfying the requirements in the area it has retained. Under the second proposed option, the original licensee may certify that it has already met or will meet its five-year construction requirement and that it will meet the 10-year requirement for the entire market involved.[165] The Commission further proposed to require that the parties file supporting documentation showing compliance with the applicable construction requirements. The Commission sought comment on whether the option of partitioning could be extended to incumbent narrowband PCS licensees as well.[166]

59. Finally, the Commission sought comment on the type of unjust enrichment requirements it should adopt as conditions for approval of an application for a partial transfer of a license owned by a qualified small business to a non-small business entity or to an entity qualifying for a lower bidding credit than the original licensee.[167] It proposed to establish separate installment payment and default obligations for small business licensees and partitionees.[168]

60. Discussion. A number of commenters support the Commission's proposal to allow geographic partitioning of narrowband spectrum,[169] and we will permit all narrowband PCS licensees, including incumbents, to partition at any time to any entity eligible for a narrowband PCS license. We believe that small businesses and others may face certain barriers to entry into the provision of spectrum-based services, which may be addressed by allowing qualifying entities to acquire a partitioned license.[170] We also believe that the partitioning policy we adopt here will allow licensees to use spectrum more efficiently, speed service to underserved areas, and stimulate competition. We find that partitioning is a *bona fide* funding source that will help licensees construct their systems and provide valuable service to the public. Moreover, our decision here is consistent with our decisions to permit geographic partitioning in other services,[171] including broadband PCS,[172] Multipoint Distribution Service (MDS),[173] 800 MHz and 900 MHz SMR,[174] 39 GHz fixed point-to-point microwave,[175] WCS,[176] Local Multipoint

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165 *Id.* at 13016, ¶ 92 .

166 *Id.*

167 *Id.* at 13016-17, ¶¶ 94-95.

168 *Id.* at 13016, ¶ 93.

169 Ameritech Comments at 8; Celpage Comments at 13; CONXUS Comments at 17; Merlin Comments at 21; Metrocall Comments at 10; PCIA Comments at 16-18, Reply Comments at 14-15; RTG Comments at 21.

170 *See* Celpage Comments at 7; Metrocall Comments at 6 (contending that the proposed partitioning rules will give smaller companies greater flexibility in forming bidding consortia or joint ventures, and therefore may enable small businesses to compete more effectively for licenses).

171 *See* Celpage Comments at 13; Metrocall Comments at 11 (arguing that narrowband PCS licensees should not be treated differently than licensees in other services with regard to partitioning).

172 Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees, WT Docket No. 96-148, Implementation of Section 257 of the Communications Act -- Elimination of Market Entry Barriers, GN Docket No. 96-113, *Report and Order and Further Notice of Proposed Rulemaking,* 11 FCC Rcd 21831 (1996) *(Broadband PCS Partitioning and Disaggregation Order).*

173 Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service, MM Docket No. 94-131, and Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253,*Report and Order*, 10 FCC Rcd 9589, 9614-15, ¶¶ 46-47 (1995).

174 Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the

Distribution Service (LMDS),[177] Maritime Services,[178] and paging.[179] Strict enforcement of our construction benchmarks and transfer rules will deter speculators and abuse.[180]

61. We agree with Celpage and Metrocall that partitioning should be permitted based on any geographic area defined by the parties to a partitioning arrangement.[181] We believe, like Ameritech, that partitioning rights will allow licensees to fashion their actual service areas to better reflect their business plans.[182] We also agree with those commenters who argue that partitionees should hold their licenses for the remainder of the partitioner's ten-year license term.[183] We find that this term is appropriate because a licensee, through partitioning, should not be able to confer greater rights than it was awarded under the terms of its license grant.

62. In addition, we will adopt our proposal to provide parties to a partitioning arrangement with two options for meeting the applicable narrowband PCS construction requirements.[184] Under the first option, the partitionee may certify that it will satisfy the same construction requirements as the original licensee, with the partitionee meeting the requirements in its partitioned area and the partitioner responsible for satisfying the requirements in the area it has retained. Under the second option, the original licensee may certify that it has already met or will meet its five-year construction requirement and that it will meet the 10-year requirement for the entire market involved. We do not agree with RTG that the second option should not be offered because of the possibility that partitionees will rely on the original licensee to meet build-out requirements and the original licensee will fail to fulfill its obligation.[185] All parties should understand that, under the first option, both the partitioner and partitionee are individually responsible for meeting the coverage requirements for their respective areas. Failure by either

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800 MHz Frequency Band, PR Docket No. 93-144, Implementation of Sections 3(n) and 322 of the Communications Act -- Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Implementation of Sections 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, *Second Report and Order*, 12 FCC Rcd 19079, 19127-53, ¶¶ 138-227 (1997) (*800 MHz SMR Second Report and Order*).

175 Amendment of the Commission's Rules Regarding the 37.0-38.6GHz and 38.6-40.0 GHz Bands, ET Docket No. 95-183, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, 37.0-38.6GHz and 38.6-40.0 GHz, PP Docket No. 93-253, *Report and Order and Second Notice of Proposed Rule Making*, 12 FCC Rcd 18600, 18634-36, ¶ 70-74 (1997).

176 *WCS Report and Order*, 12 FCC Rcd at 10836-39, ¶¶ 96-103.

177 Rule Making to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, To Reallocate the 29.5-30.0 GHz Frequency Band, To Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, CC Docket No. 92-297, *Fourth Report and Order*, 13 FCC Rcd 11655 (1998) (*LMDS Fourth Report and Order*).

178 Amendment of the Commission's Rules Concerning Maritime Communications, PR Docket No. 92-257, *Third Report and Order and Memorandum Opinion and Order*, 13 FCC Rcd 19853, 19872-74, ¶ 38-43 (1998).

179 *Paging Second Report and Order*, 12 FCC Rcd at 2817, ¶ 192; *Paging MO&O/Third Report and Order*, 14 FCC Rcd at 10101, ¶¶ 132-33.

180 *See* PageNet Reply Comments at 11 (contending that the Commission should not allow partitioning except for good cause shown on a waiver basis or until after the narrowband PCS licensee has fulfilled the second construction benchmark because partitioning could lead to abuse during and after the auction). *See also* PCIA Comments at 18.

181 Celpage Comments at 13; Metrocall Comments at 11.

182 Ameritech Comments at 8.

183 Celpage Comments at 13; Metrocall Comments at 11.

184 As discussed above, narrowband PCS licensees must meet five- and ten-year construction benchmarks or satisfy a substantial service option. *See supra* at ¶ 24.

185 RTG Comments at 22.

party to meet its coverage requirements will result in the automatic cancellation of its license without further Commission action. Under the second option, only the partitioner's license will be cancelled if it fails to meet the coverage requirements for the entire geographic area. The partitionee will not be subject to coverage requirements except for those necessary to obtain license renewal.

63. Consistent with our treatment of the WCS and 800 MHz and 900 MHz SMR services, partitioning applicants will be required to submit, as separate attachments to the partial assignment application, a description of the partitioned service area and a calculation of the population of the partitioned service area. The partitioned service area must be defined using counties, FCC-defined service areas (*e.g.*, EAs), or the boundaries of the area described in terms of latitude and longitude. When partitioning counties or FCC-defined service areas, the applicant need only supply the county and state, or market number. When describing the boundary of an area, however, the applicant must supply sets of coordinates (latitude and longitude referenced to the North American Datum of 1983 -- NAD83) along the boundary sufficient to describe the area. An applicant may use as few as three sets of coordinates, up to a maximum of 120 sets of coordinates in order to describe an area. Applicants are free to aggregate several areas described by coordinates in order to accurately describe the boundary of the partitioned area.

2. Disaggregation

64. Background. In the *Narrowband PCS R&O/Further Notice*, the Commission sought comment on the feasibility of spectrum disaggregation for narrowband PCS.[186] The Commission also asked commenters to address a number of other issues related to disaggregation, including whether minimum disaggregation standards are necessary for narrowband PCS services, whether nationwide licensees should be permitted to disaggregate spectrum, and what the respective obligations of the participants in a disaggregation transfer should be.[187] The Commission asked, among other things, what each party's responsibility should be with respect to the disaggregator's original auctions-related obligation in the event of default or bankruptcy by any of the parties to the disaggregation transfer.[188]

65. The Commission proposed to permit all small business licensees to disaggregate to similarly qualifying parties as well as parties not eligible for small business provisions. It tentatively concluded that if we permit a qualified small business licensee to disaggregate to a non-small business entity, the disaggregating licensee should be required to repay any benefits it received from the small business special provisions on a proportional basis; and that if we permit a small business licensee to disaggregate to another qualified small business that does not qualify for the same level of bidding credit as the disaggregating licensee, the disaggregating licensee should be required to repay a portion of the benefit it received.[189]

66. Discussion. We concur with those commenters that support the Commission's proposal to allow narrowband PCS licensees to disaggregate their spectrum.[190] Ameritech states

186 *Narrowband PCS R&O/Further Notice*, 12 FCC Rcd at 13017, ¶ 96.
187 *Id.* at 13017, ¶¶ 96-97.
188 *Id.* at 13017, ¶ 97.
189 *Id.* at 13017-18, ¶¶ 98-99.
190 Ameritech Comments at 8; Celpage Comments at 13; CONXUS Comments at 17; Metrocall Comments at

that the ability to disaggregate spectrum will allow licensees to tailor their services to marketplace demand.[191] CONXUS, however, claims that disaggregation, as well as partitioning, will not be effective tools in facilitating small business acquisition of additional narrowband PCS spectrum because there is no guarantee that winning bidders will agree to such arrangements or the costs may be prohibitive for small companies.[192] CONXUS also opposes the adoption of partitioning and disaggregation rules if the Commission intends to use them as the only means (*i.e.*, in place of bidding credits) of promoting small business entry into the narrowband PCS industry.[193] Other commenters believe that disaggregation is not technically feasible and therefore it is unnecessary for the Commission to address the issue at this time.[194]

67. We will permit all narrowband PCS licensees, including nationwide licensees, to disaggregate portions of their spectrum in the same general manner as we have for licensees in other CMRS services where we have adopted disaggregation.[195] We conclude that marketplace forces should determine whether it is technically feasible to disaggregate narrowband spectrum. Our experience in broadband PCS demonstrates that parties are capable of determining the economic and technical feasibility of disaggregation arrangements and will make sound business judgments regarding the propriety of these arrangements.[196] We also conclude that allowing narrowband PCS spectrum disaggregation could potentially expedite the introduction of service to underserved areas and provide increased flexibility to licensees. Finally, we believe that disaggregation combined with bidding credits and geographic partitioning will facilitate the acquisition of narrowband PCS spectrum by small businesses.

68. We find that it is unnecessary to require a party that wishes to disaggregate to retain a minimum amount of spectrum. Thus, consistent with our treatment of the broadband PCS, WCS, 800 MHz and 900 MHz SMR, and paging services, we will allow disaggregating parties to negotiate channelization plans among themselves as a part of their disaggregation agreements.[197] Parties will be permitted to disaggregate spectrum in any increments as long as such disaggregation is otherwise consistent with our rules. Disaggregatees will be authorized to hold licenses for the remainder of the disaggregator's original ten-year term. As we concluded with respect to partitioners, the disaggregator should not be entitled to confer greater rights than it was awarded under the initial license grant.

10-11.

[191] Ameritech Comments at 8.

[192] CONXUS Comments at 8-9.

[193] CONXUS at 17; Merlin Comments at 21; RTG Comments at 10-11 (arguing that partitioning alone will not provide designated entities with a meaningful opportunity to provide narrowband PCS services, especially if, as the Commission claims, large service areas are necessary to support viable narrowband PCS services). *See also* Ameritech Comments at 8.

[194] Celpage and Metrocall do not believe it is advisable to allow disaggregation of the response channels at this time since the Commission's waiver procedures provide sufficient flexibility in the event a licensee can demonstrate a technically viable disaggregation proposal. Celpage Comments at 13-14; Metrocall Comments at 11.

[195] *See* Ameritech Comments at 8 (supporting the Commission's proposal to allow the disaggregation of narrowband PCS spectrum under the same rules it has adopted for broadband PCS).

[196] *See Broadband PCS Partitioning and Disaggregation Order*, 11 FCC Rcd at 21860, ¶ 49.

[197] *See id.; WCS Report and Order*, 12 FCC Rcd at 10837, ¶ 99 (1997); *800 MHz SMR Second Report and Order*, 12 FCC Rcd at 19141-42, ¶ 183 (1997) (adopting disaggregation rules for all 800 MHz and 900 MHz SMR licensees); *Paging MO&O/Third Report and Order*, 14 FCC Rcd at 10106-07, ¶ 147.

69. With respect to meeting construction requirements, we will permit disaggregating parties to choose between two options: Under the first option, the parties may agree that either the disaggregator or the disaggregatee will be responsible for meeting the coverage requirements for the geographic service area. Under the second option, the disaggregator and disaggregatee may certify that they will share the responsibility for meeting the coverage requirements for the entire geographic area. We believe that these options are appropriate because our rules for disaggregation should allow for flexibility, and also be consistent with our rules established in other services. Our rules do not dictate the amount of spectrum that licensees must use to meet coverage requirements. Thus, a licensee who disaggregates a portion of its spectrum block to another party may still meet its preexisting construction requirements for the entire geographic area by using the spectrum it has retained. Similarly, a party who receives a portion of the spectrum from the original licensee can also meet the construction requirements for the entire geographic area by using the spectrum it has acquired. In addition, parties can share responsibility for meeting construction requirements for the entire geographic area by combining areas they serve.

70. Under the first option, if the certifying party fails to meet the coverage requirements for the entire geographic area, that party's license will be subject to cancellation, but the non-certifying party's license will not be affected. However, if the parties to a disaggregation agreement select the second option and jointly fail to satisfy the coverage requirements for the entire geographic area, both parties' licenses will be subject to cancellation. We will require parties seeking Commission approval of a disaggregation agreement to include a certification as to which party or parties will be responsible for meeting the construction requirements.

3. Combined Partitioning and Disaggregation

71. Consistent with our treatment of the broadband PCS, WCS, 800 MHz and 900 MHz SMR, and paging services, we will permit combined partitioning and disaggregation.[198] This will allow narrowband PCS licensees the flexibility to design the types of agreements they desire, and will advance the goals of providing competitive service offerings and encouraging new market entrants. In the event that there is a conflict in the application of the partitioning and disaggregation rules, the partitioning rules will prevail. As explained below, when a combination of partitioning and disaggregation is proposed, we will use both the population of the partitioned area and the amount of spectrum disaggregated to calculate unjust enrichment payments.

4. Rules Applicable to Small Businesses

72. As noted above, the Commission sought comment in the *Narrowband PCS R&O/Further Notice* on how to fashion unjust enrichment rules that would apply to small businesses that partition or disaggregate their licenses to entities that are not small businesses or that do not qualify for the same level of bidding credit. Since that time, the Commission has adopted a general rule that determines the amount of unjust enrichment payments assessed for all

[198] *See Broadband PCS Partitioning and Disaggregation Order*, 11 FCC Rcd at 21866, ¶ 66; *WCS Report and Order*, 12 FCC Rcd at 10839, ¶ 102; *800 MHz SMR Second Report and Order*, 12 FCC Rcd at 19150-51, ¶ 217; *Paging MO&O/Third Report and Order*, 14 FCC Rcd at 10110, ¶ 157.

current and future licensees that engage in partitioning and disaggregation.[199] Specifically, the rules adopted in the *Part 1 Third Report and Order* indicate that if a licensee seeks to partition any portion of its geographic area, the amount of the unjust enrichment payment will be calculated based on the ratio of the population in the partitioned area to the overall population of the license area.[200] In the event of disaggregation, the amount of the unjust enrichment payment will be based upon the ratio of the amount of spectrum disaggregated to the amount of spectrum held by the disaggregating licensee.[201] The unjust enrichment provisions adopted in the *Part 1 Third Report and Order* will apply to any narrowband PCS licensee that receives a bidding credit and later elects to partition or disaggregate its license. When combined partitioning and disaggregation is proposed, we will, consistent with our rules for other services, use a combination of both population of the partitioned area and amount of spectrum disaggregated to make these pro rata calculations.[202]

73. As noted above, installment payments have been suspended as a means of financing small businesses and other designated entities seeking to secure spectrum licenses. Nonetheless, there are a small number of current narrowband licensees that qualified as small businesses for installment payment plans. If such a licensee sought to partition or disaggregate its license to another small business, the partitionee or disaggregatee would be permitted to pay its portion of the remaining obligation on the license in installments. If, however, such a licensee sought to partition or disaggregate its license to a non-small business, our Part 1 unjust enrichment rules would apply.[203]

74. Because the Commission has suspended its installment payment program, the issue of default obligations for parties entering into partitioning and disaggregation agreements is moot with respect to future licensees. With respect to current small business licensees that may partition or disaggregate to other small businesses, we conclude that a default on one party's payment obligation should not affect the other party's license.

G. Ownership Disclosure Requirements

75. Background. In the *Narrowband PCS R&O/Further Notice*, the Commission proposed to modify the ownership disclosure requirements for narrowband PCS.[204] Consistent with its proposal for a uniform ownership disclosure requirement in its general competitive bidding rules, the Commission tentatively concluded that relaxing the disclosure requirements would serve the public interest by reducing the administrative burdens associated with the auction process. It sought comment on this proposal and whether a separate schedule to the FCC Form 175 should be designed, which would formalize the ownership disclosure requirements for

199 *See* 47 C.F.R. § 1.2111(e); *Part 1 Third Report and Order*, 13 FCC Rcd at 409, ¶ 57.

200 *Id.*

201 *Id.*

202 *See, e.g., Broadband PCS Partitioning and Disaggregation Order*, 11 FCC Rcd at 21866, ¶ 66; *LMDS Fourth Report and Order*, 13 FCC Rcd at 11669, ¶ 25; *Paging MO&O/Third Report and Order*, 14 FCC Rcd at 10111, ¶ 160.

203 *See* 47 C.F.R. § 1.2111.

204 *Narrowband PCS R&O/Further Notice*, 12 FCC Rcd at 13019, ¶ 102.

the short-form application.[205]

76. Discussion. Those commenters who addressed the issue support the Commission's proposal to simplify ownership disclosure requirements.[206] Celpage argues that the Commission's current requirement that an applicant list all businesses in which any 5 percent or greater stockholder of the applicant holds a 5 percent or greater interest is unnecessarily burdensome and likely to chill legitimate institutional investment in narrowband PCS applicants without countervailing benefits.[207] Benbow contends that the Commission should streamline the ownership reporting requirements consistent with the Commission's decision to do so in previous auctions on the grounds that this will eliminate unnecessary paperwork and expedite the commencement of auctions.[208]

77. We continue to believe that requiring detailed ownership information is necessary to ensure that all applicants claiming small business status qualify for such status. Disclosure of ownership information also aids bidders by providing them with information about their auction competitors and alerting them to entities subject to our anti-collusion rules. We no longer need to establish separate ownership disclosure requirements for narrowband PCS, however, because we have adopted a uniform requirement in Part 1, Subpart Q, of our rules for all services.[209] These rules require all auction applicants to disclose the real party or parties in interest by including as an exhibit to their short-form applications detailed ownership information. Moreover, they require that applicants list controlling interests as well as all parties holding a 10 percent or greater interest in the applicant and any affiliates of these interest holders.[210] We believe that these rules, combined with the controlling interest standard we adopt today and our definition of "affiliate,"[211] will help to ensure that only qualifying applicants obtain the benefits of our small business provisions, without being unduly burdensome.

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

78. Background. In the *Narrowband PCS R&O/Further Notice*, the Commission proposed to modify its pre-licensing construction rules for both broadband and narrowband PCS in order to expedite service to the public. Specifically, the Commission proposed to allow long-form applicants to begin construction of facilities at their own risk regardless of whether petitions to deny have been filed.[212]

79. Discussion. We received no comment on this issue. We will apply our Part 1 rules, which permit applicants for all licenses awarded by competitive bidding to begin construction of facilities prior to the grant of their applications.[213] We believe that allowing pre-grant construction furthers the statutory objective of rapidly deploying new technologies, products, and

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205 *Id.*

206 Celpage Comments at 10; Benbow Reply Comments at 8.

207 Celpage Comments at 10.

208 Benbow Reply Comments at 8-9.

209 47 C.F.R. § 1.2112. *See also Part 1 Third Report and Order*, 13 FCC Rcd at 417-21, ¶¶ 73-78.

210 *See* 47 C.F.R. § 1.2112.

211 *See* 47 C.F.R. § 1.2110(b)(4).

212 *Narrowband PCS R&O/Further Notice*, 12 FCC Rcd at 13020, ¶ 104.

213 47 C.F.R. § 1.2113.

services for the benefit of the public.[214] Pre-grant construction will be subject to any narrowband PCS service restrictions, including but not limited to antenna restrictions, environmental requirements, and international coordination. Any applicant engaging in pre-grant construction does so entirely at its own risk, and the Commission will not take such activity into account in ruling on any petition to deny.

V. SECOND FURTHER NOTICE OF PROPOSED RULE MAKING

80. Background. In the *Narrowband PCS R&O/Further Notice*, the Commission tentatively concluded that the one megahertz of spectrum that it had reserved in the *PCS First Report and Order* should be channelized and licensed. The Commission believed that licensing this spectrum would serve the public interest by facilitating competition, opening the market to new entrants, and allowing existing narrowband PCS licensees to expand their systems through access to additional spectrum.[215]

81. Discussion. We continue to believe that the one megahertz of narrowband PCS reserve spectrum should be licensed. Most commenters oppose the channelization and licensing of this spectrum, arguing that the reasons the Commission reserved it in 1993 are still valid,[216] that narrowband PCS is still in the developmental stages and it is still unclear how this spectrum will be needed,[217] that it is not necessary to auction the reserve spectrum now to achieve a competitive marketplace,[218] and that it would be best to wait and see how the market develops or undertake further study to determine the needs of the market.[219] Certain commenters also contend that licensing the reserve spectrum would devalue existing narrowband PCS licenses,[220]

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214 47 U.S.C. § 309(j)(3)(A).

215 *Narrowband PCS R&O/Further Notice*, 12 FCC Rcd at 12991, ¶ 34. In 1993, the Commission allocated three megahertz of spectrum for narrowband PCS. Only two megahertz of this spectrum was divided into specific channels and made available for licensing, however, because the Commission determined that service proposals for narrowband PCS did not require use of the entire narrowband PCS allocation at that time. *PCS First Report and Order*, 8 FCC Rcd at 7165, ¶ 19.

216 AirTouch Comments at 15; Arch Comments at 9, Reply Comments at 8; Benbow Comments at 5. *See also* PageNet Comments at 10.

217 Arch Comments at 10, Reply Comments at 8; Benbow Comments at 6, Reply Comments at 7; Celpage Comments at 7, Reply Comments at 4; CONXUS Comments at 15-16, Reply Comments at 9; Metrocall Comments at 6, Reply Comments at 4; Morgan Stanley Comments at 4; Motorola Comments at 7, Reply Comments at 2-3; PageMart Comments at 4-5, Reply Comments at 5; PageNet Reply Comments at 2; PCIA Reply Comments at 6.

218 PageNet Comments at 5, Reply Comments at 3-4.

219 American Paging Comments at 2, 5; Ameritech Comments at 7; CONXUS Comments at 15-17; PageMart Comments at 6; PCIA Comments at 9; Arch Reply Comments at 8; Benbow Reply Comments at 7; Celpage Reply Comments at 4; Metrocall Reply Comments at 4; PageNet Reply Comments at 2, 3, 5. *See also* PageNet Comments at 7. We note that PCIA commissioned a study of the narrowband PCS market that was completed in 1998. While it discusses restraints on the development of the narrowband PCS market, as well as drivers of the market, we find nothing in the study that would cause us to conclude that we should continue to hold the one megahertz in reserve. *See* Letter to Dan Phythyon, Chief, Wireless Telecommunications Bureau, from Robert L. Hoggarth, Senior Vice President, PCIA; "An Analysis of the Narrowband PCS (NPCS) Market in the U.S.," filed Oct. 27, 1998.

220 Ameritech Comments at 7, Reply Comments at 8; Celpage Comments at 8; Metrocall Comments at 7; Morgan Stanley Comments at 4. *See also* PageNet Comments at 9 (arguing that if the reserve spectrum is

or would be unlikely to raise substantial sums.[221] Merlin argues, on the other hand, that channelizing and auctioning the reserve spectrum will increase opportunities for new entrants to provide narrowband PCS services.[222]

82. Although a number of commenters argue that it is premature to auction this spectrum,[223] we note that considerable time has elapsed since these comments were filed. Moreover, as we noted in our recent Policy Statement on the reallocation of spectrum, the demand for spectrum has increased dramatically as a result of explosive growth in wireless communications[224] and there is very little unencumbered spectrum available for new services.[225] Thus, consistent with our conclusion in the Policy Statement that the Commission must focus on increasing the amount of spectrum available for use,[226] we tentatively conclude that it is in the public interest to proceed with licensing the one megahertz of narrowband PCS spectrum that has been held in reserve. We believe that this spectrum, which is unencumbered, should be made available to those interested in bringing new and innovative services to the public, and that the Commission should not create an artificial shortage of spectrum that might limit service options. To facilitate the introduction of new and innovative services, we also tentatively conclude that the reserve spectrum should be auctioned along with all of the other remaining unlicensed narrowband PCS spectrum. We believe that auctioning this spectrum together, in conjunction with our decision to eliminate the narrowband PCS aggregation limit, would make it easier for innovators who need more spectrum than is currently allotted to individual licenses to acquire the spectrum they need. If we ultimately decide that it is not in the public interest to auction the reserve spectrum at the same time as other remaining unlicensed spectrum, we nonetheless believe that we should proceed now with channelizing the reserve spectrum so that we are prepared to license it without delay when the market is ready to use it. We seek comment on these tentative conclusions.

83. We seek comment on how the reserve spectrum should be channelized. We acknowledge that the current record does not provide an adequate basis for determining the best channelization plan for this spectrum. In the *Narrowband PCS R&O/Further Notice,* we sought comment on establishing two 300 kHz licenses and one 400 kHz license.[227] Given that we will permit spectrum disaggregation, for which there was support in the comments,[228] we believe that

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auctioned now, winners likely will pay substantially lower prices for their licenses, giving them an unfair competitive edge over incumbents).

221 Morgan Stanley Comments at 4; PageMart Comments at 4-5.

222 Merlin Comments at 5. *See also* RTG Comments at 20-21 (arguing that the Commission should channelize and license the reserve spectrum along with the response channels to encourage participation of small businesses and designated entities by reducing overhead of participating). *But see* PCIA Reply Comments at 8-9 (opposing such arguments).

223 Metrocall Comments at 6; Celpage Comments at 7; PCIA Comments at 8-10. *See also* Benbow Comments at 6; Arch Comments at 10; Motorola Comments at 7; CONXUS Reply Comments at 8-9; Preferred Networks Reply Comments at 6-7.

224 Principles for Reallocation of Spectrum to Encourage the Development of Telecommunications Technologies for the New Millennium, *Policy Statement,* FCC 99-354 (released Nov. 22, 1999), ¶ 2.

225 *Id.* at ¶ 5.

226 *Id.* at ¶ 2.

227 *Narrowband PCS R&O/Further Notice,* 12 FCC Rcd at 12991, ¶ 34.

228 *See* Ameritech Comments at 8; Celpage Comments at 13; CONXUS Comments at 17; Metrocall Comments at 10.

it may make sense to create channel blocks that are larger than those currently in existence. Moreover, larger blocks may be useful to those seeking to provide innovative services. In addition, in light of our tentative conclusion that this spectrum should be auctioned simultaneously with all other remaining unlicensed narrowband PCS spectrum, we seek comment on whether the unlicensed spectrum that has already been channelized should be rechannelized to create licenses authorizing the use of larger blocks of spectrum. We ask commenters to address whether such rechannelization would facilitate the development of innovative services or otherwise assist narrowband PCS licensees in competing against other wireless sectors.

VI. CONCLUSION

84. The modifications to our narrowband PCS rules that we adopt today include the elimination of BTAs for future licensing, the establishment of a "substantial service" alternative to our previously established construction benchmarks, the elimination of the narrowband PCS spectrum aggregation limit, and the lifting of eligibility restrictions on paging response channels. We believe that these rule changes will facilitate the development of narrowband PCS; encourage competition, spectrum effciency, and innovation; reduce the regulatory burden on spectrum users; and promote service to the largest feasible number of consumers. With respect to our narrowband PCS competitive bidding rules, we eliminate race- and gender-based provisions for the present time and we apply our Part 1 rules except as otherwise provided. We expect the bidding credits we adopt for small businesses to also assist many women- and minority-owned entities, as well as rural telephone companies, and we also believe that our standardized Part 1 rules will benefit such businesses by facilitating effective business planning and capital accumulation. In the Further Notice, we tentatively conclude that we should license the one megahertz of narrowband PCS spectrum that has been held in reserve, and we seek comment on how to channelize this one megahertz and the other remaining unlicensed narrowband PCS spectrum.

VII. PROCEDURAL MATTERS

A. Regulatory Flexibility Analysis

85. A Final Regulatory Flexibility Analysis, pursuant to the Regulatory Flexibility Act, 5 U.S.C. § 604, is contained in Appendix C. An Initial Regulatory Flexibility Analysis for the Second Further Notice of Proposed Rule Making is contained in Appendix D.

B. Ex Parte Presentations

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

C. Comment Dates

87. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the

Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before July 5, 2000, and reply comments on or before July 20, 2000. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. *See* Electronic Filing of Documents in Rulemaking Proceedings, 13 FCC Rcd 11322, 11326 (1998). Parties who choose to file by paper must file an original and four copies of each filing. If interested parties want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. If more than one docket or rulemaking number appear in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number. All comments and reply comments must be sent to the Commission's Secretary, Magalie Roman Salas, Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Room TW-A325, Washington, D.C. 20554. One copy should also be sent to the Commission's copy contractor. In addition, a courtesy copy should be delivered to Alice Elder, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554.

88. Parties who choose to file by paper should also submit their comments on diskette. These diskettes should be submitted to: Alice Elder, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible format using Word or compatible software. The diskette should be accompanied by a cover letter and should be submitted in "read only" mode. The diskette should be clearly labeled with the commenter's name, proceeding (including GEN Docket No. 90-314, ET Docket No. 92-100, PP Docket No. 93-253), type of pleading (comment or reply comment), date of submission, and the name of the electronic file on the diskette. The label should also include the following phrase: "Disk Copy – Not an Original." Each diskette should contain only one party's pleadings, preferably in a single electronic file. In addition, commenters must send diskette copies to the Commission's copy contractor, International Transcription Service, Inc., 1231 20th Street, N.W., Washington, D.C. 20037.

89. Comments filed through the ECFS can be sent as an electronic file via the Internet to http://www.fcc.gov/e-file/ecfs.html. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and a reference to GEN Docket No. 90-314, ET Docket No. 92-100, and PP Docket No. 93-253. Parties may also submit an electronic comment by Internet e-mail. To obtain filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message: "get form <your e-mail address>." A sample form and directions will be sent in reply. Or you may obtain a copy of the ASCII Electronic Transmittal Form (FORM-ET) at http://www.fcc.gov/efile/email.html.

90. Documents filed in this proceeding will be available for public inspection during regular business hours at the FCC Reference Information Center, 445 12th Street, S.W.,

Washington, D.C. 20554, and will be placed on the Commission's Internet site.

D. Paperwork Reduction Act Analysis

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

92. In addition to filing comments with the Secretary, a copy of any comments on the information collection(s) contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 1-C804, 445 12th Street, S.W., Washington, DC 20554, or via the Internet to jboley@fcc.gov and to Edward Springer, OMB Desk Officer, 10236 NEOB, 725 - 17th Street, N.W., Washington, DC 20503 or via the Internet to edward.springer@omb.eop.gov."

E. Further Information

93. For further information concerning this proceeding, contact Alice Elder, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, at (202) 418-0660.

F. Ordering Clauses

94. Authority for issuance of this Second Report and Order and Second Further Notice of Proposed Rule Making is contained in Sections 4(i), 257, 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 257, 303(r), and 309(j).

95. Accordingly, IT IS ORDERED that Part 24 of the Commission's Rules IS AMENDED as specified in Appendix B, effective 60 days after publication in the Federal Register. Information collections contained in these rules will be effective upon OMB approval.

96. IT IS FURTHER ORDERED that the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this Second Report and Order and Second Further Notice of Proposed Rule Making, including the Final Regulatory Flexibility Analysis and Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the

Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Magalie Roman Salas
Secretary

APPENDIX A -- LIST OF COMMENTERS

Comments

AirTouch Paging (AirTouch)
American Paging, Inc. (American Paging)
Ameritech Mobile Services, Inc. (Ameritech)
Arch Communications Group, Inc. (Arch)
Benbow PCS Ventures, Inc. (Benbow)
Celpage, Inc. (Celpage)
CONXUS Communications, Inc. (CONXUS)
Merlin Telecom, Inc. (Merlin)
Metrocall, Inc. (Metrocall)
Morgan Stanley Partnerships (Morgan Stanley)
Motorola, Inc. (Motorola)
PageMart, Inc. (PageMart)
Paging Network, Inc. (PageNet)
Personal Communications Industry Association (PCIA)
Rural Telecommunications Group (RTG)

Reply Comments

AirTouch
American Paging
Ameritech
Arch
Benbow
Celpage
CONXUS
MAP Mobile Communications, Inc. (MAP Mobile)
Metrocall
Motorola
Narrowband PCS Companies (Narrowband PCS Companies)
National Telephone Cooperative Association (NTCA)
PageMart Wireless, Inc. (PageMart)
PageNet
PCIA
Preferred Networks, Inc. (Preferred Networks)

Ex Parte Communications

PCIA: October 27, 1998; February 10, 2000

APPENDIX B – FINAL RULES

Part 24 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

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

Authority: 47 U.S.C. 154, 301, 302, 303, 309 and 332.

§ 24.101 [Removed and Reserved]

2. Remove and reserve § 24.101.

3. Section 24.102 is amended by removing paragraph (d) and by revising the introductory text to read as follows:

§ 24.102 Service areas.

Narrowband PCS service areas are nationwide, regional, and Major Trading Areas (MTAs), as defined below. MTAs are based on the Rand McNally 1992 Commercial Atlas & Marketing Guide, 123rd Edition, at pages 38-39 (MTA Map). Rand McNally organizes the 50 States and the District of Columbia into 47 MTAs. The MTA Map is available for public inspection in the FCC's Library, Room TW-B505, 445 12th Street SW, Washington, D.C.

* * * * *

4. Section 24.103 is amended by removing the Note and by revising paragraphs (a), (b), (c), (d), (e) introductory text, and (f) to read as follows:

§ 24.103 Construction requirements.

(a) Nationwide narrowband PCS licensees shall construct base stations that provide coverage to a composite area of 750,000 square kilometers or serve 37.5 percent of the U.S. population within five years of initial license grant date; and, shall construct base stations that provide coverage to a composite area of 1,500,000 square kilometers or serve 75 percent of the U.S. population within ten years of initial license grant date. Licensees may, in the alternative, provide substantial service to the licensed area as provided in paragraph (d) of this section.

(b) Regional narrowband PCS licensees shall construct base stations that provide coverage to a composite area of 150,000 square kilometers or serve 37.5 percent of the population of the service area within five years of initial license grant date; and, shall construct base stations that provide coverage to a composite area of 300,000 square kilometers or serve 75 percent of the service area population within ten years of initial license grant date. Licensees may, in the alternative, provide substantial service to the licensed area as provided in paragraph (d) of this section.

(c) MTA narrowband PCS licensees shall construct base stations that provide coverage to a composite area of 75,000 square kilometers or 25 percent of the geographic area, or serve 37.5 percent of the population of the service area within five years of initial license grant date; and,

shall construct base stations that provide coverage to a composite area of 150,000 square kilometers or 50 percent of the geographic area, or serve 75 percent of the population of the service area within ten years of initial license grant date. Licensees may, in the alternative, provide substantial service to the licensed area as provided in paragraph (d) of this section.

(d) As an alternative to the requirements of paragraphs (a), (b), and (c) of this section, narrowband PCS licensees may demonstrate that, no later than ten years after the initial grant of their license, they provide substantial service to their licensed area. Licensees choosing this option must notify the FCC by filing FCC Form 601, no later than 15 days after the end of the five year period following the initial grant of their license, that they plan to satisfy the alternative requirement to provide substantial service. "Substantial service" is defined as service that is sound, favorable, and substantially above a level of mediocre service that would barely warrant renewal.

(e) In demonstrating compliance with the construction requirements set forth in this section, licensees must base their calculations on signal field strengths that ensure reliable service for the technology utilized. Licensees may determine the population of geographic areas included within their service contours using either the 1990 census or the 2000 census, but not both.

* * * * *

(f) Upon meeting the five and ten year benchmarks in paragraphs (a), (b), and (c) of this section, or upon meeting the substantial service alternative in paragraph (d), licensees shall notify the Commission by filing FCC Form 601 and including a map and other supporting documentation that demonstrate the required geographic area coverage, population coverage, or substantial service to the licensed area. The notification must be filed with the Commission within 15 days of the expiration of the relevant period.

* * * * *

5. A new section 24.104 is added to read as follows:

§ 24.104 Partitioning and disaggregation.

Nationwide, regional, and MTA licensees may apply to partition their authorized geographic service area or disaggregate their authorized spectrum at any time following grant of their geographic area authorizations.

(a) Application required. Parties seeking approval for partitioning and/or disaggregation shall apply for partial assignment of a license pursuant to § 1.948 of this chapter.

(b) Partitioning. In the case of partitioning, applicants and licensees must file FCC Form 603 pursuant to § 1.948 of this chapter and describe the partitioned service area on a schedule to the application. The partitioned service area shall be defined by up to 120 sets of geographic coordinates at points at every 3 degrees azimuth from a point within the partitioned service area along the partitioned service area boundary unless either an FCC-recognized service area is used

(e.g., MEA or EA) or county lines are followed. The geographical coordinates must be specified in degrees, minutes, and seconds to the nearest second latitude and longitude, and must be based upon the 1983 North American Datum (NAD83). In the case where FCC-recognized service areas or county lines are used, applicants need only list the specific area(s) through use of FCC designations or county names that constitute the partitioned area.

(c) Disaggregation. Spectrum may be disaggregated in any amount.

(d) Combined partitioning and disaggregation. Licensees may apply for partial assignment of authorizations that propose combinations of partitioning and disaggregation.

(e) License term. The license term for a partitioned license area and for disaggregated spectrum shall be the remainder of the original licensee's license term as provided for in § 1.955 of this chapter.

(f) Coverage requirements for partitioning.

(1) Parties to a partitioning agreement must satisfy at least one of the following requirements:

(i) The partitionee must satisfy the applicable coverage requirements set forth in § 24.103 for the partitioned license area; or

(ii) The original licensee must meet the coverage requirements set forth in § 24.103 for the entire geographic area. In this case, the partitionee must meet only the requirements for renewal of its authorization for the partitioned license area.

(2) Parties seeking authority to partition must submit with their partial assignment application a certification signed by both parties stating which of the above options they select.

(3) Partitionees must submit supporting documents showing compliance with their coverage requirements as set forth in § 24.103.

(4) Failure by any partitionee to meet its coverage requirements will result in automatic cancellation of the partitioned authorization without further Commission action.

(g) Coverage requirements for disaggregation.

(1) Parties to a disaggregation agreement must satisfy at least one of the following requirements:

(i) Either the disaggregator or disaggregatee must satisfy the coverage requirements set forth in § 24.103 for the entire license area; or

(ii) Parties must agree to share responsibility for meeting the coverage requirements set forth in § 24.103 for the entire license area.

(2) Parties seeking authority to disaggregate must submit with their partial assignment

application a certification signed by both parties stating which of the above requirements they select.

(3) Disaggregatees must submit supporting documents showing compliance with their coverage requirements as set forth in § 24.103.

(4) Parties that accept responsibility for meeting the coverage requirements and later fail to do so will be subject to automatic license cancellation without further Commission action.

6. Section 24.129 is amended by revising the introductory text and paragraph (c), removing paragraph (d), and removing the "*" whenever it appears to read as follows:

§ 24.129 Frequencies.

The following frequencies are available for narrowband PCS.

* * * * *

(c) Nine frequencies are available for assignment on an MTA basis as follows:

(1) Two 50 kHz channels paired with 50 kHz channels:
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) Five 50 kHz channels paired with 12.5 kHz channels:
Channel 20: 930.75-930.80 and 901.8375-901.8500 MHz;
Channel 21: 930.80-930.85 and 901.8500-901.8625 MHz;
Channel 22: 930.85-930.90 and 901.8625-901.8750 MHz;
Channel 25: 930.90-930.95 and 901.8750-901.8875 MHz; and,
Channel 26: 930.95-931.00 and 901.8875-901.9000 MHz.

(3) Two 50 kHz unpaired channels:
Channel 23: 940.90-940.95 MHz; and
Channel 24: 940.95-941.00 MHz.

* * * * *

7. Section 24.130 is revised to read as follows:

§ 24.130 Paging response channels.

The following eight 12.5 kHz unpaired channels are available for assignment on an MTA basis and shall be used only to provide mobile-to-base station communications:

A: 901.9000-901.9125 MHz;
B: 901.9125-901.9250 MHz;

C: 901.9250-901.9375 MHz;
D: 901.9375-901.9500 MHz;
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.

8. Section 24.132 is amended by revising paragraph (e) to read as follows:

§ 24.132 Power and antenna height limits.

* * * * *

(e) MTA 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

* * * * *

§§ 24.302 through 24.309 [Removed and Reserved]

9. Remove and reserve sections 24.302, 24.303, 24.304, 24.305, 24.306, 24.307, 24.308, and 24.309.

§ 24.320 [Removed and Reserved]

10. Section 24.320 is removed and reserved.

11. A new section 24.321 is added to read as follows:

§ 24.321 Designated entities.

(a) Eligibility for small business provisions.

(1) A small business is an entity that, together with its controlling interests and affiliates, has average gross revenues not exceeding $40 million for the preceding three years.

(2) A very small business is an entity that, together with its controlling interests and affiliates, has average gross revenues not exceeding $15 million for the preceding three years.

(3) For purposes of determining whether an entity meets either of the definitions set forth in paragraphs (a)(1) and (a)(2) of this section, the gross revenues of the entity, its controlling interests and affiliates shall be considered on a cumulative basis and aggregated. An applicant seeking status as a small business or very small business under this section must disclose on its

short- and long-form applications, separately and in the aggregate, the gross revenues of the applicant (or licensee), its controlling interests and affiliates for each of the previous three years.

(4) Persons or entities that hold interests in an applicant (or licensee) that are affiliates of each other or have an identity of interests identified in § 1.2110(b)(4)(iii) of this chapter will be treated as though they were one person or entity and their ownership interests aggregated for purposes of determining an applicant's (or licensee's) compliance with the requirements of this section.

(5) Where an applicant (or licensee) cannot identify controlling interests under the standards set forth in this section, the gross revenues of all interest holders in the applicant, and their affiliates, will be attributable.

(6) A consortium of small businesses (or a consortium of very small businesses) is a conglomerate organization formed as a joint venture between or among mutually independent business firms, each of which individually satisfies the definition in paragraph (a)(1) of this section (or each of which individually satisfies the definition in paragraph (a)(2) of this section). Where an applicant or licensee is a consortium of small businesses (or very small businesses), the gross revenues of each small business (or very small business) shall not be aggregated.

(7) Designated entities must describe on their long-form applications how they satisfy the requirements for eligibility for designated entity status, and must list and summarize on their long-form applications all agreements that affect designated entity status such as partnership agreements, shareholder agreements, management agreements and other agreements, including oral agreements, establishing, as applicable, *de facto* or *de jure* control of the entity. Such information must be maintained at the licensee's facilities or by its designated agent for the term of the license in order to enable the Commission to audit designated entity eligibility on an ongoing basis.

(b) Controlling interest.

(1) For purposes of this section, a controlling interest includes individuals or entities with either *de jure* or *de facto* control of the applicant. *De jure* control is evidenced by holdings of greater than 50 percent of the voting stock of a corporation, or in the case of a partnership, general partnership interests. *De facto* control is determined on a case-by-case basis. An entity must disclose its equity interest and demonstrate at least the following indicia of control to establish that it retains *de facto* control of the applicant:

(i) The entity constitutes or appoints more than 50 percent of the board of directors or management committee;

(ii) The entity has authority to appoint, promote, demote, and fire senior executives that control the day-to-day activities of the licensee; and

(iii) The entity plays an integral role in management decisions.

(2) The following rules apply for the calculation of certain interests.

(i) Ownership interests shall be calculated on a fully diluted basis; all agreements such as warrants, stock options, and convertible debentures will generally be treated as if the rights thereunder already have been fully exercised.

(ii) Partnership and other ownership interests and any stock interest equity, or outstanding stock, or outstanding voting stock shall be attributed as specified below.

(iii) Stock interests held in trust shall be attributed to 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. If the trustee has a familial, personal, or extra-trust business relationship to the grantor or the beneficiary, the stock interests held in trust will be attributed to the grantor or beneficiary, as appropriate.

(iv) Non-voting stock shall be attributed as an interest in the issuing entity.

(v) Limited partnership interests shall be attributed to limited partners and shall be calculated according to both the percentage of equity paid in and the percentage of distribution of profits and losses.

(vi) Officers and directors of an entity shall be considered to have a controlling interest in the entity. The officers and directors of an entity that controls a licensee or applicant shall be considered to have a controlling interest in the licensee or applicant.

(vii) Ownership interests that are held indirectly by any party through one or more intervening corporations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, except that if the ownership percentage for an interest in any link in the chain exceeds 50 percent or represents actual control, it shall be treated as if it were a 100 percent interest.

(viii) Any person who manages the operations of an applicant or licensee pursuant to a management agreement shall be considered to have a controlling interest in such applicant or licensee if such person, or its affiliate, has authority to make decisions or otherwise engage in practices or activities that determine, or significantly influence:

(A) The nature or types of services offered by such an applicant or licensee;

(B) The terms upon which such services are offered; or

(C) The prices charged for such services.

(ix) Any licensee or its affiliate who enters into a joint marketing arrangement with an applicant or licensee, or its affiliate, shall be considered to have a controlling interest, if such applicant or licensee, or its affiliate, has authority to make decisions or otherwise engage in practices or

activities that determine, or significantly influence:

(A) The nature or types of services offered by such an applicant or licensee;

(B) The terms upon which such services are offered; or

(C) The prices charged for such services.

(c) Bidding credits.

(1) After [effective date of rules], a winning bidder that qualifies as a small business or a consortium of small businesses as defined in this section may use the bidding credit specified in § 1.2110(e)(2)(iii) of this chapter. A winning bidder that qualifies as a very small business or a consortium of very small businesses as defined in this section may use the bidding credit specified in § 1.2110(e)(2)(ii) of this chapter.

(2)(i) Businesses owned by members of minority groups and women, including small businesses owned by members of minority groups and women, that are winning bidders on nationwide licenses on Channel 5, Channel 8, and Channel 11 prior to [effective date of rules] will be eligible for a twenty-five (25) percent bidding credit.

(ii) Businesses owned by members of minority groups and women, including small businesses owned by members of minority groups and women, that are winning bidders on regional licenses on Channel 13 and Channel 17 prior to [effective date of rules] will be eligible for a forty (40) percent bidding credit.

(d) Installment payments. Small businesses, including small businesses owned by members of minority groups and women, that are winning bidders on any regional license prior to [effective date of rules] will be eligible to pay the full amount of their winning bids in installments over the term of the license pursuant to the terms set forth in § 1.2110(f) of this chapter.

12. Section 24.404 is amended by revising paragraph (a)(1) to read as follows:

§ 24.404 Eligibility.

(a) * * *

(1) The applicant is qualified under the applicable laws and the regulations, policies and decisions issued under the laws, including § 24.12;

* * * * *

13. Section 24.430 is amended by redesignating paragraph (a)(5) as paragraph (a)(4) and adding at the end of paragraph (a)(3) the word "and."

APPENDIX C

FINAL REGULATORY FLEXIBILITY ANALYSIS
(Second Report and Order)

As required by the Regulatory Flexibility Act (RFA),[229] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in Appendix D of the *Report and Order and Further Notice of Proposed Rulemaking* in this proceeding.[230] The Commission sought written public comment on the proposals in the *Further Notice of Proposed Rulemaking,* including comment on the IRFA. As described below, no commenter raised an issue concerning the IRFA. The Commission's Final Regulatory Flexibility Analysis (FRFA) in this Second Report and Order conforms to the RFA.[231]

I. Need for and Purpose of this Action:

This Second Report and Order amends the Commission's rules for narrowband PCS. The amendments adopted promote efficient licensing of narrowband PCS and enhance the service's competitive potential in the Commercial Mobile Radio Service marketplace. The Second Report and Order also makes the competitive bidding rules for narrowband PCS, which previously provided preferences for minority- and women-owned businesses, race- and gender-neutral. The Commission deems the latter changes necessary in light of the Supreme Court's decisions in *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200 (1995) (requiring a strict scrutiny standard of review for Congressionally mandated race-conscious measures) and *United States v. Virginia,* 518 U.S. 515 (1996) (applying an intermediate scrutiny standard of review to a state program containing gender classification). By applying the Commission's standardized Part 1 competitive bidding rules to narrowband PCS and eliminating most of the service-specific competitive bidding rules previously applied, the Second Report and Order also simplifies and reduces the regulatory burden on applicants and licensees.

II. Summary of Issues Raised by the Public in Response to the IRFA:

No party filed comments responding to the IRFA. The Commission has, however, taken small business concerns into account in the Second Report and Order, as discussed in Sections V and VI of this FRFA.

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229 5 U.S.C. § 603. Congress amended the RFA, *id* § 601 *et seq.,* by the Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996.

230 Amendment of the Commission's Rules to Establish New Personal Communications Services, Narrowband PCS, GEN Docket No. 90-314, ET Docket No. 92-100, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Narrowband PCS, PP Docket No. 93-253, *Report and Order and Further Notice of Proposed Rulemaking*, 12 FCC Rcd 12972 (1997) *(Narrowband PCS R&O/Further Notice)*.

231 *See* 5 U.S.C. § 604.

III. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply:

The rules adopted in the Second Report and Order will affect small businesses that hold or seek to acquire narrowband PCS licenses. These entities include small businesses that obtain nationwide, regional or MTA geographic area licenses through auction, assignment, or transfer and small businesses that acquire partitioned and/or disaggregated MTA, regional, or nationwide geographic area licenses.

To date, two auctions of narrowband PCS licenses have been conducted. Through these auctions, the Commission has awarded a total of 41 licenses, out of which 11 were obtained by small businesses. For purposes of the two auctions that have already been held, small businesses were defined as entities with average gross revenues for the prior three calendar years of $40 million or less. To ensure meaningful participation of small business entities in the auctions, the Commission adopts a two-tiered definition of small businesses in the Second Report and Order. A small business is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $40 million. A very small business is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $15 million. In December 1998, the Small Business Administration approved this two-tiered definition, which had been proposed in the *Narrowband PCS R&O/Further Notice.*[232]

In the future, the Commission will auction 459 licenses to serve MTAs and 408 response channel licenses. There is also one megahertz of narrowband PCS spectrum that has been held in reserve and that the Commission has not yet decided to release for licensing. The Commission cannot predict accurately the number of licenses that will be awarded to small entities in future auctions. However, 4 of the 16 winning bidders in the two previous narrowband PCS auctions were small businesses, as that term was defined under the Commission's rules. The Commission assumes, for purposes of the evaluations and conclusions in this FRFA, that a large portion of the remaining narrowband PCS licenses will be awarded to small entities. The Commission also assumes that at least some small businesses will acquire narrowband PCS licenses by means of the Commission's partitioning and disaggregation rules.

[232] Letter of Dec. 2, 1998, to Amy J. Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, from Aida Alvarez, Administrator, Small Business Administration. Without this definition, the Commission would utilize the SBA definition applicable to radiotelephone companies, *i.e.*, an entity employing fewer than 1,500 persons. 13 C.F.R. § 121.201, Standard Industrial Classification Code 4812. Nearly all radiotelephone companies have fewer than 1,000 employees. The 1992 Census of Transportation, Communications, and Utilities, conducted by the Bureau of the Census, shows that only 12 radiotelephone firms out of a total of 1,178 such firms that operated during 1992 had 1,000 or more employees. U.S. Bureau of the Census, U.S. Department of Commerce, 1992 Census of Transportation, Communications, and Utilities, UC92-S-1, Subject Series, Establishment and Firm Size, Table 5, Employment Size of Firms: 1992, SIC Code 4812 (issued May 1995).

IV. Summary of Projected Reporting, Recordkeeping, and Other Compliance Requirements:

The rules adopted in the Second Report and Order impose reporting and recordkeeping requirements on small businesses, as well as others, seeking to obtain or transfer licenses through partitioning and disaggregation. The information requirements will be used to determine whether the proposed partitionee or disaggregatee is an entity qualified to obtain a partitioned license or disaggregated spectrum. The information will be a one-time filing by an applicant requesting such a license. The information can be submitted on FCC Form 603 for Part 24 narrowband PCS services. 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 filing electronically, including small businesses, will not incur any per minute on-line charge. The Commission estimates that applicants contracting out the information would use an attorney or engineer (average of $200 per hour) to prepare the information.

Narrowband PCS applicants and licensees, including small businesses, will be subject to the reporting and recordkeeping requirements already contained in the Commission's Part 1 competitive bidding rules, which apply to all auctionable services. These Part 1 rules include the unjust enrichment rule set forth at 47 C.F.R. § 1.2111, which includes a reporting requirement for applicants seeking approval of a transfer of control or assignment of license within three years of receiving a new license through competitive bidding. The Part 1 rules also include the uniform ownership disclosure requirements of 47 C.F.R. § 1.2112, which require all auction applicants to disclose the real party or parties in interest by including as an exhibit to their short-form applications detailed ownership information. The Commission finds that these rules, combined with its controlling interest standard and definition of "affiliate," will help to ensure that only qualifying applicants obtain the benefits of its small business provisions, without being unduly burdensome. In addition, narrowband PCS licensees that qualify as designated entities will be required to maintain at their facilities or by a designated agent, for the term of the license, information relevant to their eligibility for designated entity status. This requirement will further help to ensure that only qualifying applicants obtain the benefits of the Commission's small business provisions.

V. Steps Taken to Minimize Burdens on Small Entities:

The rules adopted in the Second Report and Order are designed to implement Congress' goal of giving small businesses, as well as other entities, the opportunity to participate in the provision of spectrum-based services. The rules are also consistent with the Communications Act's mandate to identify and eliminate market entry barriers for entrepreneurs and small businesses in the provision and ownership of telecommunications services. *See generally* 47 U.S.C. §§ 257, 309(j).

Service Areas. The Commission finds that MTAs, rather than nationwide and regional geographic areas, are the most appropriate geographic area for licensing the remaining

narrowband PCS spectrum because they will serve the needs of a wide range of entities, including both large and small service providers. Certain commenters argued that any additional nationwide or regional licenses would be too costly for small businesses to acquire and build out. MTAs, however, are not too large to preclude the entry of small businesses, and those interested in service areas larger than MTAs will be able to create such areas by aggregating licenses.

Bidding Credits. As noted above, to ensure meaningful participation of small business entities in the auctions, the Commission adopts a two-tiered definition of small businesses in the Second Report and Order. A small business is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $40 million. A very small business is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $15 million. Small businesses are eligible for a 15 percent bidding credit. Very small businesses are eligible for a 25 percent bidding credit. In contrast to the Commission's previous rules, bidding credits will now be applicable to narrowband PCS licenses on all channels.

Partitioning and Disaggregation. The Second Report and Order adopts rules permitting narrowband PCS licensees to partition portions of their geographic areas, or disaggregate portions of the spectrum for which they hold a license, to other entities qualified to be licensees. Such partitioning and disaggregation will facilitate market entry by parties that may lack the financial resources to participate in auctions, including small businesses. Partitioning and disaggregation are expected to enable small businesses to obtain licenses for areas smaller than nationwide, regional or MTA areas, or smaller amounts of spectrum, at costs they will be able to afford. The Commission's decision to allow parties to partitioning or disaggregation agreements to choose between two options to meet their coverage requirements will provide small businesses with more flexibility in managing their resources.

Substantial Service Option. The Second Report and Order allows narrowband PCS licensees to demonstrate "substantial service" as an alternative to meeting the coverage requirements set forth in the existing rules. The Commission finds that a substantial service option may be very useful in allowing licensees, including small businesses, to use spectrum flexibly to provide new and innovative services uninhibited by a requirement that they meet a specific coverage benchmark or lose their license.

Application of Part 1 Standardized Rules. The Commission believes that its application of the Part 1 standardized rules regarding eligible entities, unjust enrichment, and bidding credits will assist small businesses because the resulting predictability will facilitate the business planning and capital fundraising process.

VI. Significant Alternatives Considered:

The Commission considered and rejected the following alternative proposals concerning service areas, spectrum aggregation, response channels, coverage requirements, nationwide paging licensees, competitive bidding rules, installment payments, and disaggregation.

Service Areas. The Commission declined to adopt Metrocall's, Celpage's and Benbow's recommendation that it use a combination of regional and MTA service areas for future licensing

of narrowband PCS. Similarly, the Commission declined to adopt Arch's proposal that it allocate one of the two remaining 50 kHz paired channels as a nationwide license. Taking into consideration other commenters' argument that it would be too costly for small businesses to acquire and build out nationwide and regional licenses, the Commission decided to use MTAs for future licensing. The Commission also declined to adopt several commenters' recommendation that it use BTA-based licenses to license narrowband PCS spectrum. The Commission concluded that using MTAs rather than BTAs would not compromise the goal of ensuring entry for small businesses.

Spectrum Aggregation. In the Second Report and Order, the Commission considered the argument that it should maintain the narrowband PCS spectrum aggregation limit, which was originally adopted to ensure that narrowband PCS services would be offered on a competitive basis. The Commission decided to eliminate the narrowband PCS aggregation limit, finding that the aggregation limit is not needed to prevent an undue concentration of licenses and that it may be harmful if it disadvantages narrowband PCS licensees in competing against other services.

Response Channels. In the Second Report and Order, the Commission considered and rejected its tentative conclusion that the response channels should not be restricted to mobile-to-base transmissions, provided that licensees comply with the relevant rules regarding maximum transmitter power and interference. The Commission agreed with commenters Arch, Benbow, and PCIA that allowing these channels to be used for other purposes would cause harmful interference with current narrowband PCS licensees and determined that it would retain the current rule restricting use of the response channels to mobile-to-base transmissions.

Construction and Coverage Requirements. The Commission declined to adopt recommendations by certain commenters that it modify its current construction benchmarks. It declined, for example, to adopt Arch's and Benbow's suggestion that it eliminate the five-year construction requirement and allow both existing and new narrowband PCS licensees to meet a 37.5 percent population benchmark by the tenth year of their license terms. The Commission found that its five- and ten-year construction benchmarks provide sufficient time for narrowband PCS licensees to construct their systems. The nationwide narrowband PCS licensees that have reached their five-year buildout benchmarks have all represented that they met the requirement, and none requested a waiver. The Commission found that there is no need to alter the current benchmarks, and that it is best to address any problems that individual licensees may have because of difficulties with financing or equipment availability by evaluating requests for waiver on a case-by-case basis.

Several commenters opposed the adoption of a "substantial service" requirement on the grounds that replacing the existing coverage requirements with a substantial service test would encourage speculation, fraud, and anticompetitive behavior. In considering and rejecting this argument, the Commission concluded that coverage requirements, including a substantial service standard, encourage the provision of service to areas that would not necessarily receive service expeditiously solely through the operation of market forces. The Commission found that the substantial service option may be very useful in allowing licensees to use spectrum flexibly to provide new and innovative services uninhibited by a requirement that they meet a specific coverage benchmark or lose their license. The Commission also concluded that permitting

licensees to make a substantial service showing may encourage them to build out in rural areas. The Commission also declined to adopt Ameritech's recommendation that substantial service be defined as "service that is sound, favorable, and reasonably capable of meeting an appropriate portion of the public demand for one or more of the communications services of which the system is capable under the Commission's rules." In the past the Commission has offered guidance to licensees in other services with regard to factors that it would consider in evaluating whether the substantial service requirement has been met, and it will maintain this practice with respect to narrowband PCS.

Nationwide Paging Licenses. In the *Paging MO&O/Third Report and Order*, the Commission considered the issue of coverage requirements for nationwide geographic area paging licensees and deferred any decision on the issue until it resolved similar matters in the instant narrowband PCS rulemaking proceeding.[233] In the Second Report and Order, the Commission found that all nationwide paging licensees are already providing sufficient coverage to meet the five-year benchmark applicable to nationwide narrowband PCS licenseees, and some of them have met the ten-year benchmark. Thus, the Commission concluded that the build-out requirements imposed on nationwide paging licensees under its previous rules were adequate to promote coverage equivalent to that of nationwide narrowband PCS licensees, and therefore it is not necessary to adopt coverage requirements for nationwide paging licensees that would be in addition to the build-out requirements they have already met.

Competitive Bidding Rules. The Commission declined to adopt certain commenters' recommendation that it require applicants to identify each frequency in each market on which they wish to bid and submit upfront payments for each individual license. The Commission found that its current rules, which require an upfront payment to cover only those licenses on which an applicant intends to bid in any one round, are appropriate because they allow bidders the flexibility to pursue backup strategies during the course of an auction in the event they are unable to obtain their first choice of licenses. The Commission also declined to modify its anti-collusion rule to provide a safe harbor for carriers engaged in negotiations regarding mergers or intercarrier agreements, as requested by PCIA. The Commission has declined to create such a safe harbor in the past, and it has not been presented with an adequate justification for departing from that decision here. Finally, several commenters requested that the Commission provide auction participants with the identity of all competing bidders. It has generally been the Commission's practice to disclose the identity of all bidders in Commission auctions. If, in the case of particular auctions, a limit on such information appears warranted, the Wireless Telecommunications Bureau will, consistent with the Balanced Budget Act of 1997 and current practice, seek comment on the issue in a public notice prior to the auction.

Installment Payments. The Commission declined to adopt installment payment plans for small businesses participating in narrowband PCS auctions. This action is consistent with the Commission's policy set forth in the *Part 1 Third Report and Order*,[234] where the Commission

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[233] *See* Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, WT Docket No. 96-18, Implementation of Section 309(j) of the Communications Act-- Competitive Bidding, PP Docket No. 93-253, *Memorandum Opinion and Order on Reconsideration and Third Report and Order*, 14 FCC Rcd 10030, 10072, ¶ 69 (1999) (*Paging MO&O/Third Report and Order*).

[234] *See* Amendment of Part 1 of the Commissions Rules -- Competitive Bidding Procedures, WT Docket No.

noted that its experience has demonstrated that installment payments may not be necessary to ensure a meaningful opportunity for small businesses to participate successfully in its auction program.

Bidding Credits. The Commission decided to adopt a 15 percent bidding credit for small businesses and a 25 percent bidding credit for very small businesses. A small business is an entity with average annual gross revenues not to exceed $40 million for the preceding three years, and a very small business is an entity with average annual gross revenues not to exceed $15 million for the preceding three years. The Commission declined to adopt higher bidding credits, as Merlin and RTG recommend. The bidding credits adopted are those provided for in the Commission's Part 1 standardized competitive bidding rules. The Commission believes that these levels of bidding credits, which are higher than those proposed in the *Narrowband PCS R&O/Further Notice*, are sufficient to promote the participation of small businesses in the provision of narrowband PCS, and that there is no reason to deviate from the standard schedule of bidding credits here.

Bidding Credits for Rural Telephone Companies. The Commission declined to adopt RTG's and NTCA's recommendation that it provide special bidding credits for rural telephone companies in order to meet its obligation to ensure that rural telephone companies have the opportunity to participate in spectrum-based services. The Commission has no evidence that large rural telephone companies encounter barriers to capital formation comparable to those faced by other designated entities. In addition, the vast majority of rural telephone companies that have participated in the Commission's auctions to date have identified themselves as small businesses and have qualified for bidding credits on that basis. Thus, the Commission believes that small business bidding credits are sufficient to ensure that rural telephone companies have the ability to participate in spectrum-based services, and it does not believe that rural telephone companies will be unable to compete in narrowband PCS auctions or the messaging marketplace without special financial preferences.

Attribution. The Commission declined to adopt Merlin's recommendations regarding amending its rules to adapt to various business structures. Merlin suggests, for example, that, for purposes of defining whether a company is widely held, whatever its form of business organization, the Commission should formulate its rules to state that a widely held company is one in which no single equity holder has 15 percent or more of the equity of the applicant. The Commission found that the controlling interest standard adopted today, along with the definition of "affiliate" set forth in Part 1 of the Commission's rules, adequately addresses Merlin's concerns.

Disaggregation. Some commenters stated that disaggregation is not technically feasible and therefore it is unnecessary for the Commission to address the issue at this time. In considering and rejecting such arguments, the Commission concluded that marketplace forces should determine whether it is technically feasible to disaggregate narrowband spectrum. The Commission also concluded that allowing narrowband PCS spectrum disaggregation could

97-82, Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, 4660-4685 MHz, ET Docket No. 94-32, *Third Report and Order and Second Further Notice of Proposed Rule Making* 13 FCC Rcd 374 (1997) (modified by Erratum, DA 98-419 (rel. March 2, 1998)) (*Part 1 Third Report and Order*).

potentially expedite the introduction of service to underserved areas and provide increased flexibility to licensees. Finally, the Commission found that disaggregation combined with bidding credits and geographic partitioning will facilitate the acquisition of narrowband PCS spectrum by small businesses.

Report to Congress: The Commission will send a copy of the Second Report and Order, including this FRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996. *See* 5 U.S.C. § 801(a)(1)(A). In addition, the Commission will send a copy of the Second Report and Order, including FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the Second Report and Order and FRFA (or summaries thereof) will also be published in the Federal Register. *See* 5 U.S.C. § 604(b).

APPENDIX D

INITIAL REGULATORY FLEXIBILITY ANALYSIS

Second Further Notice of Proposed Rule Making

As required by the Regulatory Flexibility Act (RFA),[235] the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policies and rules proposed in this Second Further Notice of Proposed Rule Making (Second FNPRM). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the Second FNPRM provided above in paragraph 87. The Commission will send a copy of the Second FNPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration. *See* 5 U.S.C. § 603(a). In addition, the Sēcond FNPRM and IRFA (or summaries thereof) will be published in the Federal Register. *See id.*

I. Need for and Objectives of this Action:

This Second FNPRM is being initiated to secure comment on the Commission's tentative conclusion that the one megahertz of narrowband PCS reserve spectrum should be licensed. The Commission believes that this spectrum, which is unencumbered, should be made available to those interested in bringing new and innovative services to the public, and that the Commission should work to avoid any shortage of spectrum that might limit service options. The Second FNPRM also seeks comment on how the reserve spectrum should be channelized. The Commission believes that creating channel blocks that are larger than those currently in existence may be useful to those seeking to provide innovative services. Finally, the Second FNPRM seeks comment on whether rechannelizing the unlicensed spectrum that has already been channelized, to create licenses authorizing the use of larger blocks of spectrum, would facilitate the development of innovative services or otherwise assist narrowband PCS licensees in competing against other wireless sectors.

II. Legal Basis:

This action is authorized under 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).

III. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply:

The Final Regulatory Flexibility Analysis (FRFA) set forth in Appendix C describes in detail the small entities that the Commission expects will be affected by the rules adopted in the Second Report and Order. These same entities would be affected by the rules proposed in the

[235] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

Second FNPRM. The number and description of such entities contained in Section III of the FRFA are hereby incorporated in this IRFA.

IV. Reporting, Recordkeeping, and Other Compliance Requirements:

The Commission does not anticipate any additional reporting, recordkeeping, or other compliance requirements as a result of this Second FNPRM.

V. Steps Taken to Minimize Significant Economic Impact on Small Entities and Significant Alternatives Considered:

The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives: (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.

In the Second FNPRM the Commission seeks comment on whether the narrowband PCS reserve spectrum should be licensed. The Commission believes that licensing this spectrum would make it easier for innovators to acquire spectrum and develop services, and that this goal is consistent with promoting opportunities for small businesses. The Commission also seeks comment on whether rechannelizing the unlicensed spectrum that has already been channelized would assist narrowband PCS licensees in competing against other services.

VI. Federal Rules That Overlap, Duplicate, or Conflict With These Rules:

None.