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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 309(j) of the Communications Act – Competitive Bidding	)	PP Docket No. 93-253
	)	
Amendment of Parts 20 and 24 of the Commission's Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap	)	WT Docket No. 96-59
	)	
Amendment of the Commission's Cellular/PCS Cross-Ownership Rule	)	GN Docket No. 90-314

ORDER ON RECONSIDERATION

Adopted: August 11, 2000 **Released:** September 14, 2000

By the Commission:

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I. INTRODUCTION

1. In this Order on Reconsideration ("*Order on Reconsideration*"), we first address three petitions for reconsideration of the Commission's Fifth Memorandum Opinion and Order in PP Docket No. 93-253 ("*Competitive Bidding Fifth Memorandum Opinion and Order*") in which the Commission resolved petitions for reconsideration or clarification of its rules governing competitive bidding for "entrepreneurs' block" (C and F block) Personal Communications Services licenses in the 2 GHz band ("broadband PCS").[1] We next address nine petitions for reconsideration of the Commission's Report and Order in WT Docket No. 96-59 and GN Docket No. 90-314 ("*DEF Report and Order*") in which the Commission modified its competitive bidding and ownership rules for broadband PCS.[2] Finally, we reinstate provisions which, in the *Competitive Bidding Sixth Report and Order*,[3] were inadvertently eliminated from one of the Commission's competitive bidding rules.

II. BACKGROUND

2. Consistent with Congress' mandate to promote the participation of small businesses, rural telephone companies, and businesses owned by members of minority groups and women (collectively, "designated entities") in the provision of spectrum-based services,[4] the Commission originally limited eligibility for C and F block PCS licenses to "entrepreneurs"[5] and adopted special provisions for those

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[1] Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, *Fifth Memorandum Opinion and Order*, 10 FCC Rcd 403 (1994) ("*Competitive Bidding Fifth Memorandum Opinion and Order*"). A list of pleadings filed is included as Appendix A.

[2] Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, WT Docket 96-59, Amendment of the Commission's Cellular/PCS Cross-Ownership Rule, GN Docket 90-314, *Report and Order*, 11 FCC Rcd 7824 (1996) ("*DEF Report and Order*"), *appeal pending sub nom.*, Cincinnati Bell Tel Co. v. FCC, No. 96-3756 (6th Cir.), *on recon.* 12 FCC Rcd 14,031 (1997) ("*BellSouth MO&O*"), *aff'd sub nom.*, BellSouth Corporation v. FCC, 162 F. 3d 1215 (D.C. Cir. 1999). In other proceedings, the Commission has referred to the *DEF Report and Order* as the *CMRS Spectrum Cap Report and Order*. The Commission also received three petitions for stay pending reconsideration, seven oppositions to (or comments on) petitions for reconsideration, seven replies, and one notice of *ex parte* meetings. We refer herein collectively to all of these filings as "petitions," and to the filers of these documents as "petitioners," unless specific reference is made otherwise. A list of pleadings filed is included as Appendix B.

[3] Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket 93-253, *Sixth Report and Order*, 11 FCC Rcd 136 (1995) ("*Competitive Bidding Sixth Report and Order*"), *aff'd sub nom.*, Omnipoint Corp. v. FCC, 78 F.3d 620 (D.C. Cir. 1996) ("Omnipoint").

[4] *See* Communications Act of 1934, as amended ("Communications Act"), § 309(j)(4)(D), 47 U.S.C. § 309(j)(4)(D).

[5] *See* 47 C.F.R. §§ 24.709 and 24.720; Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket 93-253, *Fifth Report and Order*, 9 FCC Rcd 5532 (1994) ("*Competitive Bidding Fifth Report and Order*"); *Order on Reconsideration*, 9 FCC Rcd 4493 (1994) ("*Competitive Bidding* (continued....)

blocks to assist small and women- and minority-owned businesses.[6] The Commission considers entrepreneurs, with regard to the C and F blocks, to be those entities that can meet the auction and licensing eligibility requirements of Section 24.709 of the Commission's rules.[7] The principal requirement is set forth in Section 24.709(a)(1),[8] as follows:

> No application is acceptable for filing and no license shall be granted for frequency block C or frequency block F, unless the applicant, together with its affiliates and persons or entities that hold interests in the applicant and their affiliates, have gross revenues of less than $125 million in each of the last two years and total assets of less than $500 million at the time the applicant's short-form application (Form 175) is filed.

Under Section 24.709, C and F block licensees are required to maintain their eligibility until at least five years from the date of the initial license grant.[9] Licensees, however, are permitted to grow beyond the gross revenue and total assets caps through equity investment by non-attributable investors, debt financing, revenue from operations, business development, or expanded service.[10]

3. The Commission has held four entrepreneurs' block PCS auctions to date. Auction No. 5, the first auction of C block spectrum, ended on May 6, 1996 and was followed quickly by Auction No. 10, another C block auction, which concluded on July 16, 1996. Auction No. 11, the first F block auction, ended on January 14, 1997, and also included D and E block spectrum. The fourth auction, Auction No. 22, made available additional C and F block, as well as E block, spectrum and concluded on April 15,

(Continued from previous page)
Order on Reconsideration"), *Competitive Bidding Fifth Memorandum Opinion and Order*, 10 FCC Rcd 403; *Competitive Bidding Sixth Report and Order*, 11 FCC Rcd 136, *aff'd sub nom.*, Omnipoint, 78 F.3d 620.

[6] *See Competitive Bidding Fifth Report and Order*, 9 FCC Rcd 5532; *Competitive Bidding Fifth Memorandum Opinion and Order*, 10 FCC Rcd 403.

[7] *See* 47 C.F.R. § 24.709. Subsequent to the adoption, but prior to the release, of this *Order on Reconsideration*, we adopted and released the *C/F Block Sixth Report and Order* modifying certain C and F block auction and license rules. *See* Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, *Sixth Report and Order and Order on Reconsideration*, FCC 00-313 (rel. August 29, 2000) ("*C/F Block Sixth Report and Order*"). The rule modifications in the *C/F Block Sixth Report and Order* include, *inter alia*, removal of the entrepreneur eligibility restrictions for some C and F block licenses available in future auctions, elimination of bidding credits in entrepreneur-only bidding, creation of 10 MHz C block licenses with the same construction requirements as F block licenses, and removal of the Section 24.710 limitation on the number of C and F block licenses an auction participant could win. These rule changes will become effective 60 days after their September 5, 2000, publication in the Federal Register. *See* 65 Fed. Reg. 53,624 (September 5, 2000). Because we adopted the C and F block rule modifications of the *C/F Block Sixth Report and Order* subsequent to our adoption of this *Order on Reconsideration*, we do not refer to, or otherwise consider, those rule modifications herein, except to mention them in footnotes *infra*. We note, however, that had the *C/F Block Sixth Report and Order* been adopted prior to this *Order on Reconsideration*, it would not have altered our resolution of the issues we address herein.

[8] 47 C.F.R. § 24.709(a)(1); *see id.* § 24.720. Both of these provisions were modified in the *C/F Block Sixth Report and Order*, App. D.

[9] We modified this requirement in the *C/F Block Sixth Report and Order*, paras. 16-29, App. D.

[10] 47 C.F.R. § 24.709(a)(3); *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd 5605, para. 167; *Competitive Bidding Fifth Memorandum Opinion and Order*, 10 FCC Rcd 419-20, paras. 27, 125.

1999.[11]

III. RECONSIDERATION OF THE COMPETITIVE BIDDING FIFTH MEMORANDUM OPINION AND ORDER

A. Background

4. In the *Competitive Bidding Fifth Memorandum Opinion and Order*, the Commission, responding to petitions for reconsideration or clarification of the *Competitive Bidding Fifth Report and Order*[12] and the *Competitive Bidding Order on Reconsideration*,[13] clarified and modified its rules in order to allow better participation in broadband PCS by entrepreneurs and designated entities.

B. Withdrawal of Petitions

5. Bastion and BET have each requested withdrawal of their petitions.[14] We grant these requests.

C. Control Group Equity Exceptions

6. **Background.** To be eligible to participate in entrepreneurs' (C or F) block auctions, an applicant (together with its affiliates and persons or entities that hold interests in the applicant and their affiliates) must have had gross revenues of less than $125 million in each of the last two years and must have total assets of less than $500 million.[15] We recently adopted as our general attribution rule a "controlling interest" standard and decided that this standard would govern attribution for purposes of determining entrepreneur and small business eligibility for future auctions of C and F block licenses.[16] However, in each of the past four C and F block auctions, we applied an attribution rule that provided for two "control group" equity exceptions – the "25 percent equity exception" and the "49.9 percent equity exception" – under which auction applicants could exclude from their gross revenue and asset totals the

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[11] Auction No. 22 was originally announced as an auction of licenses for C, D, E, and F block spectrum; however, no D block spectrum remained in the license inventory by the start of the auction.

[12] *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd 5532.

[13] *Competitive Bidding Order on Reconsideration*, 9 FCC Rcd 4493.

[14]. Bastion Capital Fund, L.P., Request for Withdrawal of Petition for Reconsideration or, in the Alternative, for Declaratory Ruling (filed August 10, 1999); BET Holdings II, Inc., Request to Withdraw Petition for Reconsideration (filed September 14, 1999).

[15] 47 C.F.R. § 24.709(a)(1). There are limited exceptions to this rule for certain C block applicants. *Id.* § 24.709(b)(9). We modified this rule in the *C/F Block Sixth Report and Order*, paras. 16-29, App. D.

[16] Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, WT Docket No. 97-82, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making*, FCC 00-274, paras. 58-67 (rel. Aug. 14, 2000) ("*Part 1 Fifth Report and Order*"). We stated that existing C and F block licensees would not be required to restructure to meet the controlling interest standard in order to remain licensees; however, we determined that, to participate in future C and F block auctions, all applicants, including existing C and F block licensees, would be subject to the attribution rules in effect at the time of filing their short-form auction applications. *Id.*, para. 67.

gross revenues and total assets of passive investors.[17] Both exceptions required the applicant to form a "control group"[18] within which "qualifying investors"[19] owned at least 50.1 percent of the applicant's voting interests.[20] Under the 25 percent equity exception, the applicant's control group was required to own at least 25 percent of the applicant's total equity; and, within the control group, qualifying investors were required to hold at least 15 percent of the applicant's total equity.[21] Under the 49.9 percent equity exception, the applicant's control group was required to own at least 50.1 percent of the applicant's total equity; and, within the control group, qualifying investors were required to hold at least 30 percent of the applicant's total equity.[22] If these and certain other requirements were met, the gross revenues and total assets of non-controlling investors were not attributed to the applicant.[23]

7. For publicly-traded corporations with widely dispersed voting stock ownership, the Commission in the *Competitive Bidding Fifth Memorandum Opinion and Order* created an additional exception.[24] Under the "publicly-traded corporations exception," applicable to the four C and F block auctions conducted to date, no person could own more than 15 percent of the applicant's equity or be able to control the election of more than 15 percent of the applicant's board of directors.[25] Moreover, no person, other than the applicant's management or members of its board of directors, in their capacities as such, could have *de facto* control of the applicant.[26] If these and certain other requirements were met, the gross revenues and total assets of persons holding an interest in the applicant were not attributed to the applicant.[27]

8. **Discussion.** CommNet objects that under the control group exceptions, small, widely held,

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[17] 47 C.F.R. § 24.709(b). There was also an exception to the general rule for small business consortia. *Id.*

[18] A control group is an entity, or a group of individuals or entities, that possesses *de jure* and *de facto* control of an applicant or licensee. *See id.* § 24.720(k).

[19] A qualifying investor is a person who is (or holds an interest in) a member of the applicant's control group and whose gross revenues and total assets, when aggregated with those of all other attributable investors and affiliates, do not exceed the entrepreneurs' block gross revenues and total assets limits. *Id.* § 24.720(n).

[20] *Id.* § 24.709(b). If the applicant was a partnership, the control group was required to hold all of its general partnership interests. *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.* The equity ownership requirements under both exceptions were somewhat relaxed for entities that had been operating and earning revenues for at least two years prior to December 31, 1994. *Id.* §§ 24.709(b)(6)(ii), 24.720(o); *infra*, Section V and Appendix C.

[24] *Competitive Bidding Fifth Memorandum Opinion and Order*, 10 FCC Rcd at 444-45, paras. 72-75; *see* 47 C.F.R. § 24.709(b)(2).

[25] *See* 47 C.F.R. § 24.720(m).

[26] *See id.*

[27] *Id.* § 24.709(b)(2).

publicly-traded companies "cannot serve at the 'control group' level of the PCS applicant and are thereby effectively precluded from raising equity capital through the pursuit of joint ventures with non-controlling strategic investors."[28] CommNet petitions the Commission either to allow publicly-traded companies to serve as control groups or to "extend the public company exemption to the control group level."[29] While there was nothing in the control group rules explicitly preventing a publicly-traded company from using one of the control group equity exceptions or even from serving as the control group of an applicant, as a practical matter, these options were unlikely to be available to corporations that were publicly-traded. Nevertheless, we believe that the Commission provided such corporations with ample opportunity to obtain financing and to form strategic relationships with other entities. Such corporations were able, under the publicly-traded corporations exception, to sell classes of stock to strategic investors in amounts up to 15 percent of the corporation's equity.[30] They were also permitted to obtain unlimited amounts of debt financing from,[31] or enter into management agreements with, other entities, provided that such arrangements did not constitute a transfer of *de jure* or *de facto* control of the applicant or licensee.[32] Given our recent determination that the controlling interest standard would apply to all future C and F block auctions, we dismiss as moot CommNet's request as to such auctions. Moreover, we believe that to relax the entrepreneurs' block exceptions in the manner CommNet requests for existing C and F block licensees would seriously undermine the effectiveness of the financial caps and, for this reason, deny CommNet's petition with regard to such licensees.

IV. RECONSIDERATION OF THE DEF REPORT AND ORDER

A. Background

9. In the *DEF Report and Order*, the Commission, responding to the Supreme Court's decision in *Adarand Constructors, Inc. v. Peña*[33] ("*Adarand*"), modified its F block rules to make them race- and gender-neutral, as it previously had done for the C block.[34]

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[28] CommNet Petition at 5.

[29] *Id.* at 8.

[30] *See, e.g.*, Applications of Airgate Wireless, L.L.C., Assignor, and Cricket Holdings, Inc., Assignee, for Consent to Assign Broadband PCS F Block Licenses KNLF882, KNLG279, KNLG280 and KNLG281, FCC File No. 000002035; Application of Leap Wireless International, Inc. for Authorization to Construct and Operate 36 Broadband PCS C Block licenses, FCC File No. 0000012974, *Memorandum Opinion and Order*, 14 FCC Rcd 11,827 (1999).

[31] *See* 47 C.F.R. § 24.709(a)(3).

[32] *See Competitive Bidding Fifth Memorandum Opinion and Order*, 10 FCC Rcd at 454-56, paras. 91-96.

[33] 515 U.S. 200 (1995).

[34] *See Competitive Bidding Sixth Report and Order*, 11 FCC Rcd 136, *aff'd sub nom.*, *Omnipoint*, 78 F.3d 620. In the *DEF Report and Order*, the Commission also streamlined auction procedures and eliminated the cellular/PCS cross-ownership rule and the 40 MHz broadband PCS spectrum cap. The Commission substituted a single 45 MHz Commercial Mobile Radio Service ("CMRS") cap, *see* 47 C.F.R. § 20.6, deciding that this cap would give PCS providers more flexibility to participate in the marketplace and would help to simplify the Commission's rules. *DEF Report and Order*, 11 FCC Rcd at 7825, paras. 105-107. The Commission received several petitions regarding the cross-ownership and spectrum cap rules, which have been resolved in other (continued....)

B. Auction Timing

10. Both NABOB and PTSI ask that the Commission delay the start date of Auction No. 11.[35] As stated, Auction No. 11, which began on August 26, 1996, concluded on January 14, 1997. Accordingly, the petitions of NABOB and PTSI are dismissed as moot.[36]

C. Changes Resulting From *Adarand*

11. **Background.** In the *DEF Report and Order*, the Commission examined the F block auction rules in light of the Supreme Court's decision in *Adarand* that all racial classifications must be analyzed by a reviewing court under strict scrutiny.[37] The Commission decided that it did not have sufficient evidence to support its F block race- and gender-based provisions and concluded that the F block rules should be race and gender neutral. Accordingly, the Commission modified the F block rules regarding control group equity structures, affiliation, installment payment plans, and bidding credits. The changes to the F block rules followed analogous modifications to the C block rules by the Commission in the *Competitive Bidding Sixth Report and Order*,[38] which was upheld by the D.C. Circuit Court of Appeals in *Omnipoint v. FCC*.[39] Two days after release of the *DEF Report and Order*, the Supreme Court clarified that under "intermediate scrutiny," the standard of review for gender classifications, the government must demonstrate an 'exceedingly persuasive justification' in order to defend gender-based government action, emphasizing that such action is constitutional only if it serves an important governmental

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Commission proceedings, as follows: The *BellSouth MO&O* denied a petition for reconsideration of the *DEF Report and Order* filed by BellSouth. *BellSouth MO&O*, 12 FCC Rcd 14031. The Commission also addressed an opposition to the BellSouth petition filed by AT&T and reply comments filed by BellSouth. *Id.* In the *CMRS Spectrum Cap Report and Order*, the Commission concluded a comprehensive reassessment of the CMRS spectrum cap and cellular cross-interest rules and incorporated all relevant pending proceedings, including petitions for reconsideration of the *DEF Report and Order* filed by Omnipoint and Radiofone and the related comments, oppositions, and replies. 1998 Biennial Regulatory Review – Spectrum Aggregation Limits for Wireless Telecommunications Carriers, WT Docket 98-205, *Report and Order*, FCC 99-244, paras. 134-35 (Omnipoint Petition, Radiofone Petition at pp. 1-22) (released September 22, 1999) ("*CMRS Spectrum Cap Report and Order*"), *Notice of Proposed Rulemaking*, 13 FCC Rcd 25,132, 25,143-44, paras. 22, 23 (Omnipoint Petition), paras. 22, 24 (Radiofone Petition at pp. 1-22), para. 23 (AT&T Comments and Opposition, Bell Atlantic Opposition, CTIA Opposition, Radiofone Opposition, Omnipoint Reply to Oppositions of AT&T, Bell Atlantic, Radiofone, Omnipoint Reply to Opposition of CTIA), para. 24 (Omnipoint Opposition, Pacific Bell Opposition, Pocket Opposition, Radiofone Reply to Opposition of Bell Atlantic, Radiofone Reply to Opposition of Omnipoint, Radiofone Reply to Opposition of Pacific Bell, Radiofone Reply to Opposition of Pocket) (1998).

[35] PTSI Petition at i, 4-5, 9, 13-14; NABOB Petition for Stay Pending Reconsideration; and PTSI Petition for Stay Pending Reconsideration; *see* Supplement to PTSI Petition for Stay Pending Reconsideration.

[36] We note that no petitioner sought a judicial stay of the auction.

[37] *DEF Report and Order*, 11 FCC Rcd at 7828-34, paras. 7-18.

[38] *See Competitive Bidding Sixth Report and Order*, 11 FCC Rcd 136, *aff'd sub nom.*, Omnipoint, 78 F.3d 620.

[39] *Id.*

objective and is substantially related to the achievement of that objective.[40]

12. In the *Second Further Notice*, we sought comment on whether there is a compelling governmental interest that would justify the use of preferences for minority-owned businesses or an exceedingly persuasive justification to support gender-based preferences for women-owned businesses.[41] In addition, we asked commenters to provide evidence in support of their positions and to indicate what measures, if any, could be narrowly tailored to withstand judicial review.[42] We sought comment on what specifically tailored tools, such as bidding credits, might be appropriate or whether preferences should be given to minority-owned or women-owned businesses that also qualify as small businesses.[43] In our recent *Part 1 Fifth Report and Order*, we noted that we did not receive any comments on these issues and concluded that because the record was sparse we did not believe that it was appropriate to adopt special provisions for minority- and women-owned businesses at that time.[44]

13. **Discussion.** NatTel asks the Commission to reconsider its decision to eliminate race and gender preferences.[45] It argues that the Commission is subject to fewer time pressures for the F block auction than it was for the initial C block auction and that the Commission has had the time to make, and should make, the factual showing necessary to justify reimplementing its race and gender F block provisions. NatTel's request is moot with regard to the two F block auctions already completed.

14. With regard to future F block auctions, we do not have a sufficient record to justify the reimplementation of race- and gender-based auction rules. As stated, we received no comments on these issues in response to the *Second Further Notice*. We note that our Office of Communications Business Opportunities has initiated several studies to examine ownership of telecommunications facilities by minority- and women-owned entities. Further, we have recently commenced several new studies to explore additional entry barriers and to seek further evidence of racial and gender discrimination against potential licensees. In addition, we will continue to track the rate of participation in our auctions by minority- and women-owned firms and evaluate this information with other data gathered to determine whether provisions to promote participation by minorities and women can satisfy judicial scrutiny. If a sufficient record can be adduced, we will consider race- and gender-based provisions for future auctions. We, therefore, deny NatTel's petition. We discuss below other petitions addressing specific rule changes resulting directly or indirectly from the *Adarand* decision.

1. Control Group Equity Exception and Affiliation Exception

15. **Background.** *Control Group Equity Exception.* As explained earlier, the Commission's

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[40] United States v. Virginia, et al., 518 U.S. 515 (1996). *See also* J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994); Mississippi University for Women v. Hogan, 458 U.S. 718 (1982).

[41] Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Procedures, WT Docket No. 97-82, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374, 471, para. 172 (1998) ("*Part 1 Third Report and Order*" and "*Second Further Notice*").

[42] *Id.* at 471-472, para. 172.

[43] *Id.* at 472, para. 174.

[44] *Part 1 Fifth Report and Order*, para. 48.

[45] NatTel Petition at 1-3.

rules applicable to the four past C and F block auctions provided for two control group equity exceptions to the entrepreneurs' block financial caps.[46] Under these exceptions, the gross revenues and total assets of certain persons or entities holding interests in an applicant were not considered for purposes of determining eligibility to participate in a C or F block auction. As originally adopted, the 49.9 percent equity exception was available only to women- and minority-owned businesses. In the *DEF Report and Order*, the Commission made the 49.9 percent equity exception available to all small businesses and entrepreneurs.[47]

16. *Affiliation Exception.* In the *Competitive Bidding Sixth Report and Order*, the Commission modified an exception to the C and F block affiliation rules under which the gross revenues and assets of affiliates controlled by minority investors that were members of a C or F block applicant's control group were not attributed to the applicant.[48] The exception as modified allowed every small business C block applicant to exclude the gross revenues and assets of any affiliates that did not exceed the entrepreneurs' block caps, provided that the gross revenues and total assets of all such affiliates of the small business applicant, when aggregated, did not exceed those caps.[49] The modified exception was limited to C block applicants;[50] language making the exception applicable to F block applicants was inadvertently eliminated.[51] Subsequently, in the *DEF Report and Order*, instead of extending the exception to F block applicants,[52] the Commission removed the exception entirely, expressing skepticism that the exception was still needed and acknowledging the argument that the exception might allow too many larger entities to qualify as small businesses.[53] The Commission stated that it would consider waiver requests to allow participation in the first F block auction by parties that had participated in the first C block auction and had relied on the affiliation exception in structuring themselves.[54]

17. **Discussion.** NABOB contends that elimination of the affiliation exception for the F block is unfair to F block bidders that participated in the original C block auction, because such bidders designed business plans that anticipated bidding in both blocks under the same bidding credit structure.[55] We find this petition unpersuasive. As stated, the Commission offered Auction No. 11 applicants that had participated in the first C block auction the opportunity to request a waiver in order to be able to participate in Auction No. 11; however, the Commission received no such requests.[56] Radiofone argues

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46 *See supra* paragraph 6.

47 11 FCC Rcd at 7837-38, para. 24; *see* 47 C.F.R. § 24.709(b)(4) and (b)(6).

48 *Competitive Bidding Sixth Report and Order*, 11 FCC Rcd 136, 154-156, paras. 32-34.

49 *Id.*; 47 C.F.R. § 24.720(l)(11)(ii) (removed 1996).

50 *See* 60 Fed. Reg. 37,786, 37,800 (July 21, 1995).

51 *DEF Report and Order*, 11 FCC Rcd at 7839, n.87.

52 *Id.* at 7841, para. 34.

53 *Id.* at 7841, para. 36; *see* 61 Fed. Reg. 51,233-34 (October 1, 1996).

54 *DEF Report and Order*, 11 FCC Rcd at 7841, para. 36.

55 NABOB Petition at 7-8.

56 The Commission received waiver requests from two entities that qualified to participate in the auction without the former C block affiliation exception but sought to use the exception to be able to qualify as (continued....)

that the Commission should adopt the affiliation exception for the F block and eliminate the 49.9 percent equity exception or, alternatively, eliminate or retain both the affiliation and the 49.9 percent equity exceptions.[57] As we noted, the Commission eliminated the affiliation exception for the C block as well as the F block; and we continue to believe that the exception may lead to abuses. Accordingly, we deny the requests of NABOB and Radiofone with regard to existing licensees. With regard to past auctions, we dismiss as moot the NABOB and Radiofone petitions. Additionally, in light of our recent determination that the controlling interest standard will apply to all future C and F block auctions, we dismiss as moot the NABOB and Radiofone petitions with regard to future auctions.[58]

2. C Block Licenses as Assets

18. **Background.** In the *DEF Report and Order*, the Commission decided not to treat C block licenses as assets for purposes of determining an applicant's eligibility for the then-upcoming F block auction, fearing that including such licenses might preclude C block winners from F block eligibility.[59] The Commission stated that, because of the Commission's previous indications that the C and F blocks are linked, it would be unfair to disqualify C block winners from participation in the F block auction on the basis of their success in acquiring capital for the C block auction.[60] Specifically, the Commission had earlier noted that the two blocks are contiguous and lend themselves to aggregation and that together they are subject to a cap on the number of licenses that may be won at auction.[61] The Commission expressed concern that treating C block licenses as assets for purposes of eligibility for the initial F block auction could frustrate business plans and auction strategies made in reliance on the Commission's earlier statements. The Commission also noted that it was uncertain whether C block licenses that had already been won would be issued before the F block auction.[62] Finally, the Commission decided that licenses other than C block licenses would be included in the total asset calculations of applicants for the F block auction.[63]

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small businesses. These requests were denied. *See* letter from Kathleen O'Brien Ham, Chief, Auctions Division, Wireless Telecommunications Bureau, to Sara F. Seidman, Esq., Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C., attorney for SJI, Inc., DA 96-1402 (released August 20, 1996); letter from Kathleen O'Brien Ham, Chief, Auctions Division, Wireless Telecommunications Bureau, to George Petrutsas, Esq., and Paul J. Feldman, Esq., Fletcher, Heald & Hildreth., P.L.C., attorneys for West Coast PCS, L.L.C., DA 96-1404 (released August 20, 1996).

57 Radiofone Petition at 22-23; *see* Radiofone Reply to Opposition of Pacific Bell at 5; Radiofone Reply to Opposition of Pocket at 5. Radiofone refers to this exception as the "49% equity exception."

58 We note, moreover, that the controlling interest attribution standard will govern future C and F block auctions. *See supra* note 16 and accompanying text.

59 *DEF Report and Order*, 11 FCC Rcd at 7838, para. 26.

60 *Id.*

61 *Id.*; *see* 47 C.F.R. § 24.710. In the *C/F Block Sixth Report and Order*, adopted subsequent to the adoption of this *Order on Reconsideration*, we removed the Section 24.710 limitation on the number of C and F block licenses an auction participant could win. *See C/F Block Sixth Report and Order*, paras. 54-55.

62 *DEF Report and Order*, 11 FCC Rcd at 7838, para. 26.

63 *Id.* para. 27.

19. **Discussion.** Radiofone asserts that it is inconsistent for the Commission not to require the inclusion of C block licenses in applicants' total asset valuations when the Commission requires A and B block broadband PCS licenses to be included in such valuations.[64] Radiofone argues further that the Commission's decision will diminish opportunities for small businesses in the F block auction.[65] Radiofone also suggests that the issuance of C block licenses after Auction No. 11 to winners of F block licenses in Auction No. 11 could interfere with the ability of such license holders to maintain their eligibility as entrepreneurs. Omnipoint counters that Radiofone has misconstrued the Commission's rules for maintaining entrepreneur eligibility and that, under the rules, entrepreneur eligibility is not lost simply because a licensee acquires additional licenses.[66]

20. Because Auction No. 11 has already occurred, Radiofone's petition is now moot as to that auction. We believe, however, that the Commission's decision was correct. In reaching this decision, the Commission determined that to prevent F block auction participation by C block winners on the basis of their earlier ability to raise capital within the limitations of our rules would be unfair. To further the Congressional objective that PCS licenses be disseminated among a wide variety of applicants,[67] we encourage the success of C and F block licensees and recognize that such success is generally accompanied by asset growth. For this reason, we will not require applicants for participation in future auctions to treat either C or F block licenses as assets for purposes of determining applicants' C or F block entrepreneur eligibility. We will, however, continue to require that all other Commission licenses be included in the total asset calculations on the short-form applications for C and F block auctions. We also clarify that the acquisition by C or F block licensees of other Commission licenses, entrepreneurs' block or otherwise, will not of itself prevent licensees' continued eligibility to hold entrepreneurs' block licenses.

3. Bidding Credits

21. **Background.** Under the originally adopted F block bidding credit rule, a small business was granted a 10 percent bidding credit; a business owned by members of minority groups or women was granted a 15 percent bidding credit; and a small business owned by members of minority groups or women was allowed to aggregate these bidding credits for a 25 percent bidding credit. In the *DEF Report and Order*, the Commission eliminated the race- and gender-based aspects of its bidding credit provisions and, instead, adopted a two-tiered approach. Under the modified rule, small businesses receive a 15 percent bidding credit and very small businesses receive a 25 percent bidding credit.[68] In the *C Block Fourth Report and Order*, the Commission changed the C block bidding credit rule to adopt, for Auction No. 22 and subsequent C block auctions, the same two tiers that it had for the F block.[69]

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[64] Radiofone Petition at 23-24.

[65] *Id*; *see* Radiofone Reply to Opposition of Bell Atlantic at 6; Radiofone Reply to Opposition of Omnipoint at 5-7; Radiofone Reply to Opposition of Pacific Bell at 5; and Radiofone Reply to Opposition of Pocket at 5.

[66] Omnipoint Opposition at 6-10; *see* Pocket Opposition at iii, 1.

[67] *See* Communications Act, § 309(j)(3)(B), 47 U.S.C. § 309(j)(3)(B).

[68] *DEF Report and Order*, 11 FCC Rcd at 7846-49, paras. 49-55; 47 C.F.R. § 24.717.

[69] *See* Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, WT Docket No. 97-82, *Fourth Report and Order*, 13 FCC (continued....)

22. **Discussion.** NABOB objects to the fact that the Commission did not adopt the same bidding credit for the F block that it had for the initial C block auction, a 25 percent bidding credit for all small businesses.[70] NABOB argues that minority-owned bidders had an "understanding that, at a minimum, the Commission would preserve for them the rules as they existed in the C block auction."[71] The Commission considered and rejected similar arguments in the *DEF Report and Order*.[72] The Commission disagreed that entities interested in bidding in Auction No. 11 had the same expectations as C block applicants in structuring their businesses or formulating strategies in reliance on the tiered bidding credits originally adopted.[73] The Commission explained, moreover, that the timing of the F block modification allowed the Commission to take a different approach than it had for the C block.[74] The Commission also indicated that a two-tiered approach would ensure that the smallest businesses receive the greatest benefit.[75] NABOB has not provided any new rationale to justify our deviating from this reasoning here, and its petition is therefore denied. We note, as mentioned, that under current rules, bidding credits are the same for C and F block licenses.[76]

4. Installment Financing

23. **Background.** The originally adopted F block rules provided for five different installment payment plans.[77] One of these plans was available only to entities owned by members of minority groups or women, while another plan was restricted to small businesses owned by members of minority groups or women.[78] To satisfy the requirements of *Adarand*, the Commission, in the *DEF Report and Order*, eliminated these two plans.[79] Of the three remaining plans, one was available only to small businesses.

(Continued from previous page)
Rcd 15,743, at 15,767-68, paras. 45-46 (1998) ("*C Block Fourth Report and Order*"); *see* 47 C.F.R. § 24.712. In the *C Block Fourth Report and Order*, we tied our bidding credit rules for both the C and the F blocks to a schedule of bidding credits we had adopted in the *Part 1 Third Report and Order*. *C Block Fourth Report and Order*, 13 FCC Rcd at 15,768, para. 46; *see Part 1 Third Report and Order*, 13 FCC Rcd at 402-04, paras. 44-48; *see also* 47 C.F.R. § 1.2110(e)(2)(iii). In the *C/F Block Sixth Report and Order*, adopted subsequent to the adoption of this *Order on Reconsideration*, we modified the bidding credits that will be available to future C and F block auction winners. *See C/F Block Sixth Report and Order*, paras. 43-45.

70 NABOB Petition at 8-10.

71 *Id.* at 9.

72 *DEF Report and Order*, 11 FCC Rcd at 7846-49, paras. 49-55.

73 *Id.* at 7849, para. 55.

74 *Id.*

75 *See id.* at 7848-49, para. 53 ("We . . . believe . . . that a tiered approach enhances the discounting effect of bidding credits because not all entities receive the same benefit.").

76 As mentioned, in the *C/F Block Sixth Report and Order*, adopted subsequent to the adoption of this *Order on Reconsideration*, we modified the bidding credits that will be available to future C and F block auction winners. *See C/F Block Sixth Report and Order*, paras. 43-45.

77 *DEF Report and Order*, 11 FCC Rcd at 7842, para. 37.

78 *Id.*

79 *Id.* at 7844, para. 41; *see* 47 C.F.R. § 24.716.

With the elimination of the two plans restricted to minority groups or women, the small business plan became the likely choice for minority- and women-owned small businesses. The Commission modified this plan in the *DEF Report and Order*. As modified, the plan offers small businesses or small business consortia a two-year interest-only period with an interest rate equal to the ten-year U.S. Treasury rate and principal amortized over the remaining eight years of the license term.[80] This plan has the same interest rate as, but a shorter interest-only period than, the two eliminated plans and also the plan available to small businesses in the first two C block auctions.[81] The Commission concluded that the availability of the small business plan would provide minority- and women-owned businesses an opportunity to participate in the provision of spectrum-based services.[82] The Commission explained that the build-out requirement for F block licenses is less stringent than it is for C block licenses and that a two-year interest only period would provide F block licensees a substantial period in which to construct their systems, while also encouraging them to provide service to the public quickly.[83] It explained further that restricting the interest-only period to two years would deter speculation and insincere bidding.[84] Finally, the Commission discussed how the revised small business installment payment plan was still extremely attractive in comparison to other financing options likely to be available to small businesses.[85]

24. In the *Part 1 Third Report and Order*, we suspended the installment payment program.[86] Accordingly, we decided in the *C Block Fourth Report and Order* not to offer installment payments for Auction No. 22.[87] Most recently, in the *Part 1 Fifth Report and Order*, we decided to adhere to our previous decision to suspend the installment payment program.[88]

25. **Discussion.** We received petitions from Devon, Harvey Leong, NABOB, and PTSI opposing the alterations in the *DEF Report and Order* to the F block installment financing plans and, in

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80 *DEF Report and Order*, 11 FCC Rcd at 7844, para. 42.

81 Small business license winners in the first two C block auctions were eligible for an installment payment plan with an interest rate equal to the ten-year U.S. Treasury rate, a six-year interest-only period, and principal amortized over the remaining four years of the license term.

82 *DEF Report and Order*, 11 FCC Rcd at 7844, para. 41.

83 *Id.* We have since established a build-out requirement for 15 MHz C block licenses that is identical to the requirement for F block licenses. The requirement for 30 MHz C block licenses remains, as before, more demanding that the F block build-out requirement. *See* 64 Fed. Reg. 26,887, 26,889, 26,890 (May 18, 1999); 47 C.F.R. § 24.203. We note that in the *C/F Block Sixth Report and Order*, adopted subsequent to the adoption of this *Order on Reconsideration*, we reconfigured certain 30 MHz C block licenses into three 10 MHz C block licenses, which have the same construction requirements as 15 MHz C block licenses and F block licenses. *See C/F Block Sixth Report and Order*, paras. 11-15 and App. D.

84 *DEF Report and Order*, 11 FCC Rcd at 7846, para. 46.

85 *Id.* at 7845, para. 45.

86 *Part 1 Third Report and Order*, 13 FCC Rcd 374, 397-98, para. 38.

87 *C Block Fourth Report and Order*, 13 FCC Rcd at 15,767-68, paras. 45-46.

88 *Part 1 Fifth Report and Order*, para. 55.

particular, objecting to the reduction of the interest-only payment period under the small business plan.[89] Given our current suspension of installment payment financing, these petitions are, as a practical matter, moot with regard to future F block auctions. Furthermore, we believe that, even with the two-year interest-only period, the plan available to small business winners in Auction No. 11 provided them with sufficient assistance to build out their systems and provide timely service. For this reason, we decline to alter the terms of existing F block installment loans.[90]

D. Upfront Payment and Down Payment

26. **Background.** Under the originally adopted rules, participants in an F block auction were required to submit an upfront payment of $0.015 per MHz per pop (or bidding unit) for the maximum number of licenses on which they intended to bid in any one round.[91] Winning bidders were required to supplement their upfront payment with a down payment sufficient to bring their total deposits up to 10 percent of their winning bid(s).[92] Based upon its experience in the first C block auction, the Commission changed the rules in the *DEF Report and Order* to require an upfront payment of $0.06 per MHz per pop and a down payment that, including the upfront payment amount, would total 20 percent of a participant's winning bid(s).

27. In the *Part 1 Third Report and Order*, we affirmed the Commission's decision in the *Competitive Bidding Second Report and Order* that the upfront payment amount and terms should be determined on an auction-by-auction basis.[93] We also concluded that a standard down payment of 20 percent is appropriate for all auctionable services; however, we reserved the right, in the event of unusual circumstances affecting a particular service, to adopt a different down payment amount by rule in that service.[94] Accordingly, in the *C Block Fourth Report and Order*, we modified our Part 24 rules for the C and F blocks to reflect that upfront payments would be established on an auction-by-auction basis[95] and that winning C and F block bidders would be subject to the 20 percent down payment requirement of Part

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[89] Devon Petition at 1-6; Harvey Leong Petition at 1-3; NABOB Petition at 10-12; PTSI Petition at 6,8; and PTSI Notice of *Ex Parte* Meetings at 3.

[90] *See* Fresno Mobile Radio, Inc. v. FCC, 165 F.3d 965, 971 (D.C. Cir. 1999) (upholding Commission's decision not to allow small businesses to pay by installment for licenses won in an 800 MHz Specialized Mobile Radio Service auction).

[91] *DEF Report and Order*, 11 FCC Rcd at 7858, para. 73.

[92] *Id.*

[93] *Part 1 Third Report and Order*, 13 FCC Rcd at 425, para. 86; *see* 47 C.F.R. § 1.2106; *see Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2378, para. 171.

[94] *Part 1 Third Report and Order*, 13 FCC Rcd at 427, para. 91; *see* 47 C.F.R. § 1.2107.

[95] *C Block Fourth Report and Order*, 13 FCC Rcd at 15,761, para. 32; *see* 47 C.F.R. §§ 24.711, 24.716. We note that the Balanced Budget Act of 1997 provides that "before the issuance of bidding rules," the Commission must provide adequate time for parties to comment on proposed auction procedures. Balanced Budget Act of 1997, Pub. L. 105-33, § 3002(a)(1)(B)(iv), 111 Stat. 251, 259 (codified at 47 U.S.C. § 309(j)(3)(E)(i)). Accordingly, it has been the practice of the Wireless Telecommunications Bureau ("Bureau") to issue a public notice seeking comment on certain auction-specific issues, including the amount of the upfront payment, in advance of the application deadline for each auction. We expect that the Bureau will continue this practice.

1 of the Commission's rules.[96]

28. **Discussion.** Devon, Harvey Leong, and PTSI all protest the changes in the *DEF Report and Order* to the F block upfront and/or down payment rules.[97] With regard to past auctions, these petitions are moot. With regard to future auctions, we continue to adhere to the wisdom of tailoring the specific amount and terms of the upfront payment to each specific auction. We also maintain our conviction, expressed in the *Part 1 Third Report and Order*, that a 20 percent down payment is an appropriate amount to provide the Commission with sufficient assurance that a winning bidder will be able to pay the full amount of its winning bid and that it possesses the financial strength to attract the capital necessary to deploy and operate its system.[98] In addition, we continue to believe that a 20 percent down payment facilitates our discovery early in the licensing process that an applicant might be unable to finance its winning bid.[99]

E. Administrative Procedure

1. Contract with America Advancement Act

29. **Background.** Shortly before release of the *DEF Report and Order*, Congress enacted the Contract with America Advancement Act of 1996 ("CWAAA"),[100] which, *inter alia*, requires generally that a "major rule" cannot take effect until 60 days after the later of the rule's publication in the Federal Register or submission by the Federal agency of a required report to Congress.[101] Under CWAAA, a major rule is one --

> that the Administrator of the Office of Information and Regulatory Affairs ["OIRA"] of the Office of Management and Budget finds has resulted in or is likely to result in -- (A) an annual effect on the economy of $100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (C) significant adverse effects on competition, employment, investment, productivity, [or] innovation . . . .[102]

The Commission determined, and OIRA concurred, that the rule changes made in the *DEF Report and*

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96 *C Block Fourth Report and Order*, 13 FCC Rcd at 15,762-64, paras. 35-37; *see* 47 C.F.R. §§ 24.711, 24.716.

97 Devon Petition at 6-8; Harvey Leong Petition at 1-3; PTSI Petition at 6-8; and PTSI Notice of *Ex Parte* Meetings at 3.

98 *See Part 1 Third Report and Order*, 13 FCC Rcd at 427, para. 90.

99 *Id.*

100 Pub. L. No. 104-21, 110 Stat. 847 (1996) (codified in relevant part at 5 U.S.C. §§ 801-808).

101 5 U.S.C. § 801(a)(3).

102 *Id.* § 804(2). Non-major rules are not subject to the CWAAA 60-day requirement. *Id.* U.S.C. § 801.

Order were not major.[103] Accordingly, the Commission made the rules effective 30 days after their July 1, 1996 Federal Register publication.[104]

30. **Discussion.** PTSI contends that the Commission violated CWAAA by failing to determine that the rule changes resulting from the *DEF Report and Order* were major and delaying their effectiveness for at least 60 days after their Federal Register publication.[105] By terms of the statutory language, OIRA's finding that the rule changes were not major is dispositive.[106] PTSI's argument is therefore rejected.

2. Regulatory Flexibility Act

31. PTSI also claims that the Commission failed to describe significant alternatives to the rules designed to minimize any significant economic impact on small entities as required by the Regulatory Flexibility Act ("RFA").[107] We disagree. The portion of the *DEF Report and Order* – the Final Regulatory Flexibility Analysis (FRFA) – addressing this RFA requirement refers to the substantive part of the Order, which discusses in great depth the impact of the rules on small businesses, alternatives considered, and why each alternative was rejected or adopted.[108] Consolidation of the discussion of the impact on small businesses from the item into the FRFA would have been repetitive in this instance, where analyses of alternatives related to small businesses infuse the decision. Indeed, PTSI identifies no specific instances where the Commission omitted consideration of such alternatives. Accordingly, PTSI's petitions are denied.

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[103] *See* PTSI Petition at Ex. 1 (e-mail from Timothy R. Fain, Policy Analyst, OMB/OIRA, to Dorothy Conway, Federal Communications Commission (June 24, 1996)).

[104] 61 Fed. Reg. 33,859 (July 1, 1996).

[105] PTSI Petition at 9-13 and Ex. 1-2.

[106] 5 U.S.C. § 804(2). We note that this determination is not subject to judicial review. *Id.* § 805.

[107] PTSI Supplement to Petition for Reconsideration at 1-2; PTSI Supplement to Petition for Stay Pending Reconsideration at 1-2. The statutory language cited by PTSI was changed in 1996. *See* Pub. L. 104-121, 110 Stat. 847, 864; 5 U.S.C. § 604(a)(3).

[108] *See, e.g.*, *DEF Report and Order*, 11 FCC Rcd at 7831, para 12, 7832, para. 13, 7833-34, paras. 16-17 (effect of race- and gender-based provisions on small businesses; barriers to entry faced by small businesses), 7835-38, paras. 20-25 (extending 50.1 percent control group equity exception to all small businesses), 7839-42, paras. 28-36 (eliminating small business affiliation exception), 7842-46, paras. 37-48 (installment payment plans available to small businesses and women- and minority-owned businesses), 7846-49, paras. 49-55 (bidding credits available to small businesses), 7849-40, para. 57 (information collection to facilitate special provisions available to small businesses), 7850-53, paras. 57-61 (defining small businesses), 7853-55, paras. 61-67 (defining rural telephone companies), 7855-58, paras. 68-72 (extending small business provisions to the D and E blocks), 7859, para. 75 (creating uniform upfront payments to simplify cross-bidding by small businesses), 7861-64, paras. 80-85 (modification of F block license holding requirement to permit transfers and assignments of licenses to entrepreneurs, including small businesses, in the first five years after license grant), 7877-78, 7879, 7829-80, 7883-84, paras. 110, 114-15, 117, 123-25 (cellular/PCS cross-ownership attribution standard for small businesses), 7891, para. 140 (burden on small businesses of using audited financial statements to demonstrate financial size), 7891-93, 7893-94, paras. 143-44, 146 (effect of auction schedule on small businesses).

V. RULE CORRECTION

32. On our own motion, we correct the final rules adopted in the *Competitive Bidding Sixth Report and Order*, in which the Commission inadvertently deleted portions of Section 24.709.[109] A summary of the *Competitive Bidding Sixth Report and Order*, including the final rules, was published in the Federal Register, 60 Fed. Reg. 37,786 (July 21, 1995). We reincorporate the deleted provisions at Appendix C.

VI. ORDERING CLAUSES

33. Accordingly, IT IS ORDERED THAT, pursuant to Sections 4(i), 5(b), 5(c)(1), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 155(b), 156(c)(1), 303(r), and 309(j), the Request for Withdrawal of Petition for Reconsideration or, in the Alternative, for Declaratory Ruling filed by Bastion Capital Fund, L.P., in response to the *Competitive Bidding Fifth Memorandum Opinion and Order* IS GRANTED.

34. IT IS FURTHER ORDERED THAT, pursuant to Sections 4(i), 5(b), 5(c)(1), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 155(b), 156(c)(1), 303(r), and 309(j), the Request to Withdraw Petition for Reconsideration filed by BET Holdings II, Inc., in response to the *Competitive Bidding Fifth Memorandum Opinion and Order* IS GRANTED.

35. IT IS FURTHER ORDERED THAT, pursuant to Sections 4(i), 5(b), 5(c)(1), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 155(b), 156(c)(1), 303(r), and 309(j), the Petition for Reconsideration of CommNet Cellular, Inc., filed in response to the *Competitive Bidding Fifth Memorandum Opinion and Order* IS DISMISSED in part as moot and DENIED in all other respects.

36. IT IS FURTHER ORDERED THAT, pursuant to Sections 4(i), 5(b), 5(c)(1), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 155(b), 156(c)(1), 303(r), and 309(j), the Petition for Reconsideration, as supplemented, of Personal Technology Services, Inc., Digivox Corporation, and National Paging & Personal Communications Association filed in response to the *DEF Report and Order* IS DISMISSED in part as moot and DENIED in all other respects.

37. IT IS FURTHER ORDERED THAT, pursuant to Sections 4(i), 5(b), 5(c)(1), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 155(b), 156(c)(1), 303(r), and 309(j), the Petition for Stay Pending Reconsideration, as supplemented, of The National Paging & Personal Communications Association, Personal Technology Services, Inc., and Digivox Corporation filed in response to the *DEF Report and Order* IS DISMISSED in part as moot and DENIED in all other respects.

38. IT IS FURTHER ORDERED THAT, pursuant to Sections 4(i), 5(b), 5(c)(1), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 155(b), 156(c)(1), 303(r), and 309(j), the Petition for Stay Pending Reconsideration of The National Association of Black Owned Broadcasters, Inc., filed in response to the *DEF Report and Order* IS DISMISSED as moot.

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[109] *See* 60 Fed. Reg. 37,786, 37,795 (July 21, 1995) (inadvertently removing 47 C.F.R. § 24.709(b)(5)(i)(D) and (ii)).

39. IT IS FURTHER ORDERED THAT, pursuant to Sections 4(i), 5(b), 5(c)(1), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 155(b), 156(c)(1), 303(r), and 309(j), the Petition for Reconsideration of National Telecom PCS, Inc., filed in response to the *DEF Report and Order* IS DISMISSED in part as moot and DENIED in all other respects.

40. IT IS FURTHER ORDERED THAT, pursuant to Sections 4(i), 5(b), 5(c)(1), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 155(b), 156(c)(1), 303(r), and 309(j), the Petition for Reconsideration of The National Association of Black Owned Broadcasters, Inc., filed in response to the *DEF Report and Order* IS DISMISSED in part as moot and DENIED in all other respects.

41. IT IS FURTHER ORDERED THAT, pursuant to Sections 4(i), 5(b), 5(c)(1), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 155(b), 156(c)(1), 303(r), and 309(j), the Petition for Reconsideration of Radiofone, Inc., filed in response to the *DEF Report and Order* IS DISMISSED in part as moot and DENIED in all other respects.

42. IT IS FURTHER ORDERED THAT, pursuant to Sections 4(i), 5(b), 5(c)(1), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 155(b), 156(c)(1), 303(r), and 309(j), the Petition for Reconsideration of Devon Mobile Communications, L.P., filed in response to the *DEF Report and Order* IS DISMISSED as moot.

43. IT IS FURTHER ORDERED THAT, pursuant to Sections 4(i), 5(b), 5(c)(1), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 155(b), 156(c)(1), 303(r), and 309(j), the Petition for Reconsideration of Harvey Leong filed in response to the *DEF Report and Order* IS DISMISSED as moot.

44. IT IS FURTHER ORDERED THAT, pursuant to Sections 4(i), 5(b), 5(c)(1), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 155(b), 156(c)(1), 303(r), and 309(j), this *Order on Reconsideration* are HEREBY ADOPTED, and Section 24.709 of the Commission's rules, 47 C.F.R. Section 24.709, is corrected *nunc pro tunc* as set forth above effective immediately upon publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Magalie Roman Salas
Secretary

Appendix A

LIST OF PLEADINGS--COMPETITIVE BIDDING FIFTH MEMORANDUM OPINION AND ORDER

Petitions for Reconsideration

1. Bastion Capital Fund, L.P. ("Bastion") (Petition for Reconsideration, or, in the Alternative, for Declaratory Ruling)
2. BET Holdings, Inc. ("BET")
3. CommNet Cellular, Inc. ("CommNet") (Petition for Clarification or Reconsideration)

Requests for Withdrawal/to Withdraw

1. Bastion Capital Fund, L.P. ("Bastion") (Request for Withdrawal of Petition for Reconsideration or, in the Alternative, for Declaratory Ruling)
2. BET Holdings, Inc. ("BET") (Request to Withdraw Petition for Reconsideration)

Appendix B

LIST OF PLEADINGS--DEF REPORT AND ORDER

Petitions for Reconsideration

1. BellSouth Corporation ("BellSouth")
2. Devon Mobile Communications, L.P. ("Devon")
3. Harvey Leong
4. The National Association of Black Owned Broadcasters, Inc. ("NABOB")
5. National Telecom PCS, Inc. ("NatTel")
6. Omnipoint Corporation ("Omnipoint")
7. Personal Technology Services, Inc.; Digivox Corporation; National Paging & Personal Communications Association ("PTSI")
8. The National Paging & Personal Communications Association; Personal Technology Services, Inc.; Digivox Corporation ("PTSI") (Supplement to Petition for Reconsideration)
9. Radiofone, Inc. ("Radiofone") (Petition for Partial Reconsideration)

Petitions for Stay Pending Reconsideration

1. The National Association of Black Owned Broadcasters, Inc. ("NABOB")
2. The National Paging & Personal Communications Association; Personal Technology Services, Inc.; Digivox Corporation ("PTSI")
3. The National Paging & Personal Communications Association; Personal Technology Services, Inc.; Digivox Corporation ("PTSI") (Supplement to Petition for Stay Pending Reconsideration)

Oppositions to Petitions for Reconsideration

1. AT&T Wireless Services, Inc. ("AT&T") (Comments and Opposition)
2. Bell Atlantic NYNEX Mobile, Inc. ("Bell Atlantic")
3. Cellular Telecommunications Industry Association ("CTIA")
4. Omnipoint Corporation ("Omnipoint")
5. Pacific Bell Mobile Services ("Pacific Bell")
6. Pocket Communications, Inc. ("Pocket")
7. Radiofone, Inc. ("Radiofone")

Replies

1. BellSouth Corporation ("BellSouth")
2. Omnipoint Corporation ("Omnipoint")[110] (to oppositions of AT&T, Bell Atlantic, and Radiofone)
3. Omnipoint Corporation ("Omnipoint") (to opposition of CTIA)
4. Radiofone, Inc. ("Radiofone") (to opposition of Bell Atlantic)
5. Radiofone, Inc. ("Radiofone") (to opposition of Omnipoint)
6. Radiofone, Inc. ("Radiofone") (to opposition of Pacific Bell)
7. Radiofone, Inc. ("Radiofone") (to opposition of Pocket)

Notice of Ex Parte Meetings

1. The National Paging & Personal Communications Association; Digivox Corporation; Personal Technology Services, Inc. ("PTSI")

[110] Late-filed reply.

Appendix C

REVISED RULE

PART 24 - PERSONAL COMMUNICATIONS SERVICES

1. Section 24.709 of the Commission's rules is amended by revising paragraph (b)(5)(i)(D)-(ii):

§ 24.709 Eligibility for licenses for frequency Blocks C and F.

* * * * *
(b) * * *
(5) * * *
(i) * * *
(D) Following termination of the three-year period specified in paragraph (b)(5)(i) of this section, qualifying investors must continue to own at least 10 percent of the applicant's (or licensee's) total equity unconditionally or in the form of stock options subject to the restrictions in paragraph (b)(5)(i)(A) of this section. The restrictions specified in paragraph (b)(5)(i)(C)(1) through (4) of this section no longer apply to the remaining equity after termination of such three-year period.
(ii) At the election of an applicant (or licensee) whose control group's sole member is a preexisting entity, the 25 percent minimum equity requirements set forth in paragraph (b)(5)(i) of this section shall apply, except that only 10 percent of the applicant's (or licensee's) total equity must be held by qualifying investors, and that the remaining 15 percent of the applicant's (or licensee's) total equity may be held by qualifying investors, or noncontrolling existing investors in such control group member or individuals that are members of the applicant's (or licensee's) management. These restrictions on the identity of the holder(s) of the remaining 15 percent of the licensee's total equity no longer apply after termination of the three-year period specified in paragraph (b)(5)(i) of this section.

* * * * *