

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

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In the Matter of )  
)  
Implementation of Competitive Bidding )  
Rules To License ) WT Docket No. 01-32  
Certain Rural Service Areas ) RM-8897

REPORT AND ORDER

Adopted: January 16, 2002

Released: January 28, 2002

By the Commission:

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## I. INTRODUCTION

1. In the *Notice of Proposed Rule Making* in this proceeding (*Notice*),<sup>1</sup> we proposed rules for awarding licenses for four cellular Rural Service Areas (RSAs) that remain unlicensed because the initial lottery winner was disqualified or has otherwise withdrawn its application.<sup>2</sup> Under the Balanced Budget Act of 1997 (1997 Budget Act), we are now required, with certain exceptions not applicable here, to resolve mutually exclusive applications for initial licenses by competitive bidding.<sup>3</sup> Based on the record compiled in this proceeding we have decided to implement the proposals put forth in the *Notice*, namely, to: 1) allow all eligible parties to apply for these initial licenses; 2) license these markets on an RSA basis under our Part 22 rules; and 3) use our Part 1 competitive bidding rules to auction these licenses.

## II. BACKGROUND

2. The Commission has been awarding cellular licenses since 1982.<sup>4</sup> Under the original cellular licensing rules, one of the two cellular channel blocks in each market (the B block) was awarded to a local wireline carrier, while the other block (the A block) was awarded competitively to a carrier other than a local wireline incumbent.<sup>5</sup> After awarding the first thirty Metropolitan Statistical Area (MSA) licenses pursuant to comparative hearing rules, we adopted rules in 1984 and 1986 to award the

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<sup>1</sup> In the Matter of Implementation of Competitive Bidding Rules To License Certain Rural Service Areas, *Notice of Proposed Rule Making*, 16 FCC Rcd 4296 (2001). A list of the commenting parties is included in Appendix A.

<sup>2</sup> There are currently four cellular RSA markets that remain unlicensed because the initial lottery winner was disqualified. These markets are: 332A – Polk, AR; 582A – Barnes, ND; 672A – Chambers, TX ; and 727A – Ceiba, PR. Three additional markets (370A – Monroe, FL; 492A – Goodhue, MN; and 615A – Bradford, PA) were the subject of recent Congressional action in which the Commission was directed to reinstate the original lottery winner in each of the three markets to tentative selectee status and proceed with processing the selectee's application for authority to operate. See District of Columbia Appropriations Act of FY 2001, Pub. L. No. 106-553, Title X, § 1007, 114 Stat. 2762, Launching Our Communities' Access to Local Television Act of 2000 (2000) (D.C. Appropriations Act of FY 2001); *Public Notice*, Wireless Telecommunications Bureau Grants Rural Cellular Licenses, 16 FCC Rcd 5601 (2001), recon. denied, In the Matter of Applications of Great Western Cellular Partners, L.L.C., Monroe Telephone Services, L.L.C., and Futurewave Partners, L.L.C., *Memorandum Opinion and Order*, DA 01-2443 (CWD rel. Oct. 19, 2001) (application for review pending).

<sup>3</sup> Balanced Budget Act of 1997, Pub. L. No. 105-33, § 3002(a), 111 Stat. 251, 258-60 (1997). Section 3002(a) provides that competitive bidding shall be used to resolve mutually exclusive applications for initial licenses and construction permits except in the case of public safety radio services, digital television service licenses and permits given to existing terrestrial broadcast licensees to replace their analog television service licenses, and licenses and construction permits for noncommercial educational broadcast stations and public broadcast stations. 1997 Budget Act, Section 3002(a)(1)(A), *codified at* 47 U.S.C. § 309(j)(1), (2). Section 3002(a) further states that, with limited exceptions not applicable to this proceeding, "the Commission shall not issue any licenses or permits using a system of random selection under this subsection after July 1, 1997." 1997 Budget Act, Section 3002(a)(2)(B), *codified at* 47 U.S.C. § 309(i)(5).

<sup>4</sup> See An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems, *Memorandum Opinion and Order on Reconsideration*, 89 F.C.C. 2d 58 (1982).

<sup>5</sup> *Id.*

remaining cellular MSA and RSA licenses through lotteries.<sup>6</sup> By 1991, lotteries had been held for every MSA and RSA, and licenses were awarded to the lottery winners in most instances. In some RSA markets, however, the initial lottery winner was disqualified from receiving the license because of a successful petition to deny or other Commission action.<sup>7</sup> In these markets, the initial RSA license was never awarded, but under our former cellular lottery procedures, the remaining lottery applications remained pending. These procedures provided that, if the application of the tentative selectee were denied, a second lottery would be held among the remaining applicants or, in cases where multiple rank-ordered applicants were selected, the next ranked applicant would become the tentative selectee.<sup>8</sup>

3. In the Omnibus Budget Reconciliation Act of 1993 (1993 Budget Act), Congress added Section 309(j) to the Communications Act, authorizing the Commission to resolve mutually exclusive applications for use of the electromagnetic spectrum by auction.<sup>9</sup> In addition, Section 6002(e) of the 1993 Budget Act provided that: "[t]he Federal Communications Commission shall not issue any license or permit [by lottery] after the date of enactment of this Act unless . . . one or more applications for such license were accepted for filing by the Commission before July 26, 1993."<sup>10</sup> This provision left to the Commission's discretion whether to use auctions or lotteries for applications filed before July 26, 1993. Beginning in 1994, the Commission exercised its discretion and used lotteries, rather than auctions, to

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<sup>6</sup> See, e.g., Amendment of the Commission's Rules to Allow the Selection from Mutually Exclusive Competing Cellular Applications Using Random Selection or Lotteries Instead of Comparative Hearings, *Report and Order*, 98 F.C.C. 2d 175 (1984); Amendment of the Commission's Rules for Rural Cellular Service, *First Report and Order*, 60 Rad. Reg. 2d (P&F) 1029 (1986) (subsequent history omitted).

<sup>7</sup> In RSAs where there was no licensee, and none was expected for some time to come (e.g., because an application was tied up in litigation before the Commission or the courts), the Commission was willing to grant "interim operating authority," or "IOA," to adjacent licensees to expand their existing system (e.g., by increasing power at existing cell sites) to provide service in the unlicensed RSA. These IOAs were specifically conditioned on the IOA holder ceasing its operations in the RSA upon the initiation of service by the eventual licensee, provided 30 days advance written notice had been provided. See *Notice*, 16 FCC Rcd at 4301 & n. 21.

<sup>8</sup> See *Public Notice*, FCC to Hold Domestic Public Cellular Telecommunications Service Lottery for RSA Markets in Which the Previous Winner Was Defective, Mimeo No. 63896 (July 12, 1996). See also former rule section 1.823(b)(3), 47 C.F.R. § 1.823(b)(3) (1991) (providing that if a winning application for an unserved area was dismissed, another lottery would be held to select an application from the remaining applicants). See also Amendment of the Commission's Rules on the Selection from Among Mutually Exclusive Competing Applications Using Random Selection or Lotteries in the Public Land Mobile and Domestic Cellular Radio Telecommunications Services, *Order*, 4 FCC Rcd 7294 (1988) (amending rule section 1.823(a) to provide the Chief of the Common Carrier Bureau and the Managing Director with the authority to determine the number of applicants to be selected in each lottery). In 1988, the Chief of the Common Carrier Bureau and Managing Director routinely placed a number of tentative selectees in rank order and, for RSA lotteries, where an initial tentative selectee was disqualified, the next rank-ordered applicant would become the tentative selectee for the RSA market.

<sup>9</sup> Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(a), 107 Stat. 312, 387-92 (1993).

<sup>10</sup> *Id.* at § 6002(e).

resolve already-pending mutually exclusive applications for cellular unserved areas filed prior to July 26, 1993.<sup>11</sup>

4. On July 12, 1996, the Wireless Telecommunications Bureau (Bureau) scheduled a lottery for September 18, 1996, for six RSA markets in which applications had been filed prior to July 26, 1993, and the original lottery winner had been disqualified.<sup>12</sup> This lottery was scheduled to resolve mutually exclusive applications originally filed in 1989 for the six markets. On September 9, 1996, Cellular Communications of Puerto Rico (CCPR) filed a petition requesting that the Commission award these six licenses by auction instead of lottery.<sup>13</sup> On September 10, 1996, the Bureau postponed the lottery so that it could consider the issues raised by the petition.<sup>14</sup>

5. On August 5, 1997, the 1997 Budget Act was signed into law, modifying the Commission's auction authority by amending Section 309(j) of the Communications Act to require that all mutually exclusive applications for initial licenses or construction permits be auctioned, with certain exceptions not applicable here.<sup>15</sup> The 1997 Budget Act expressly repealed Section 6002(e) of the 1993 Budget

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<sup>11</sup> See Implementation of Section 309(j) of the Communications Act — Competitive Bidding, *Memorandum Opinion and Order*, 9 FCC Rcd 7387 (1994). For mutually exclusive cellular unserved area applications filed after July 26, 1993, the Commission conducted an auction, which was concluded on January 21, 1997. See *Public Notice, Cellular Unserved Areas Auction Closes; Winning Bidders in the Auction of 14 Licenses to Provide Cellular Service in Unserved Areas*, 12 FCC Rcd 999 (1997).

<sup>12</sup> *Public Notice, FCC to Hold Domestic Public Cellular Telecommunications Service Lottery for RSA Markets in Which the Previous Winner Was Defective*, Mimeo No. 63896 (July 12, 1996). The six markets that were to be included in this lottery were: RSA 332 (Arkansas 9 – Polk); RSA 370 (Florida 11 – Monroe); RSA 492 (Minnesota 11 – Goodhue); RSA 582 (North Dakota 3 – Barnes); RSA 615 (Pennsylvania 4 – Bradford); and RSA 727 (Puerto Rico 5 – Ceiba). As indicated in note 2, *supra*, the Commission has granted authorizations in three of these markets pursuant to Congressional directive.

In other markets where the original lottery winner was disqualified, the Commission completed second lotteries. For example, a second lottery was completed for RSA 672A (Texas 21 – Chambers). However, the application of the tentative selectee from the second lottery for Market 672A, Alee Cellular Communications, was dismissed for lack of character qualifications. In the Matter of Application of Alee Cellular Communication for Authorization to Construct Nonwireline Cellular System in Texas RSA 21 Market 672, *Memorandum Opinion and Order*, 15 FCC Rcd 2831 (2000) (*Alee Cellular*). Alee has filed a petition for reconsideration of that decision, which is still pending. Therefore, the cellular A block in Market 672 at present is unlicensed, resulting in four currently unlicensed RSA markets.

<sup>13</sup> Cellular Communications of Puerto Rico, Inc. Petition for Declaratory Ruling, Or, in the Alternative, for Rulemaking, RM-8897 (filed Sept. 9, 1996) (*CCPR Petition*).

<sup>14</sup> *Public Notice, Wireless Telecommunications Bureau Postpones Cellular Telecommunications Service Lottery for Rural Service Areas*, Mimeo No. 65051 (Sept. 10, 1996). On April 17, 1997, the Coalition for Equity in Licensing filed a Petition for Writ of Mandamus with the U.S. Court of Appeals for the D.C. Circuit. The Petition asked the Court to order the Commission to award the licenses at issue in this rulemaking proceeding by lottery. On June 27, 1997, the Court denied the Petition. See *In re: Coalition for Equity in Licensing, Petitioner*, No. 97-1272 (D.C. Cir. June 27, 1997).

<sup>15</sup> 1997 Budget Act, Pub. L. No. 105-33, § 3002(a), 111 Stat. 251, 258-60 (1997) (amending 47 U.S.C. § 309(j)).

Act,<sup>16</sup> and terminated the Commission's authority to award licenses through random selection, even in the case of applications filed prior to July 26, 1993, except for licenses for noncommercial educational and public broadcast stations.<sup>17</sup> Because the 1997 Budget Act terminated the Commission's remaining lottery authority, the Bureau dismissed all pending RSA lottery applications, including those in the six markets that had been designated for lottery in September 1996.<sup>18</sup> Several of the applicants sought reconsideration of the Bureau's dismissal of the RSA applicants, and the Bureau declined to reconsider its actions earlier this year.<sup>19</sup>

6. As noted above, six markets were designated for relottery in September 1996. Of those six markets, licenses in three markets (370A – Monroe, FL; 492A – Goodhue, MN; and 615A – Bradford, PA) were granted pursuant to Congressional action.<sup>20</sup> Thus, three markets remain to be licensed from the

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<sup>16</sup> *Id.* at § 3002(a)(4).

<sup>17</sup> *Id.* at § 3002(a)(2)(B). The Commission had found in the *Competitive Bidding Second Report and Order* that mutually exclusive applications for initial licenses to provide cellular service were auctionable under the auction authority provided by the 1993 Budget Act. Implementation of Section 309(j) of the Communications Act — Competitive Bidding, *Second Report and Order*, 9 FCC Rcd 2348, 2359, ¶ 61 (1994) (*Competitive Bidding Second Report and Order*).

<sup>18</sup> See In the Matter of Certain Cellular Rural Service Area Applications, *Order*, 14 FCC Rcd 4619 (WTB 1999) (dismissing applications in RSAs 332A (Polk, AR), 370A (Monroe, FL), 492A (Goodhue, MN), 582A (Barnes, ND), 615A (Bradford, PA), and 727A (Ceiba, PR)); In the Matter of Certain Cellular Rural Service Area Applications in Market Nos. 599A and 672A, *Order*, DA 99-814 (CWD rel. Apr. 29, 1999) (dismissing applications in RSAs 599A (Nowata, OK) and 672A (Chambers, TX)); In the Matter of Certain Rural Service Area Applications in Market Nos. 599A and 672A, *Order on Reconsideration*, DA 99-1426 (CWD rel. July 21, 1999) (reinstating applications of tentative selectees in those markets – Zephyr Tele-Link in RSA 599A and Alee in RSA 672A); In the Matter of Zephyr Tele-Link Application for a Construction Permit to Establish a Cellular System Operating on Frequency Block A in the Domestic Public Cellular Radio Telecommunications Service To Serve the Oklahoma 4-Nowata Rural Service Area, Market No. 599A, *Order* 15 RCC Rcd 4247 (CWD 2000) (granting application of Zephyr Tele-Link); *Alee Cellular*, note 12, *supra*, (recon. pending) (dismissing application of Alee). In the first dismissal order cited above, the Bureau also dismissed as moot CCPR's Petition requesting that we award licenses for the remaining RSA markets through competitive bidding. CCPR's Petition specifically requested that market 727A – Ceibo, Puerto Rico, be awarded through competitive bidding rather than through a second lottery. However, the CCPR Petition raised certain issues concerning the broader applicability of the use of competitive bidding for all markets where an initial lottery was held and the winner was disqualified. We therefore treated the CCPR Petition as a petition for rulemaking and requested comment on awarding cellular licenses through competitive bidding for all remaining unlicensed RSAs. Although we dismissed CCPR's Petition as moot because we are required by the 1997 Budget Act to award licenses through competitive bidding, we have considered, and are incorporating into the record of this proceeding, all comments and reply comments submitted in response to the CCPR Petition. A list of commenters on the CCPR Petition is included in Appendix A.

<sup>19</sup> In the Matter of Certain Cellular Rural Service Area Applications, *Order*, 16 FCC Rcd 4619 (WTB 2001) (affirming dismissals) (*March 2, 2001 Order*). Ranger Cellular and Miller Communications, Inc. have sought further reconsideration of the Bureau's dismissal of the applications, and High Tower Communications, Inc. has sought Commission review of the Bureau's action. Consolidated Petition for Reconsideration of Ranger Cellular and Miller Communications, Inc. (filed Mar. 30, 2001); Application for Review of High Tower Communications, Inc. (filed Apr. 2, 2001).

<sup>20</sup> See D.C. Appropriations Act of FY 2001, note 2, *supra*; *Public Notice*, Wireless Telecommunications Bureau Grants Rural Cellular Licenses, 16 FCC Rcd 5601 (2001), recon. denied, In the Matter of Applications of (continued....)

September 1996 lottery notice: 332A – Polk, AR; 582A – Barnes, ND; and 727A – Ceiba, PR. We also are including market 672A – Chambers, TX in this item, since no entity has yet been licensed in this market at this time.<sup>21</sup> Thus, these four markets are the subject of this *Report and Order*.

7. The *Notice*, released on February 12, 2001, specifically sought comment on a number of issues, including: 1) whether, if mutually exclusive applications are filed, the four RSA licenses should be awarded pursuant to the rules for competitive bidding set forth in Part 1 of our rules; 2) whether the four markets should continue to be licensed on an RSA basis or based on some other set of boundaries; and 3) the scope of eligibility to apply for and hold the subject licenses. We received opening comments from four parties, and one reply comment, which was filed by one of the opening round commenters.<sup>22</sup> In addition, we have considered the comments and reply comments submitted in response to the *CCPR Petition*.<sup>23</sup>

### III. DISCUSSION

#### A. Eligibility for Licenses

8. *Background.* In the *Notice*, the Commission proposed to allow all eligible entities to participate in an auction for the four cellular RSA licenses at issue in this proceeding.<sup>24</sup> We noted that our competitive bidding program seeks to award each license to the applicant that values it most highly and that is, therefore, most likely to offer valued service to the public.<sup>25</sup> We explained that excluding potential applicants that were not previously lottery applicants would be inconsistent with that goal.<sup>26</sup> We also recognized that, because nearly twelve years have passed since the closing of the original RSA filing window, a number of commenters that have expressed interest in participating in RSA auctions would not have had the opportunity to file applications, while some applicants that did file lottery applications may no longer exist.<sup>27</sup> Finally, we reasoned that, to the extent former lottery applicants continue to have an interest in applying for these markets, open eligibility allows them to do so.<sup>28</sup>

9. The Commission also specifically proposed to permit cellular operators that have been granted interim operating authority (IOA) in the four unlicensed RSAs to participate in the RSA

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Great Western Cellular Partners, L.L.C., Monroe Telephone Services, L.L.C., and Futurewave Partners, L.L.C., *Memorandum Opinion and Order*, DA 01-2443 (CWD rel. Oct. 19, 2001) (application for review pending).

<sup>21</sup> As discussed in note 12, *supra*, the application of the second tentative selectee of this market, Alee, was dismissed for lack of character qualifications, although a petition for reconsideration is pending.

<sup>22</sup> A list of parties that filed comments in response to the *Notice* is included in Appendix A.

<sup>23</sup> A list of parties that filed comments in response to the *CCPR Petition* is included in Appendix A.

<sup>24</sup> *Notice*, 16 FCC Rcd at 4300, ¶ 8.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 4300-01, ¶ 8.

<sup>28</sup> *Id.* at 4301, ¶ 8.

auction.<sup>29</sup> We noted that although IOAs confer no interest or expectation of receiving a cellular license, IOA holders might have a substantial interest in bidding for permanent authorizations in markets where they may have been providing interim cellular service.<sup>30</sup>

10. *Discussion.* After careful consideration, we conclude that it is in the public interest to allow all entities, including current IOA holders and former lottery applicants, to participate in the RSA auction. In recent years, the Commission has generally favored open eligibility because we believe that maximizing the pool of auction applicants helps to ensure that licenses are awarded to entities that value them most highly and are, therefore, most likely to offer prompt service to the public.<sup>31</sup> The Commission has found that this approach to auction participation best fulfills the public interest objectives set forth in Section 309(j)(3) of the Communications Act.<sup>32</sup> Further, we do not believe that there are any compelling reasons to exclude potential participants in the upcoming RSA auction.

11. A number of commenters support open eligibility, particularly current IOA holders and entities that did not previously file lottery applications.<sup>33</sup> Cingular argues that permitting open eligibility will ensure that licenses are awarded to applicants that value them the most highly.<sup>34</sup> Cingular specifically insists that the Commission allow IOA holders in the subject markets to apply for licenses.<sup>35</sup> ALLTEL also supports the Commission's proposal to permit open eligibility.<sup>36</sup> BANM asserts that open

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<sup>29</sup> *Id.* at 4301, ¶ 9. In each of the four unlicensed RSAs, the Commission has granted interim operating authority to one or more cellular operators to provide cellular service on the Channel A block pending the ultimate permanent licensing of these RSAs.

<sup>30</sup> *Notice*, 16 FCC Rcd at 4301, ¶ 9.

<sup>31</sup> *See, e.g., Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2349-50, ¶¶ 3-5 (1994); Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, Implementation of Section 309(j) of the Communications Act - Competitive Bidding, 37.0-38.6 GHz and 38.6-40.0 GHz, *Report and Order and Second Notice of Proposed Rulemaking*, 12 FCC Rcd 18600, 18617-20, ¶¶ 30-35 (1997); Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended, Promotion of Spectrum Efficient Technologies on Certain Part 90 Frequencies, Establishment of Public Service Radio Pool in the Private Mobile Frequencies Below 800 MHz, *Report and Order*, 15 FCC Rcd 22709, 22736-37, ¶¶ 54-56 (2000) (*BBA Report and Order*). *But see, e.g., BBA Report and Order*, 15 FCC Rcd at 22737, ¶ 56 (the Commission has authority to restrict eligibility in particular cases if such restrictions are consistent with our spectrum management responsibilities under Section 309(j)).

<sup>32</sup> 47 U.S.C. § 309(j)(3)(A)-(D).

<sup>33</sup> With respect to eligibility, two of the four commenters that responded to the *Notice* support open eligibility. ALLTEL Comments at 1; Cingular Comments at 2; Cingular Reply Comments at 1-7. In addition, several commenters that responded to the *CCPR Petition* favored open eligibility. *See, e.g.,* BANM Comments at 2, 11; BANM Reply Comments at 2, 19-25; CCPR Reply Comments at 3, 13-16; Century Reply Comments at 1, 5-7; WWC Comments at 5-6.

<sup>34</sup> Cingular Comments at 2.

<sup>35</sup> *Id.*

<sup>36</sup> ALLTEL Comments at 1.

eligibility will expedite cellular service to the RSA markets.<sup>37</sup> WWC urges the Commission to give all interested applicants an opportunity to provide cellular service in the RSAs.<sup>38</sup> Century contends that the number of potential service providers has increased in the years since the closing of the original RSA filing window and that broadening auction participation would permit the best qualified and most highly motivated entities to compete.<sup>39</sup>

12. Several commenters oppose open eligibility. Some of these commenters, such as Ranger and Miller, seek to restrict eligibility to former lottery applicants who continue to contest dismissal of their applications.<sup>40</sup> Other commenters argue that IOA holders should be barred from participating in the cellular RSA auction.<sup>41</sup> These commenters generally contend that it is the Commission's policy, when it grants a party's application for IOA service, to dismiss that party's pending application for permanent authority for the subject market.<sup>42</sup> AALA claims that an IOA holder would have an advantage over other applicants in an auction because it would have a "unique ability" to calculate the value of the license.<sup>43</sup> In contrast, BANM and CCPR argue that the Commission's policy for excluding IOAs was implemented to avoid unfair advantage in the comparative hearing process and thus is not relevant when licenses are assigned by competitive bidding.<sup>44</sup>

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<sup>37</sup> BANM Comments at 11.

<sup>38</sup> WWC Comments at 5-6.

<sup>39</sup> Century Reply Comments at 5.

<sup>40</sup> One commenter responding to the *Notice* contends that the auction should be restricted to former lottery applicants. Ranger and Miller Comments at 1-17. Commenters in response to the *CCPR Petition* also argue that the Commission should limit the auction to former lottery applicants. *See, e.g.*, AALA Comments at 9-10; AALA Reply Comments at iii, 11; CPLS Reply Comments at 3, 5-7; Crystal Reply Comments at 4; Price Comments at 6; RSAA Comments at 3, 5-6; RSAOG Comments at i, 1, 3, 6-8, 14-15; RSAOG Reply Comments at 1-4.

<sup>41</sup> *See, e.g.*, AALA Comments at iii, 13-15; AALA Reply Comments at iii, 10-11; Crystal Comments at 7-10; Crystal Reply Comments at 6; CPLS Comments at 11-12; Domencich Reply Comments at 6-7; Moving Phones Comments at 8-10; RSAA Comments at ii-iii, 2-5; RSAOG Comments at 2, 16; RSAOG Reply Comments at 1-2.

<sup>42</sup> *See, e.g.*, RSAA Comments at 4 (the purpose of the policy is to "assure that the fact of interim operation and concomitant investment should not in any way influence the FCC's selection of the ultimate licensee").

<sup>43</sup> AALA Comments at 14-15. Several commenters cite to *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945). *See, e.g.*, AALA Comments at 14 (to allow one applicant to operate in a market under temporary authority poses a severe threat to the principles set forth in *Ashbacker*). We note that short-form applications to participate in competitive bidding are governed by Section 309(j), and not the procedural requirements of Sections 309(a), 309(b), or 309(e), or the *Ashbacker* doctrine, which requires a comparative hearing when competing applicants file conflicting license or construction permit applications for the same authorization. *See* Elleron Oil Co. and WVI Partners, Inc. Petition for Reconsideration of Dismissal of Short-Form Applications for Interactive Video and Data Service Auction, *Order*, 13 FCC Rcd 17246, 17251-52, ¶ 9 (WTB 1998). Section 309(j) does not require the Commission to use a notice and cut-off procedure or establish "cut-off dates" to invite mutually exclusive applications for a particular license. *See id.* at 17250, ¶ 8.

<sup>44</sup> BANM Reply Comments at 22-24; CCPR Reply Comments at 13-14 (the Commission rightfully was concerned that ordinary human decision-makers would be influenced by the fact that interim operators had invested money constructing facilities and had experience in service to the public that the other applicants lacked).

13. In determining eligibility for auction participation, the Commission is required by Section 309(j)(3) to promote certain public interest objectives. Those objectives include rapid deployment of new technologies and services to the public, promotion of economic opportunity and competition, recovery for the public of a portion of the value of the spectrum, and efficient and intensive use of the spectrum.<sup>45</sup> We believe that a policy of unrestricted eligibility in the RSA auction will best fulfill our public interest goals. Here, open eligibility has a higher probability of promoting the rapid delivery of services to the public than limited eligibility. This is because open eligibility increases the likelihood that all entities who have an interest in putting the license to use will participate in the auction. Among these, the bidder who is willing to pay the most will be highly motivated to rapidly put the license to a use that the public finds valuable because only such a use will make its investment worthwhile. Importantly, no commenter has presented evidence in this case that there are entities with market power whose participation might allow them to limit or reduce competition by their entry. In such a situation, permitting as many qualified bidders as possible allows competition and economic opportunity to flourish by reducing one barrier to market entry, potentially resulting in a more competitive applicant pool. In the absence of evidence of market failure, the market, and not regulation, should determine participation in competitive bidding here, and we should allow the maximum number and types of bidders to participate in the auctions.

14. An important factor in our decision to permit open eligibility is that the licenses at issue in this proceeding will cover rural areas. Under Section 309(j)(4)(B), the Commission is required to encourage the rapid deployment of services specifically to rural areas.<sup>46</sup> BANM also highlights the need for the provision of service in rural markets, stating that, “[w]hile many urban markets have enjoyed cellular service for as long as thirteen years, these rural service areas have remained without a permanent nonwireline cellular licensee.”<sup>47</sup> We believe that open eligibility will encourage participation in the RSA auction by entities that are most likely to be interested in, and capable of, serving rural areas.

15. Our decision to permit open eligibility in the RSA auction includes the participation of current IOA holders in the four unlicensed RSAs. The Commission’s policy to dismiss applications for permanent status filed by IOA holders originated in the context of comparative hearings, based on the concern that the decision to grant a license in a comparative hearing would be biased in favor of an IOA holder because it had incurred substantial expenses in its temporary operations.<sup>48</sup> We decline to extend that policy to the competitive bidding process. IOA holders will not have an advantage over other bidders as they once had over other applicants in comparative hearings because, in an auction, licenses are assigned to the highest bidder, regardless of prior operating status.<sup>49</sup> As we stated in the *Notice*,

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<sup>45</sup> 47 U.S.C. § 309(j)(3)(A)-(D).

<sup>46</sup> 47 U.S.C. § 309(j)(4)(B).

<sup>47</sup> BANM Comments at 10-11.

<sup>48</sup> See *In re Applications of La Star Cellular Telephone Co. and New Orleans CGSA, Inc.*, *Memorandum Opinion and Order*, 4 FCC Rcd 3777 (1989), *aff’d*, 899 F.2d 1233 (D.C. Cir 1990). See *Community Broadcasting Co. v. FCC*, 274 F.2d 753 (D.C. Cir. 1960) (an interim operator’s expenditure of sizeable funds on its temporary operation would inevitably influence the Commission’s final decision, no matter how much the Commission tried to eliminate this factor).

<sup>49</sup> See *Implementation of Section 309(j) of the Communications Act - Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses*, *Memorandum Opinion and Order*, 14 FCC Rcd (continued....)

although IOAs confer no entitlement to, or expectation of, receiving a cellular license, IOA holders may have a substantial interest in bidding for permanent authorizations in markets where they have been providing interim cellular service.<sup>50</sup> Given our previously adopted policies and the record in this proceeding, we conclude that current IOA holders should not be excluded from participating in the auction of licenses for the unlicensed RSAs on an equal basis with other applicants.

16. Joint commenters Ranger and Miller raise a variety of statutory and equitable arguments against open eligibility, none of which we find persuasive. First, Ranger and Miller argue that Section 309(l) of the Communications Act of 1934, as amended, restricts eligibility for cellular radio licenses to lottery applicants that filed their applications prior to July 1997 and whose applications allegedly are “unresolved.”<sup>51</sup> Section 309(l) provides in pertinent part that, with respect to competing applications for initial licenses for “commercial radio and television stations” that were filed with the Commission before July 1, 1997, the Commission shall treat the persons filing such applications as the only persons eligible to be qualified bidders.<sup>52</sup> Ranger and Miller contend that the Commission’s rules define cellular radio<sup>53</sup> as a “commercial mobile radio service” and that, therefore, the reference to “commercial radio” in Section 309(l) includes cellular radio.<sup>54</sup> Cingular disagrees with Ranger and Miller, asserting that the Commission should not view “commercial radio” and “television stations” as distinct, unrelated terms.<sup>55</sup> Cingular maintains that the term “commercial” was intended to exclude *noncommercial educational radio and television* applications from the scope of Section 309(l) and from competitive bidding under Section 309(j)(2)(C).<sup>56</sup>

17. We agree with Cingular’s interpretation of the statutory language, which is plain on its face. The statute does not use “commercial radio” and “television stations” as distinct terms. Rather, the reference in the statute to “commercial radio and television stations” clearly refers to broadcast facilities.<sup>57</sup> Where Congress has referred to wireless services like cellular in other provisions of the

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8724, 8737-39, ¶¶ 23-26 (1999) (the Commission rejected arguments that holders of interim authority have a comparative advantage in an auction process).

<sup>50</sup> Notice, 16 FCC Rcd at 4301, ¶ 9.

<sup>51</sup> Ranger and Miller Comments at 4-6. Ranger, Miller, and High Tower Communications sought further review of the *March 2, 2001 Order* dismissing all pending RSA lottery applicants. Ranger and Miller describe these applications as “unresolved.”

<sup>52</sup> Pub. L. No. 105-33, § 3002(a)(3), 111 Stat. 251, 260 (1997) (*codified at* 47 U.S.C. § 309(l)).

<sup>53</sup> 47 C.F.R. § 20.9.

<sup>54</sup> Ranger and Miller Comments at 5.

<sup>55</sup> Cingular Reply Comments at 2.

<sup>56</sup> *Id.* at 2-3.

<sup>57</sup> Contrary to the claim of Ranger and Miller, *Bachow Communications, Inc. v. FCC* does not support the notion that Section 309(l) applies to cellular RSA applications as well as broadcast license applications. Ranger and Miller Comments at 5-6; *Bachow Communications, Inc. v. FCC*, 237 F.3d 683 (D.C. Cir. 2001) (*Bachow*). *Bachow*’s central holding instead is that license applications for 39 GHz service filed under a comparative hearing licensing scheme could be dismissed when the Commission shifted to an auction licensing scheme. *Bachow*, 237 F.3d at 686-688 (recognizing the “Commission’s authority to change license assignment allocation (*sic*) procedures (continued....)

Communications Act of 1934, as amended, it has clearly used the term “commercial mobile services.”<sup>58</sup> As the Supreme Court has explained, “[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”<sup>59</sup> The legislative history also confirms that Section 309(l) applies only to commercial broadcast radio and television applications. The Conference Report specifically states that “[n]ew section 309(l) of the Communications Act requires the Commission to use competitive bidding to resolve any mutually exclusive applications for *radio or television broadcast licenses* that were filed with the Commission prior to July 1, 1997.”<sup>60</sup>

18. Ranger and Miller also offer up a litany of equitable arguments that they contend support artificially limiting eligibility. They argue that the Commission should limit the RSA applicant pool because the number of unresolved lottery applicants is small, the applications have been pending for thirteen years, the service rules for RSA licenses have not changed, and the lottery applicants did not have notice when they filed their applications that competitive bidding, rather than lotteries, might be used to assigned licenses.<sup>61</sup> In addition, Ranger and Miller oppose open eligibility on the grounds that the Commission did not refund their lottery application filing fees,<sup>62</sup> and that open eligibility will lead to delay and litigation.<sup>63</sup>

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midstream” even though it disrupts expectations and alters the competitive balance among applicants). Ranger and Miller also cite the D.C. Circuit’s opinion in *McElroy* to support their argument that the Commission cannot make the RSA licenses available to new applicants. Ranger and Miller Comments at 16-17; *McElroy Electronics Corp. v. FCC*, 86 F.3d 248 (D.C. Cir. 1996) (*McElroy*); see, e.g., AALA Comments at 9-10; AALA Reply Comments at iii, 11; CPLS Reply Comments at 3, 5-7; Crystal Reply Comments at 4; Price Comments at 6; RSAA Comments at 3, 5-6; RSAOG Comments at i, 1, 3, 6-8, 14-15; RSAOG Reply Comments at 1-4. *McElroy* holds that when the Commission decides to process timely-filed applications, it generally may not also process competing applications filed out of time. *McElroy*, 86 F.3d at 253-259. Because we will permit open eligibility for the subject licenses, and all applications to participate in the auction will be newly filed, the *McElroy* decision is inapposite.

<sup>58</sup> See, e.g., 47 U.S.C. §§ 253(e), 274(i)(2)(B), 332(c)(1), 332(d)(1).

<sup>59</sup> *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotation marks omitted), citing *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5<sup>th</sup> Cir. 1972).

<sup>60</sup> H.R. Conf. Rep. No. 217, 105<sup>th</sup> Cong., 1<sup>st</sup> Sess. at 573 (1997) (*Conference Report*) (emphasis added). The Commission has applied Section 309(l) only to pending comparative broadcast licensing cases. See Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, *First Report and Order*, 13 FCC Rcd 15920 (1998) (*Broadcast First Report and Order*); recon. denied, 14 FCC Rcd 8724 (1999); modified, 14 FCC Rcd 12541 (1999); see In the Matter of Amendment of Section 73.202(B), FM Table of Allotments, FM Broadcast Stations, *Memorandum Opinion and Order*, 16 FCC Rcd 2272 (2001).

<sup>61</sup> Ranger and Miller Comments at 1, 7-10, 12-13. Ranger and Miller suggest that the *MDS Report and Order* and the *Broadcast First Report and Orders* considered various equities to limit eligibility. See 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, *Report and Order*, 10 FCC Rcd 9589 (1995) (*MDS Report and Order*); *Broadcast First Report and Order*, note 60, *supra*. Neither the *MDS Report and Order* nor the *Broadcast First Report and Order* address eligibility issues and are therefore not relevant as to whether we should restrict eligibility in the RSA auction.

<sup>62</sup> Ranger and Miller Comments at i, 9, 12-13. Ranger and Miller argue that the Commission should restrict eligibility because Miller helped the Commission determine that a cellular RSA licensee was unqualified to hold a (continued....)

19. Ranger and Miller fail to show how the public interest would be served by limiting the RSA auction to only three former lottery applicants.<sup>64</sup> In fact, it is well-established that, regardless of when an application is filed, an applicant has no vested right to a continuation of the licensing procedures in effect at the time its application was filed.<sup>65</sup> Moreover, there is no logical nexus between the length of time the applications were pending and the rationale for restricting eligibility to bid in the RSA auction. Similarly, the claim that the lottery applicants did not have any notice of possible rule changes at the time they filed their applications provides no reasonable rationale for the proposed narrowing of eligibility. The Commission's action declining to refund application filing fees neither gives the applications continued "life" nor justifies restrictions on eligibility. Finally, the Commission necessarily is guided by the public interest objectives set forth in Section 309(j)(3)(A)-(D) in setting application eligibility and not by concerns over the prospects of litigation and appeals.<sup>66</sup>

20. In fact, Ranger and Miller totally disregard the equities of other parties potentially interested in seeking the subject authorizations, as well as equitable considerations relevant to the public interest. As we found above, adopting open eligibility – the antithesis of the licensing plan promoted by Ranger and Miller – for these licenses has a greater probability than limited eligibility of resulting in the rapid deployment of new technologies and services to the public, the possibility of competition and economic opportunity, and the efficient and intensive use of the spectrum.<sup>67</sup> Such a result would promote the public interest, and therefore, open eligibility is warranted. In addition, it is important to recognize that there may be parties interested in providing cellular service in these markets, and qualified to do so, that did not even exist at the time the lottery applications were filed.

21. Finally, Ranger and Miller argue that an open eligibility policy in this context must necessarily be based on the potential for increased revenue to the Treasury.<sup>68</sup> Section 309(j)(7)(B) does not preclude the Commission from adopting eligibility rules based on other considerations, even though such rules may also result in increased federal revenues. The purpose of open eligibility is not to

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RSA license. Ranger and Miller Comments at 10-12. We disagree. Any action by Miller that may have led the Commission to such a determination is irrelevant to our decision whether we should, as a general rule, adopt open eligibility with respect to the four cellular RSA markets. We are obligated to promote the public interest, not individual applicants.

<sup>63</sup> Ranger and Miller Comments at i, 7-10, 12.

<sup>64</sup> Ranger and Miller raise the same equitable arguments seeking reconsideration of the dismissal of cellular RSA lottery applications. Petition for Reconsideration of Ranger Cellular and Miller Communications, Inc. (filed March 30, 2001).

<sup>65</sup> See, e.g., *Bachow*, 237 F.3d at 687-688; Revision of Part 22 and Part 90 of the Commission's Rules To Facilitate Future Development of Paging Systems, *Memorandum Opinion and Order on Reconsideration and Third Report and Order*, 14 FCC Rcd 10030, 10038, ¶ 8 (1999); *Broadcast First Report and Order*, 13 FCC Rcd at 15937, ¶ 44; Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, *Third Order on Reconsideration*, 13 FCC Rcd 4856, 4941, ¶ 195 (1998), citing *Chadmoore Communications, Inc. v. FCC*, 113 F.3d 235, 240-41 (D.C. Cir. 1997).

<sup>66</sup> 47 U.S.C. § 309(j)(3)(A)-(D).

<sup>67</sup> See ¶¶ 10, 13-14, *supra*.

<sup>68</sup> Ranger and Miller Comments at i, 13-15.

maximize the amount of revenues raised in an auction but to ensure that licenses are awarded to those that value them most highly and that, therefore, will be most likely to provide rapid and efficient service to the public.<sup>69</sup> Our determination to permit open eligibility in the RSA auction is based on our statutory obligations to promote competition and rapid deployment of services to rural areas, not to enhance the Federal Treasury.

## B. Market Areas To Be Auctioned

22. *Background.* In the *Notice*, we sought comment on whether the markets for which licenses are to be awarded through competitive bidding should be based on RSAs, or whether alternative licensing models should be considered.<sup>70</sup> We received two comments that supported licensing the markets on an RSA basis,<sup>71</sup> and no party expressed opposition to that proposal.

23. *Discussion.* We conclude that the remaining unlicensed cellular RSA markets should be licensed on an RSA basis under our Part 22 rules. As we observed in the *Notice*, the initial lotteries for the unlicensed markets were for RSAs as defined in Part 22 of our rules.<sup>72</sup> To employ another market model for these RSAs would be potentially disruptive to adjacent cellular operations, as well as possibly impede the cost-effective buildout of facilities to serve the residents of these areas as well as transient users. We also will subject licenses awarded for these markets to the same construction and operational rules as licenses granted to prior RSA lottery winners, including the exclusive right of the auction winner to expand its system within that market for a period of five years.<sup>73</sup> After the expiration of the five-year expansion period, any areas within the RSA that remained unserved would be available for licensing pursuant to our Part 22 unserved areas Phase I and Phase II filing procedures.<sup>74</sup>

## C. Competitive Bidding Procedures

### 1. Incorporation by Reference of Part 1 Standardized Auction Rules

24. *Background.* In the *Part 1 Third Report and Order*, the Commission streamlined its auction procedures by adopting general competitive bidding rules set forth in Part 1, Subpart Q, of the Commission's rules applicable to all auctionable services.<sup>75</sup> In the *Notice*, we proposed to conduct the

<sup>69</sup> By asserting that auction revenues will be greater if they are forced to compete with a larger number of bidders, Ranger and Miller may be suggesting that they value the RSA licenses less highly than their potential competitors.

<sup>70</sup> *Notice*, 16 FCC Rcd at 4301-4302, ¶¶10-11.

<sup>71</sup> Ranger and Miller Comments at 15; ALLTEL Comments at 1.

<sup>72</sup> *Notice*, 16 FCC Rcd at 4302, ¶ 11; 47 C.F.R. § 22.909.

<sup>73</sup> 47 C.F.R. § 22.947.

<sup>74</sup> 47 C.F.R. § 22.949.

<sup>75</sup> Amendment of Part 1 of the Commission's Rules — Competitive Bidding Procedures, Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, *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*). The Commission clarified and amended these general competitive bidding procedures. Amendment of Part 1 of the Commission's Rules — Competitive Bidding Procedures, *Order on* (continued....)

auction of cellular RSA licenses in conformity with the general competitive bidding rules,<sup>76</sup> including any amendments adopted in the ongoing Part 1 proceeding.<sup>77</sup> Specifically, we proposed to employ the Part 1 rules governing competitive bidding design, designated entities, application and payment procedures, reporting requirements, collusion issues, and unjust enrichment.<sup>78</sup> We further stated that winning bidders would be eligible to obtain a bidding credit for serving qualifying tribal lands.<sup>79</sup> Finally, our *Notice* contemplated that auction-related procedural matters such as the appropriate competitive bidding design for the RSA auction, as well as minimum opening bids and reserve prices, would be determined by the Bureau pursuant to its delegated authority prior to the start of the cellular RSA auction.<sup>80</sup>

25. *Discussion.* We adopt our proposal to conduct the auction for initial licenses in the four cellular RSAs in conformity with the general competitive bidding rules set forth in Part 1, Subpart Q, of the Commission's rules. We believe that this decision to conduct the RSA auction in conformity with the standardized Part 1 rules will increase the efficiency of the competitive bidding process and provide specific guidance to auction participants.

26. Although we received few comments on this issue, none of the commenters opposed the application of the general competitive bidding rules. One commenter, Cingular, favors application of the general competitive bidding rules to the RSA auction.<sup>81</sup> In its comments, Cingular also requests that the bidding design ultimately selected not include combinatorial bidding,<sup>82</sup> arguing that it is inappropriate where no "synergies" exist among the markets in question.<sup>83</sup> As indicated in the *Notice*, the Bureau will seek comment by Public Notice on auction-related procedural issues, including the appropriate

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*Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making*, 15 FCC Rcd 15293 (2000) (modified by Erratum, DA 00-2475 (rel. Nov. 3, 2000)) (*Part 1 Order on Reconsideration*) (recons. pending). More recently, the Commission adopted modifications to Section 1.2105(c) of the Commission's rules, the competitive bidding "anti-collusion rule." Amendment of Part 1 of the Commission's Rules — Competitive Bidding Procedures, WT Docket No. 97-82, *Seventh Report and Order*, FCC 01-270 (rel. Sept. 27, 2001). See also 47 C.F.R. § 1.2101 *et seq.*

<sup>76</sup> *Notice*, 16 FCC Rcd at 4302, ¶ 12.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* See 47 C.F.R. § 1.2110(f)(3). A tribal land bidding credit is in addition to, and separate from, any other bidding credit for which a winning bidder may qualify. Unlike other bidding credits that are requested prior to the auction, a winning bidder applies for the tribal land bidding credit after winning the auction when it files its long-form application. In this regard, we note that only one RSA subject to these proposals — RSA 582A-Barnes, ND — contains any federally recognized tribal lands.

<sup>80</sup> *Notice*, 16 FCC Rcd at 4302-4303, ¶ 12. See 47 C.F.R. §§ 0.131(c), 0.331, and 0.332; see also Amendment of Part 1 of the Commission's Rules—Competitive Bidding Procedures, *Order, Memorandum Opinion and Order, and Notice of Proposed Rule Making*, 12 FCC Rcd 5686, 5697, ¶ 16 (1997).

<sup>81</sup> Cingular Comments at 1, 3.

<sup>82</sup> Combinatorial bidding design allows for bids on combinations or packages of licenses.

<sup>83</sup> Cingular Comments at 3.

competitive bidding design, prior to the start of the cellular RSA auction. This approach will provide the Bureau with an opportunity to weigh the benefits and disadvantages of combinatorial bidding design, among other auction-specific issues.

## 2. Small Business Definitions and Bidding Credits.

27. *Background.* In the *Notice*, we proposed to adopt special provisions for small businesses that participate in the auction for cellular RSA licenses.<sup>84</sup> We noted that the markets at issue could attract a wide range of entities and the adoption of bidding credits will help us meet our Congressional mandate to promote competition and to disseminate licenses among a wide variety of applicants.<sup>85</sup> Accordingly, we proposed to define an entrepreneur as an entity with average annual gross revenues for the preceding three years not exceeding \$40 million, a small business as an entity with average annual gross revenues for the preceding three years not exceeding \$15 million, and a very small business as an entity with average annual gross revenues for the preceding three years not exceeding \$3 million.<sup>86</sup> We further proposed, as provided in Section 1.2110(f)(2) of our rules, to offer entrepreneurs a bidding credit of 15 percent, small businesses a bidding credit of 25 percent, and very small businesses a bidding credit of 35 percent.<sup>87</sup>

28. We sought comment on whether the characteristics and capital requirements of cellular service call for a different approach.<sup>88</sup> We also asked commenters, to the extent that they propose additional provisions to ensure participation by businesses owned by minorities and women, to address how such provisions should be crafted to meet the relevant standards of judicial review.<sup>89</sup>

29. *Discussion.* As we tentatively concluded in the *Notice*, we will adopt the following small business definitions and bidding credits: (1) an “entrepreneur” with average annual gross revenues for the preceding three years not exceeding \$40 million will be eligible for a 15 percent bidding credit; (2) a “small business” with average annual gross revenues for the preceding three years not exceeding \$15 million will be eligible for a 25 percent bidding credit; and (3) a “very small business” with average annual gross revenues for the preceding three years not exceeding \$3 million will be eligible for a 35 percent bidding credit.

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<sup>84</sup> *Notice*, 16 FCC Rcd at 4303, ¶ 13.

<sup>85</sup> *Id.* at 4303, ¶ 14.

<sup>86</sup> *Id.* The entrepreneur and small business definitions are consistent with the small business definitions we established for the broadband Personal Communications Services C and F blocks. We also proposed the definition of very small business for the RSA auction because smaller businesses may be interested in acquiring licenses to provide service in these markets. The Small Business Administration approved these proposed small business definitions on January 30, 2001. See Letter from Fred P. Hochberg, Acting Administrator, Small Business Administration, to Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, dated Jan. 30, 2001.

<sup>87</sup> *Notice*, 16 FCC Rcd at 4303, ¶ 14.

<sup>88</sup> *Id.* at 4304, ¶ 15.

<sup>89</sup> *Id.*

30. We received two comments that addressed special provisions for small businesses. Ranger and Miller believe that bidding credits should be adopted to encourage small businesses to bid and win licenses,<sup>90</sup> while ALLTEL opposes such adoption.<sup>91</sup> ALLTEL argues that the cellular industry has evolved into a “mature” service that is occupied by national and super regional carriers that are better situated to incorporate rural service into the “larger scope and scale of their existing operations.”<sup>92</sup> ALLTEL maintains that small businesses may have difficulty remaining economically viable unless they affiliate with larger carriers.<sup>93</sup> If large carriers ultimately manage the RSA markets, ALLTEL argues that they should therefore have an “equal shot of obtaining the license in the first instance.”<sup>94</sup> Accordingly, ALLTEL concludes that bidding credits should not be adopted because promoting small business ownership of stand-alone rural cellular markets in the “mature” cellular industry would be contrary to market realities.<sup>95</sup>

31. We are not persuaded by ALLTEL’s arguments. We do not believe that large carriers are necessarily better suited to provide cellular RSA service, as suggested by ALLTEL. In any case, the Commission does not prescreen applicants’ relative qualifications. Further, we believe that competition between large and small entities will benefit subscribers in the rural markets. We are also not persuaded that the adoption of bidding credits will, in any way, impede service to these areas. To the extent that, as ALLTEL suggests, cellular service is a national “mature” service dominated by large carriers, our decision to adopt bidding credits should help eliminate barriers to entry for small businesses, consistent with our statutory mandate.<sup>96</sup>

32. Finally, ALLTEL contends that the auction will be skewed toward smaller entities that receive an overly generous bidding credit, which will distort market valuation.<sup>97</sup> While we agree that bidding credits provide small businesses with an advantage, Congress, in Section 309(j), specifically directed the Commission to promote economic opportunities for small businesses. We further note that bidding credits alone do not guarantee success; rather, they provide small businesses with an opportunity

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<sup>90</sup> Ranger and Miller Comments at 15.

<sup>91</sup> ALLTEL Comments at 1-3.

<sup>92</sup> *Id.* at 1-2. ALLTEL also believes that such integration will ultimately benefit consumers in the form of lower rates than might be available from stand-alone rural markets. *Id.* at 3.

<sup>93</sup> *Id.* at 2 (ALLTEL claims that the auction winners in the RSA markets at issue here may ultimately obtain management, switching facilities, and cellular infrastructure from larger adjoining carriers).

<sup>94</sup> *Id.* at 2-3. To support its argument that all applicants should have “an equal footing” in the RSA auction, ALLTEL cites to a Commission statement in the *Notice*. See *Notice*, 16 FCC Rcd at 4301, ¶ 9. ALLTEL argues that the Commission’s proposal to allow current IOA holders to participate in the RSA auction on an equal basis with other applicants somehow implies that the Commission would reject bidding credits. However, ALLTEL’s argument is misplaced. Our tentative conclusion in the *Notice* referred to the question of eligibility, not bidding credits.

<sup>95</sup> ALLTEL Comments at 1-2.

<sup>96</sup> See 47 U.S.C. § 309(j)(3)(B).

<sup>97</sup> ALLTEL Comments at 2-3.

to successfully compete against larger, well-financed bidders.<sup>98</sup> Because bidding credits are the best tool we have to promote these opportunities, we conclude that it is appropriate to adopt the special provisions for small businesses.

33. We will not adopt special preferences for entities owned by minorities or women. As the Commission did not receive any comments on this issue, we do not have an adequate record to support such special provisions under the current standards of judicial review.<sup>99</sup> We believe the bidding credits we adopt here for small businesses will further our objective of disseminating licenses among a wide variety of applicants. Furthermore, minority and women-owned entities that qualify as small businesses may take advantage of the special provisions.

#### D. Disposition of Alee's Argument Concerning Texas 21

34. In its comments,<sup>100</sup> Alee has requested that RSA 672A (Texas 21 – Chambers) not be included in any upcoming auction pending the outcome of its petition for reconsideration of an order denying its application in that market.<sup>101</sup> For the reasons stated below, we deny Alee's request and include the Texas 21 RSA authorization among the markets to be subject to auction rules.

35. The Commission based its decision to deny the application for Texas 21 on a prior finding that Alee had lacked candor before the Commission in its application for authorization to operate New Mexico RSA 3, and was therefore not suitable under the Commission's character qualifications to be a Commission licensee.<sup>102</sup> The U.S. Court of Appeals for the D.C. Circuit recently upheld the Commission's determination of lack of candor, and subsequently denied Alee's petition for rehearing.<sup>103</sup> The Supreme Court has recently denied Alee's petition for a writ of certiorari.<sup>104</sup>

36. Alee requests that, if we include the Texas 21 authorization in the contemplated auction, the Commission give notice to any potential bidder that any license won in that market would be subject to Alee's claim. If Alee ultimately prevails in the hearing process, the license will be awarded accordingly. If Alee does not prevail, then we will have the necessary licensing rules and policies in place for the

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<sup>98</sup> See Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Second Report and Order and Further Notice of Proposed Rulemaking*, 12 FCC Rcd 2732, 2811, ¶ 178 (1997).

<sup>99</sup> See *Adarand Constructors v. Peña*, 515 U.S. 200 (1995) (requiring a strict scrutiny standard of review for Congressionally mandated race-conscious measures); *United States v. Virginia*, 518 U.S. 515 (1996) (applying an intermediate standard of review to a state program based on gender classification).

<sup>100</sup> Alee Comments at 2.

<sup>101</sup> See *Alee Cellular*, note 12, *supra*.

<sup>102</sup> In re Applications of Algreg Cellular Engineering, 12 FCC Rcd 8148, 8172-8181, ¶¶ 51-79, 8190, ¶ 104 (1997), recon. denied, 14 FCC Rcd 18524, 18533-18535, ¶¶ 12-16, 18538, ¶ 26 (1999).

<sup>103</sup> *Alee Cellular Communications v. FCC*, No. 99-1460 (D.C. Cir. Jan. 30, 2001), pet. for rehearing denied (D.C. Cir. Apr. 5, 2000).

<sup>104</sup> *Alee Cellular Communications v. FCC*, No 01-15, pet. for writ of cert. denied (S. Ct. Oct. 9, 2001).

Texas 21 authorization without having to conduct another rulemaking proceeding. We will ensure that interested parties are fully informed to the extent that Alee's claim remains unresolved.

#### E. IOA Operations

37. *Background.* Under the terms of each of the existing IOAs, the IOA operator must cease operations immediately upon initiation of service by the new licensee, provided that the new licensee gives at least 30 days written notice of its intent to provide service.<sup>105</sup> In order to prevent unnecessary interruption of service to existing cellular customers, we proposed in the *Notice* that, in the event that any of the current IOA holders do not obtain the RSA license for their markets, they should be allowed to continue providing service on a temporary basis subject to these conditions, *i.e.*, until the auction winner provides the required notice and is prepared to commence service.<sup>106</sup> Cingular requests that the Commission clarify its rules to provide that interim operators may continue to operate until the auction winner is prepared to commence service in that particular part of the market where the IOA holder is operating in order to avoid disruption in service to the public.<sup>107</sup>

38. *Discussion.* Because of the nature of these markets and carrier buildout practices, we anticipate the auction winner will not initially provide coverage throughout the entire market. As a result, the auction winner may or may not initiate service in the area where the public currently is receiving service from the IOA holder. We will require the IOA holder to "pull back" its service area boundaries (SAB) to eliminate any overlap with the auction winner's own SAB, and to terminate service in the RSA upon notice from the auction winner that the latter is extending coverage into the area served under the IOA. We feel that this will best serve the public interest by preventing localized disruptions in service during the transition period.

### IV. PROCEDURAL MATTERS

#### A. Final Regulatory Flexibility Analysis

39. Pursuant to the Regulatory Flexibility Act, 5 U.S.C. § 603, the Final Regulatory Flexibility Analysis (FRFA) is set forth in Appendix C. The Commission's Consumer Information Bureau, Reference Information Center, will send a copy of this *Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with the Regulatory Flexibility Act.

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<sup>105</sup> *Notice*, 16 FCC Rcd at 4301, ¶ 9. The IOA condition specifically provides that "[t]he interim operator must fully cooperate with the permanent licensee in effectuating a smooth transition to the provision of service in the market by the permanent licensee without *disruption* of service to the public. The interim operator must cease operations in the market on the date of initiation of permanent service or within 30 days of written notice by the permanent permittee to the interim operator of the day and time that it intends to initiate service, whichever date occurs later."

<sup>106</sup> *Id.* Minimizing such interruptions while the auction winner establishes its service will also help to retain 911 access in the IOA service area.

<sup>107</sup> Cingular Comments at 1, 2-3.

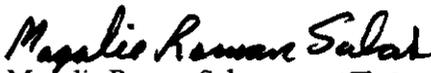
**B. Ordering Clauses**

40. Pursuant to 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), IT IS ORDERED THAT Part 22, 47 C.F.R. is AMENDED as specified in Appendix B and the auctions for Markets 322A – Polk, AR, 592A – Barnes, ND, 727A – Ceiba, PR, and 672A – Chambers, TX be conducted under Part 1, Subpart Q of the Commission's rules, 47 C.F.R. § 1.2101 *et seq.*, and that all eligible parties be permitted to participate in the bidding.

41. IT IS FURTHER ORDERED THAT the rules and policies adopted in this Report and Order shall become effective thirty days after publication in the Federal Register.

42. IT IS FURTHER ORDERED that the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this *Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

  
Magalie Roman Salas *WRC*  
Secretary

**APPENDIX A****COMMENTING PARTIES****NOTICE COMMENTS**

Cingular Wireless, LLC (Cingular)  
Ranger Cellular and Miller Communications, Inc. (Ranger and Miller)  
ALLTEL Communications, Inc. (ALLTEL)  
Alee Cellular Communications, Inc. (Alee)

**NOTICE REPLY COMMENTS**

Cingular Wireless, LLC (Cingular)

**CCPR PETITION COMMENTS**

Applicants Against Lottery Abuse (AALA)  
Bell Atlantic NYNEX Mobile, Inc. (BANM)  
Committee to Preserve Lottery Selection (CPLS)  
Crystal Communications Systems (Crystal)  
Darsh Aggarwal (Aggarwal)  
Thomas Domencich/Committee for a Fair Lottery (Domencich)  
Great Western Cellular Partners (Great Western)  
JMC Enterprises/SDK Enterprises/Donald J. Kunkle/Formula I Cellular (JMC)  
Miller Communications, Inc./Skywave Communications Partners (Miller)  
Moving Phones Partnership, L.P./FutureWave General Partners, L.P. (Moving Phones)  
Price Communications Cellular, Inc. (Price)  
RSA Applicants (RSAA)  
RSA Operators Group (RSAOG)  
Richard L. Vega Group (Vega)  
TME Cellular Partners (TME)  
Telephone and Data Systems, Inc. (TDS)  
Terradyne, Ltd. (Terradyne)  
Western Wireless Corporation (WWC)

**CCPR PETITION LATE-FILED COMMENTS**

American Cellular Services (American Cellular)

**CCPR PETITION REPLY COMMENTS**

Applicants Against Lottery Abuse (AALA)  
Bell Atlantic NYNEX Mobile, Inc. (BANM)  
Blackwater Cellular Corp. (Blackwater)  
Cellular Communications of Puerto Rico (CCPR)  
Century Cellunet Inc. (Century)  
Committee to Preserve Lottery Selection (CPLS)  
Crystal Communications Systems (Crystal)  
Thomas Domencich/Committee for a Fair Lottery (Domencich)  
Moving Phones Partnership, L.P./FutureWave General Partners, L.P. (Moving Phones)  
RSA Operators Group (RSAOG)  
Tri-Coastal Cellular II (Tri-Coastal)

## APPENDIX B

## FINAL RULES

Part 22 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

**PART 22 – PUBLIC MOBILE SERVICES**

1. The authority citation for Part 22 continues to read as follows:

AUTHORITY: 47 U.S.C. §§ 154, 222, 303, 309, and 332.

2. A new Section 22.228 is added to Subpart B to read as follows:

**§ 22.228 Cellular Rural Service Area licenses subject to competitive bidding.**

Mutually exclusive initial applications for Cellular Rural Service Area licenses are subject to competitive bidding. The general competitive bidding procedures set forth in Part 1, Subpart Q of this chapter will apply unless otherwise provided in this part.

3. A new Section 22.229 is added to Subpart B to read as follows:

**§ 22.229 Designated entities.***(a) Eligibility for small business provisions.*

(1) A very small business is an entity that, together with its controlling interests and affiliates, has average annual gross revenues not exceeding \$3 million for the preceding three years.

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

(3) An entrepreneur is an entity that, together with its controlling interests and affiliates, has average annual gross revenues not exceeding \$40 million for the preceding three years.

(4) 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. A consortium of 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)(2) of this section. A consortium of entrepreneurs 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)(3) of this section.

(5) For purposes of determining whether an entity meets any of the definitions set forth in paragraphs (a)(1), (a)(2), (a)(3), or (a)(4) of this section, the gross revenues of the entity, its controlling interests and affiliates shall be considered in the manner set forth in § 1.2110(b) and (c) of this chapter.

*(b) Bidding credits.* 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(f)(2)(i) of this

chapter. 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(f)(2)(ii) of this chapter. A winning bidder that qualifies as an entrepreneur or a consortium of entrepreneurs as defined in this section may use the bidding credit specified in § 1.2110(f)(2)(iii) of this chapter.

4. A new Section 22.969 is added to Subpart H to read as follows:

**§ 22.969. Cellular RSA licenses subject to competitive bidding.**

Mutually exclusive applications for initial authorization for the following Cellular Rural Service Areas filed after the effective date of this rule are subject to competitive bidding procedures as prescribed by Sections 22.228 and 22.229: 332A – Polk, AR; 582A – Barnes, ND; 672A – Chambers, TX; and 727A – Ceiba, PR.

## APPENDIX C

FINAL REGULATORY FLEXIBILITY ANALYSIS  
Regulatory Flexibility Act

As required by the Regulatory Flexibility Act (RFA),<sup>108</sup> an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Notice of Proposed Rule Making* in this docket.<sup>109</sup> The Commission sought written public comment on the proposals in the *Notice*, including comment on the IRFA. The comments received are discussed below. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.<sup>110</sup>

**A. Need for and Objectives of the *Report and Order*:**

Congress enacted the Balanced Budget Act of 1997, which requires the Commission to resolve mutually exclusive applications for initial licenses through competitive bidding instead of random selection, with certain exceptions not applicable here.<sup>111</sup> Accordingly, we initiated this rulemaking in order to adopt rules for the granting of initial cellular RSA authorizations by means of competitive bidding. Our objective in this rulemaking proceeding is to establish, for cellular RSA markets for which a tentative selectee has been disqualified, the applicable competitive bidding and licensing rules. Such rules are necessary in order to determine the classes of eligible entities as well as determine what policies, if any, should be adopted to promote participation by small business entities, consistent with the Commission's statutory obligation under Section 309 of the Communications Act of 1934, as amended, 47 U.S.C. § 309.

**B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA:**

No comments were submitted specifically in response to the IRFA. Some of the comments responding to the proposals contained in the *Notice*, however, discussed issues that could affect small businesses. Two of the three commenters that addressed eligibility for the four cellular RSA licenses at issue generally supported permitting all eligible entities to apply for the licenses.<sup>112</sup> The third commenter opposed such open eligibility (which would encompass small businesses), instead arguing that only entities that had filed lottery applications for these licenses in 1988 and 1989 *and* had appealed

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<sup>108</sup> 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).

<sup>109</sup> In the Matter of Implementation of Competitive Bidding Rules to License Certain Rural Service Areas, *Notice of Proposed Rule Making*, 16 FCC Rcd 4296, 4308-4310 (2001) (*Notice*).

<sup>110</sup> See 5 U.S.C. § 604.

<sup>111</sup> See In the Matter of Certain Cellular Rural Service Area Applications, *Order*, 14 FCC Rcd 4619 (1999); In the Matter of Certain Cellular Rural Service Area Applications, *Order*, 16 FCC Rcd 4860 (2001) (recons. pending).

<sup>112</sup> See *Report and Order* at ¶¶ 8-21; Cingular Comments at 2; Cingular Reply Comments at 1-7; ALLTEL Comments at 1.

the dismissal of their lottery applications should be permitted to apply for these licenses (which would mean only three entities would be potentially eligible).<sup>113</sup>

One commenter supported the proposals contained in the *Notice* to provide bidding credits to small businesses to encourage them to bid on and win the cellular RSA licenses.<sup>114</sup> Another commenter opposed adoption of such bidding credits on the basis that such credits would unfairly and uneconomically skew the auction in favor of smaller entities.<sup>115</sup>

Regarding eligibility for the four cellular RSA licenses, we determined in the *Report and Order* that any entity otherwise qualified under the rules would be permitted to apply for any of the four RSA licenses.<sup>116</sup> As explained in greater detail in the *Report and Order* and in Section E *infra*, we concluded that permitting broad-based eligibility would best further the public interest as well as facilitate participation by small businesses.

Regarding the adoption of bidding credits for certain categories of small businesses, we concluded that including such bidding credits as part of the cellular RSA application and bidding process would help to promote opportunities for small businesses.<sup>117</sup> As explained in greater detail in the *Report and Order* and Section E *infra*, implementation of bidding credits facilitates the ability of small businesses to compete against larger entities and promotes economic opportunities for those small businesses.

**C. Description and Estimate of the Number of Small Entities To Which the Rules Will Apply:**

The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.<sup>118</sup> The RFA defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”<sup>119</sup> The term “small business” has the same meaning as the term “small business concern” under section 3 of the Small Business Act.<sup>120</sup> A small business concern is one which:

<sup>113</sup> See *Report and Order* at ¶¶ 8-21; Ranger and Miller Comments at 1-17.

<sup>114</sup> See *Report and Order* at ¶¶ 27-33; Ranger and Miller Comments at 15.

<sup>115</sup> See *Report and Order* at ¶¶ 27-33; ALLTEL Comments at 1-3.

<sup>116</sup> See *Report and Order* at ¶¶ 8-21.

<sup>117</sup> See *id.* at ¶¶ 27-33.

<sup>118</sup> 5 U.S.C. § 603(b)(3).

<sup>119</sup> *Id.* § 601(6).

<sup>120</sup> *Id.* § 601(3) (incorporating by reference the definition of “small business concern” in 15 U.S.C. § 632). Pursuant to the RFA, the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.” 5 U.S.C. § 601(3).

(1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.<sup>121</sup>

A small organization is generally “any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.”<sup>122</sup> Nationwide, as of 1992, there were approximately 275,801 small organizations.<sup>123</sup> “Small governmental jurisdiction” generally means “governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000.”<sup>124</sup> As of 1992, there were approximately 85,006 such jurisdictions in the United States.<sup>125</sup> This number includes 38,978 counties, cities, and towns; of these, 37,566, or 96 percent, have populations of fewer than 50,000. The Census Bureau estimates that this ratio is approximately accurate for all governmental entities. Thus, of the 85,006 governmental entities, we estimate that 81,600 (91 percent) are small entities. According to SBA reporting data, there were 4.44 million small business firms nationwide in 1992.<sup>126</sup>

According to recent telecommunications industry revenue data, 808 carriers reported that they were engaged in the provision of either cellular service or Personal Communications Services (PCS), which are placed together in that data.<sup>127</sup> This data does not indicate how many of these 808 carriers fall within each of the revenue tiers defined by the Commission<sup>128</sup> for the purpose of receiving bidding credits as some form of small business or entrepreneur.

The Commission is required to estimate in this FRFA the number of small entities to which any new rules would apply, provide a description of such entities, and assess the impact of the rule on such entities. The rules adopted in the *Report and Order* will apply to all entities that seek to obtain the subject licenses, including small entities. The number of entities that may apply to participate in these future

<sup>121</sup> 15 U.S.C. § 632.

<sup>122</sup> 5 U.S.C. § 601(4).

<sup>123</sup> 1992 Economic Census, U.S. Bureau of the Census, Table 6 (special tabulation of data under contract to Office of Advocacy of the U.S. Small Business Administration).

<sup>124</sup> 5 U.S.C. § 601(5).

<sup>125</sup> 1992 Census of Governments, U.S. Bureau of the Census, U.S. Department of Commerce.

<sup>126</sup> See note 123, *supra*.

<sup>127</sup> Trends in Telephone Service, Table 19.3 (March 2000).

<sup>128</sup> See *Report and Order* at ¶¶ 29-33. As described in the *Report and Order* and Section E *infra*, the Commission defined an “entrepreneur” as an entity with average annual gross revenues not exceeding \$40 million for the preceding three years and provided a 15 percent bidding credit; a “small business” as an entity with average annual gross revenues not exceeding \$15 million for the preceding three years and provided a 25 percent bidding credit; and a “very small business” as an entity with average annual gross revenues not exceeding \$3 million for the preceding three years and provided a 35 percent bidding credit.

auctions is unknown. Moreover, these entities might already be providers of cellular service or PCS or other wireless services,<sup>129</sup> or they may have no current involvement in the wireless industry.

The number of small businesses that have participated in prior auctions has varied. Small businesses, as defined under the Commission's rules in the context of various auctions for authorizations in specific services, have accounted for 1,667 out of a total of 2,096 qualified bidders in all prior auctions, not including broadcast auctions.<sup>130</sup> Given these statistics, we expect a large percentage of participants in our auctions program generally to be small businesses in the future, although this may not be the case in this individual auction.

**D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements:**

We impose no new reporting, recordkeeping, or other compliance requirements in the *Report and Order*. The only projected reporting and recordkeeping requirements that will apply in any auctions for the four cellular RSA authorizations are those that are already established by Commission regulations. Nothing in this rulemaking changes those regulations. We will accept new license applications and use our general Part 1 competitive bidding rules to conduct the auction. These rules require all applicants to electronically submit FCC Form 175 in order to participate in the auction<sup>131</sup> and, at the conclusion of the auction, all high bidders to electronically submit FCC Form 601 to apply for a license.<sup>132</sup> The purposes of these forms are to ensure that applicants are eligible to participate in the auction and that high bidders are eligible to hold the cellular RSA licenses at issue. The Office of Management and Budget has already approved both of these forms.<sup>133</sup> In addition, under our Part 1 rules, any entity wishing to receive a bidding credit for serving qualifying tribal lands must comply with 47 C.F.R. § 1.2110(f)(3), an obligation also approved by the Office of Management and Budget.<sup>134</sup>

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<sup>129</sup> To the extent that existing cellular or PCS operators would apply for the subject authorizations, the applicable NAICS code is 513322. Existing paging carriers, which might also be interested in these authorizations, fall under NAICS code 513321. Resellers of paging and cellular services are identified by NAICS code 51333.

<sup>130</sup> As provided in Section 1.2110(c)(1) of the Commission's rules, and in conformity with the Small Business Act and the regulations of the Small Business Administration, the Commission establishes small business definitions for purposes of its auctions on a service-specific basis. See 47 C.F.R. § 1.2110(c)(1); 15 U.S.C. § 632(c)(2)(c); 13 C.F.R. § 121.902(b). Statistics for broadcast license auctions are not available, and would be less relevant to the licenses at issue here.

<sup>131</sup> 47 C.F.R. § 1.2105(a).

<sup>132</sup> *Id.* § 1.2107(c).

<sup>133</sup> FCC Form 175, OMB Control No. 3060-0600 (effective until Apr. 30, 2004); FCC Form 601, OMB Control No. 3060-0798 (effective until Mar. 31, 2002).

<sup>134</sup> 47 C.F.R. § 1.2110(f)(3).

**E. 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 (among others): (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.<sup>135</sup>

In the *Report and Order*, we adopt rules to permit us to grant initial licenses in four cellular RSAs. In adopting these rules, the Commission considered the potential significant economic impact of the rules on small entities. Specifically, the Commission considered the impact of its eligibility definition on the ability of small businesses even to apply for the licenses at issue in this proceeding and to participate in the associated auctions. The Commission also considered the effect of the proposed bidding credits for three categories of small businesses<sup>136</sup> on the ability of small businesses to compete successfully in the auctions and to build out a system should such businesses be awarded any of the licenses.

Also, in proposing to apply the Commission's existing Part 1 competitive bidding rules to any auctions for these licenses, the Commission took into account their effect on small businesses.

The rules adopted by the *Report and Order* will affect all small entities that seek to acquire any of the four cellular RSA licenses discussed herein. We believe that permitting all eligible entities to apply for the four licenses – instead of restricting eligibility to three applicants that filed lottery applications in 1988 and 1989 – will promote opportunities for participation by small businesses. A greater number of small businesses will have the chance to seek the authorizations at issue.

We have sought to promote small business ownership by defining three tiers of small businesses for the purposes of providing bidding credits to small entities: an “entrepreneur” is an entity with average annual gross revenues not exceeding \$40 million for the preceding three years; a “small business” is an entity with average annual gross revenues not exceeding \$15 million for the preceding three years; and a “very small business” is an entity with average annual gross revenues not exceeding \$3 million for the preceding three years.<sup>137</sup> The bidding credits are 15 percent for entrepreneurs, 25 percent for small

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<sup>135</sup> 5 U.S.C. §§ 603(c)(1)-(4).

<sup>136</sup> As described in the *Report and Order* and Section E *infra*, the Commission defined an “entrepreneur” as an entity with average annual gross revenues not exceeding \$40 million for the preceding three years and provided a 15 percent bidding credit; a “small business” as an entity with average annual gross revenues not exceeding \$15 million for the preceding three years and provided a 25 percent bidding credit; and a “very small business” as an entity with average annual gross revenues not exceeding \$3 million for the preceding three years and provided a 35 percent bidding credit.

<sup>137</sup> The Small Business Administration approved these proposed small business definitions on January 30, 2001. See Letter from Fred P. Hochberg, Acting Administrator, Small Business Administration, to Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, dated Jan. 30, 2001. See also Letter from Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, to Gary M. Jackson, Assistant Administrator, Small Business Administration, dated Sept. 21, 2001.

businesses, and 35 percent for very small businesses. We specifically rejected arguments in opposition to the use of bidding credits for small businesses. As explained in the *Report and Order*, adoption of bidding credits for small businesses provides them with an opportunity to compete successfully against larger, well-financed bidders.<sup>138</sup> We believe the bidding credits we have adopted will benefit a range of small businesses.

We will apply our Part 1 competitive bidding rules equally to all applicants for the licenses, including small businesses. Our Part 1 competitive bidding rules have been designed to ensure that small businesses are not placed at a disadvantage and have a full and fair opportunity to compete in fair auction proceedings. While these rules require small businesses to submit application forms in order to participate in the auctions for the subject licenses, we believe that equitably applying the same rules to all entities helps to promote fairness in the process and to ensure that the auction is effective. Fair and effective auction proceedings benefit small businesses as well as all other participants.

**Report to Congress:** The Commission will include a copy of the *Report and Order*, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.<sup>139</sup> In addition, the Commission will send a copy of the *Report and Order*, including this FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *Report and Order* and FRFA (or summaries thereof) will also be published in the Federal Register.<sup>140</sup>

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<sup>138</sup> *Report and Order* at ¶ 32.

<sup>139</sup> *See* 5 U.S.C. § 801(a)(1)(A).

<sup>140</sup> *See* 5 U.S.C. § 604(b).