

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

In the Matter of)
)
)
Amendment of Part 1 of the Competitive Bidding) WT Docket No. 97-82
Rules – Competitive Bidding Procedures)
)

SECOND ORDER ON RECONSIDERATION OF THE FIFTH REPORT AND ORDER

Adopted: December 22, 2004

Released: January 31, 2005

By the Commission: Commissioner Adelstein issuing a statement.

I. OVERVIEW

1. In this Second Order on Reconsideration of the Part 1 Fifth Report and Order, we grant two petitions for reconsideration of the Commission’s Part 1 Reconsideration Order.1 The petitioners seek to modify one of the elements of the three-part test that rural telephone cooperatives must satisfy to receive a limited exemption from the attribution rules that are part of the Commission’s Part 1 competitive bidding rules.2 In particular, petitioners seek to refine a portion of the rule that defines the category of eligible rural telephone cooperatives so as not to limit the flexibility of rural telephone cooperatives to provide new telecommunications and other advanced communications services to consumers in rural areas. In this decision, we revise the third element of the exemption to permit a rural telephone cooperative applicant (or its controlling interest) to demonstrate that either it is eligible for tax-exempt status pursuant to Section 501(c)(12) of the Internal Revenue Code3 or it adheres to the cooperative principles enumerated in Puget Sound Plywood, Inc. v. Commissioner of Internal Revenue (“Puget Sound”).4 We also clarify how the first element of this rule applies in cases where a rural telephone cooperative applicant is organized in a jurisdiction that lacks a specific statute governing organization as a

1 Amendment of Part 1 of the Commission’s Rules – Competitive Bidding Procedures, Second Order on Reconsideration of the Third Report and Order and Order on Reconsideration of the Fifth Report and Order, 18 FCC Rcd 10,180 (2003) (“Part 1 Reconsideration Order”).

2 Petition for Partial Reconsideration filed by the National Telecommunications Cooperative Association (“NTCA”), Rural Telecommunications Group (“RTG”), the law firm of Blooston, Mordkofsky, Dickens, Duffy & Prendergast, and the law firm of Kraskin, Lesse & Cosson, filed Aug. 20, 2003 (collectively the “Rural Cooperative Coalition” or “RCC;” this filing will be referred to herein as the “RCC Petition”); Ex parte letter from L. Marie Guillory et al. to Marlene H. Dortch filed May 4, 2004 (“RCC May 4th Ex Parte”); Petition for Reconsideration filed by Cable & Communications Corporation, Northeast Nebraska Telephone Company, and Poka Lambro Telecommunications, Ltd., filed Jun. 9, 2003 (“Joint Petition”); Part 1 Reconsideration Order, 18 FCC Rcd at 10190-95 ¶¶ 15-20. See 47 C.F.R. § 1.2110. The Part 1 general competitive bidding rules, including 47 C.F.R. § 1.2110, apply to all auctionable services unless otherwise provided in service-specific rules.

3 26 U.S.C. § 501(c)(12).

4 Puget Sound Plywood, Inc. v. Comm’r of the Internal Revenue Serv., 44 T.C. 305 (1965) (“Puget Sound”).

cooperative.

II. BACKGROUND

A. Section 1.2110 Controlling Interest Standard

2. In the *Part 1 Fifth Report and Order*, the Commission adopted as part of its attribution rule for competitive bidding a controlling interest standard, section 1.2110(c)(2), to be used to determine which applicants are eligible for small business status.⁵ Applicants that qualify as small businesses may apply for bidding credits if they are available in a particular service.⁶ Through the attribution rule, including the controlling interest standard, the Commission ensures that only those entities truly meriting small business status qualify for the small business provisions.⁷

3. In determining eligibility for small business status, the Commission attributes to the applicant the gross revenues of the applicant, its controlling interests, the applicant's affiliates, and the affiliates of the applicant's controlling interests.⁸ Section 1.2110(c)(2)(i) defines a "controlling interest" as including "individuals or entities with either *de jure* or *de facto* control."⁹ Thus, there may be more than one controlling interest whose gross revenues must be counted. The premise of this rule is that all parties that control an applicant or have the power to control an applicant, and such parties' affiliates, will have their gross revenues counted and attributed to the applicant in determining the applicant's eligibility for small business status or for any other size-based status using a gross revenue threshold.¹⁰

4. Section 1.2110(c) also provides specific guidance on attribution of interests and gross revenues in certain circumstances.¹¹ For example, section 1.2110(c)(2)(ii)(F) provides that the officers and directors of any applicant will be considered to have a controlling interest in the applicant.¹² Because the gross revenues of all affiliates of the applicant and affiliates of the applicant's controlling interests are attributed to the applicant in calculating an applicant's gross revenues, the gross revenues of other entities controlled by such officers and directors must be included.¹³

⁵ 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*, 15 FCC Rcd 15,293, 15,323-27 ¶¶ 58-67 (2000) (*Part 1 Fifth Report and Order*); see 47 C.F.R. § 1.2110(c).

⁶ *Part 1 Fifth Report and Order*, 15 FCC Rcd at 15,323-27 ¶¶ 58-67.

⁷ The controlling interest standard, "together with the application of our affiliation rules, will effectively prevent larger firms from illegitimately seeking status as small businesses." *Part 1 Fifth Report and Order*, 15 FCC Rcd at 15,325 ¶ 64. See also *Part 1 Reconsideration Order*, 18 FCC Rcd at 10,183-4 ¶ 5.

⁸ *Part 1 Fifth Report and Order*, 15 FCC Rcd at 15,324 ¶ 59. See 47 C.F.R. § 1.2110(b).

⁹ 47 C.F.R. § 1.2110(c)(2)(i); *Part 1 Fifth Report and Order*, 15 FCC Rcd at 15,324 ¶ 60.

¹⁰ *Part 1 Fifth Report and Order*, 15 FCC Rcd at 15,324 ¶ 60.

¹¹ 47 C.F.R. § 1.2110(c)(2).

¹² 47 C.F.R. § 1.2110(c)(2)(ii)(F); *Part 1 Fifth Report and Order*, 15 FCC Rcd at 15,325 ¶ 63 & n. 203.

Additionally, the officers and directors of an entity that controls an applicant are considered to have a controlling interest in the applicant.

¹³ Similarly, for purposes of establishing entrepreneur eligibility in the broadband Personal Communications Service, the total assets of an applicant's affiliates may be attributed under Sections 1.2110(b)(1)(ii) and 24.709 of the Commission's rules. 47 C.F.R. §§ 1.2110(b)(1)(ii), 24.709.

B. Exemption from Part 1 Attribution For Officers and Directors of Rural Telephone Cooperatives

5. Following the adoption of the *Part 1 Fifth Report and Order*, certain rural telephone cooperative interests petitioned for reconsideration, seeking an exemption for rural telephone cooperatives from the requirement that the gross revenues of entities controlled by an applicant's officers and directors are attributed to the applicant.¹⁴ The petitioners argued that the typical structure and operation of a rural telephone cooperative makes it unlikely that affiliates of officers and directors of a rural telephone cooperative could exercise control over the cooperative.¹⁵

6. Specifically, petitioners observed that rural telephone cooperatives differ in significant respects from traditional corporations.¹⁶ For example, rural telephone cooperatives are democratic organizations controlled by their member-subscribers.¹⁷ These parties also pointed out that ownership and control of the cooperative is held by patrons of the cooperative (*i.e.*, telephone subscribers), rather than by non-patron equity investors, as is often the case with traditional corporations or other business forms, and that members contribute equity to, and control, the capital of the cooperative, as opposed to outside investors.¹⁸ Finally, commenters noted that, unlike traditional corporations or other business forms, cooperatives do not have access to the financial and management resources of the outside business interests of their officers and directors.¹⁹ In particular, they pointed out that the cooperative's officers and directors do not personally guarantee cooperative debts nor leverage their outside assets to secure capital for the cooperative.²⁰ Petitioners explained that, in contrast to common stock companies, rural telephone companies are typically characterized by their not-for-profit and tax-exempt status.²¹

7. Acknowledging the unique characteristics of rural telephone cooperatives, as compared with traditional business forms, the Commission in its *Part 1 Reconsideration Order*, adopted a narrow exemption from the attribution rule for the officers and directors of a rural telephone cooperatives pursuant to which the gross revenues of the affiliates of the cooperative's officers and directors are not attributed to the applicant.²² Specifically, the gross revenues of the affiliates of a cooperative's officers and directors will not be attributed if either the applicant or a controlling interest, as the case may be, meets *all* of the following conditions: (1) the applicant (or the controlling interest) is validly organized as a cooperative pursuant to state law; (2) the applicant (or the controlling interest) is a "rural telephone company" as defined by section 153(37) of the Communications Act, as amended;²³ and (3) the applicant

¹⁴ See Petition for Reconsideration of Rural Telecommunications Group ("RTG"), WT Docket 97-82 (filed Sept. 28, 2000). Representatives of rural telephone cooperatives and other interests filed comments in support of RTG's petition for reconsideration. See National Telecommunications Cooperative Association Comments (filed Oct. 30, 2000); Reply to Comments on Petitions for Reconsideration, Penasco Valley Telephone Cooperative, Inc. Comments (filed Nov. 9, 2000); RTG Reply (filed Nov. 15, 2000).

¹⁵ *Part 1 Reconsideration Order*, 18 FCC Rcd at 10,188-9 ¶¶ 13-14 and filings referenced therein.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Part 1 Reconsideration Order*, 18 FCC Rcd at 10,190-95 ¶¶ 15-20. See 47 C.F.R. § 1.2110(b)(3)(iii).

²³ 47 U.S.C. § 153(37).

(or the controlling interest) is eligible for tax-exempt status under section 501(c)(12) of the Internal Revenue Code.²⁴ In the *Part 1 Reconsideration Order*, we noted that the exemption will not apply if the gross revenues or other financial and management resources of the affiliates of the applicant's officers and directors (or the controlling interests' officers and directors) are available to the applicant.²⁵ Also, we noted that if an officer or director of a rural telephone cooperative is considered a controlling interest of the applicant under another subsection of the controlling interest attribution rule, this exemption does not apply.²⁶ Through these measures the Commission has sought to prevent sham small businesses from obtaining bidding credits while ensuring that bidding credits are received by rural telephone cooperatives that are *bona fide* small businesses.²⁷

8. Consistent with the policy objectives underlying that decision, the Commission also granted three pending waiver requests filed by rural telephone cooperative applicants in Auction No. 44.²⁸ Specifically, three winning bidders that are rural telephone cooperatives (or wholly-owned by rural telephone cooperatives) and which had filed substantively identical requests for waiver of Section 1.2110(c)(2)(ii)(F) were granted waivers conditioned upon the submission of information demonstrating each applicant's compliance with rule adopted in the *Part 1 Reconsideration Order*.²⁹ Certain winning bidders in Auction No. 49 also requested similar relief.³⁰

III. DISCUSSION

A. Proposed Change to Exemption's Tax-Exempt Element

9. After adoption of the rural telephone cooperative exemption, we received two petitions for

²⁴ *Part 1 Reconsideration Order*, 18 FCC Rcd at 10,191-92 ¶ 16.

²⁵ *Id.* Thus, for example, where A, B, and C are controlling interests of an applicant and C is a rural telephone cooperative that meets the requirements of Section 1.2110(b)(3)(iii)(a), the gross revenues that might otherwise attributable to the applicant through C (e.g., gross revenues of an affiliate of a director of C) would not be attributed to C for purposes of determining whether the applicant is a small business. However, such exemption would not apply if the management or financial resources of C's affiliate are available to the applicant. Further, while C may be entitled to an exemption from attribution, the gross revenues of the other controlling interests, in this example A and B, would be attributed to the applicant. See 47 C.F.R. § 1.2110(b)(3)(iii)(b).

²⁶ *Part 1 Reconsideration Order*, 18 FCC Rcd at 10,191-92 ¶ 16.

²⁷ *Id.*, 18 FCC Rcd at 10,192 ¶ 17.

²⁸ Auction No. 44 offered licenses in the C and D blocks of the Lower 700 MHz band. The auction concluded on September 18, 2002. Additional information on Auction No. 44, including auction results, may be found on the Commission's auctions Web site at: <http://wireless.fcc.gov/auctions/44/>. In the *Part 1 Reconsideration Order*, the Commission granted requests for waiver of 1.2110(c)(2)(ii)(F) to Cable and Communications Corporation, Northeast Nebraska Telephone Company, and Poka Lambro Telecommunications, Ltd. based on information presented in their short-form applications subject to the applicants' submission of information demonstrating compliance with 47 C.F.R. § 1.2112(b)(2)(iv). See *Part 1 Reconsideration Order*, 18 FCC Rcd at 10,215 ¶ 57.

²⁹ See *Part 1 Reconsideration Order*, 18 FCC Rcd at 10,194 ¶ 19.

³⁰ Licenses that were not won in Auction No. 44 were offered Auction No. 49. That auction concluded on June 13, 2003. Additional information on Auction No. 49 may be found on the Commission's auctions Web site. See <http://wireless.fcc.gov/auctions/49/>. Adams Telecom, Inc. ("Adams"), Cable and Communications Corporation, Grand River Communications, Inc. ("Grand River"), Northeast Nebraska Telephone Company, Poka Lambro Telecommunications, Ltd., S.E.I. Data, Inc., and WCTA Wireless, Inc. ("WCTA") filed requests for waiver of 1.2110(c)(2)(ii)(F) in their short-form applications for Auction No. 49. Of those applicants, Adams, Grand River, and WCTA were winning bidders and sought waiver of the attribution rule in their long-form applications.

reconsideration of the *Part 1 Reconsideration Order* asking us to modify the eligibility requirements for the exemption by changing one part of the three-part eligibility standard.³¹ Specifically, petitioners ask us to eliminate the prerequisite that the rural telephone cooperative applicant (or its controlling interest) be eligible for tax-exempt status under section 501(c)(12) of the Internal Revenue Code.³² The RCC petitioners suggest that the Commission should instead employ a test based on a showing that the cooperative operates consistent with the cooperative principles enumerated in *Puget Sound*.³³ For the reasons discussed below, we revise the eligibility criteria in Section 1.2110(b)(3)(iii) to provide an alternative eligibility showing pursuant to which a rural telephone cooperative seeking to exempt from attribution gross revenues (or, where applicable, total assets) attributable through its officers or directors may show that it operates pursuant to the cooperative principles described in *Puget Sound*.

1. Section 501(c)(12) Tax-Exempt Status Criterion

10. We included the tax-exemption criterion in the rule as a means of ensuring that only *bona fide* rural telephone cooperatives would be eligible to receive the benefits of this exemption. Parties participating in earlier stages of this proceeding had advised the Commission that rural telephone cooperatives were typically characterized by their tax-exempt status. Section 501(c)(12) of the Internal Revenue Code exempts a telephone cooperative from federal income tax only if 85 percent or more of the cooperative's income consists of amounts collected from members for the sole purpose of meeting losses and expenses.³⁴ We crafted this exemption based, in part, on our belief that a cooperative's tax status provided a bright-line rule for which compliance would create no additional burdens on cooperatives beyond their current obligations to comply with the tax code.

11. Petitioners maintain that compliance with the tax code's 85 percent member revenue test is an overly narrow standard for weeding out shams.³⁵ Although it had previously suggested that tax-exempt status was a characteristic of typical rural telephone cooperatives, RCC now contends that use of the tax code's member income test may have the unintended effect of disqualifying rural telephone cooperatives that seek to provide advanced telecommunications services to rural consumers who are not members of the cooperative.³⁶ In this regard, RCC asserts that the tax-exempt requirement would render approximately 50 percent of the rural telephone cooperatives ineligible for this exemption from attribution and that increasing numbers of cooperatives may be unable to meet this test as they expand services in rural areas.³⁷ RCC provides several examples of how a cooperative might fail to meet the 85 percent member income test: it might enter into a partnership with another entity in order to obtain a spectrum license; expand Internet service to neighboring communities to meet rural communities' demand for toll free dial-up access; or seek to provide other wireless services, such as Wi-Fi, to customers

³¹ RCC Petition *supra* at note 2; Joint Petition *supra* at note 2.

³² 26 U.S.C. § 501(c)(12).

³³ *Puget Sound*, 44 T.C. 305 (1965).

³⁴ Specifically, section 501(c)(12) of the Internal Revenue Code exempts from Federal income tax "mutual or cooperative telephone companies, or like organizations; but only if 85 percent or more of the income consists of amounts collected from members for the sole purpose of meeting losses and expenses." 26 U.S.C. § 501(c)(12). See also 26 C.F.R. § 1.501(c)(12)-1(a).

³⁵ See Joint Petition at 5-6; RCC Petition at 10-11.

³⁶ See RCC Petition at 10-12; RCC Supplemental Petition at 7. According to RCC, the rural telephone cooperative is often the only entity in rural areas that provides such advanced telecommunications services as broadband Internet access, wireless services, and video services. See RCC Petition at 10-11.

³⁷ See RCC Petition at 10; RCC May 4th *Ex Parte* at 1-3.

outside of its wireline service area.³⁸ In this regard, RCC contends that the tax-exempt status requirement is contrary to the Commission's statutory obligation to promote the rapid deployment of spectrum-based services to rural areas pursuant to section 309(j) of the Communications Act, as amended.³⁹ RCC also notes that capital gains from the sale of telephone facilities, such as the sale of a central office building because of a need to expand to larger facilities, are considered non-member income (even if the sale is to a member of the cooperative) and may cause a cooperative to fail to meet the 85 percent member income test.⁴⁰ A cooperative may also take in wireless roaming revenues that may not be member-sourced.⁴¹

12. Petitioners argue that a rural telephone cooperative's tax status is irrelevant to whether or not the entity is controlled by an outside interest or has access to the resources of outside interests.⁴² The petitioners assert that the tax status of a rural telephone cooperative does not alter the ownership structure or operation of the cooperative.⁴³ Petitioners maintain that regardless of whether a telephone cooperative is a section 501(c)(12) tax exempt entity, control of the cooperative is held by the member-subscribers who elect the board of directors.⁴⁴ In addition, petitioners argue that a cooperative's tax status does not alter its inability to access either the financial or management resources of the outside business interests of its officers and directors.⁴⁵

13. We agree that the tax-status of a rural telephone cooperative is independent of whether it is a *bona fide* cooperative. This is borne out by Internal Revenue Service ("IRS") decisions. The IRS has recently recognized that "[a]s the telephone business has developed . . . very few rural telephone cooperatives now qualify for this [section 501(c)(12)] exemption"⁴⁶ The IRS treats such rural telephone cooperatives as "non-profit, but taxable, cooperatives."⁴⁷ A cooperative does not lose its cooperative status when it no longer qualifies for tax-exempt status. In addition, the Internal Revenue Manual, which provides "guidance on organizations exempt from tax under [section] 501(c)(12)," treats "mutual or cooperative telephone companies and like organizations" as a separate element from the provision that members of a cooperative must be the source of at least 85 percent of the income used to meet losses and expenses.⁴⁸ That is, whether or not an entity is a cooperative is a separate inquiry that is preliminary to determining whether the cooperative derives 85 percent of its income from members of the cooperative.

2. *Puget Sound* Cooperative Principles

14. RCC suggests that the Commission should instead use the *Puget Sound* principles as an

³⁸ See RCC May 4th *Ex Parte* at 2-3.

³⁹ See RCC Petition at 12. See also 47 U.S.C. § 309(j).

⁴⁰ See RCC May 4th *Ex Parte* at 3-4.

⁴¹ See *id.* at 3.

⁴² See RCC Petition at 7; Joint Petition at 2.

⁴³ See RCC Petition at 7; Joint Petition at 3, 5.

⁴⁴ See RCC Petition at 7-9; Joint Petition at 2-3, 6.

⁴⁵ See RCC Petition at 7, 9; Joint Petition at 3.

⁴⁶ See, e.g., Prv. Ltr. Rul. 04-04-003 (Jan. 23, 2004), Prv. Ltr. Rul. 02-39-029 (Sept. 27, 2002).

⁴⁷ *Id.*

⁴⁸ Internal Revenue Service, Internal Revenue Manual §§ 7.25.12.3, 7.25.12.4, available at <http://www.irs.gov/irm/part7/ch10s14.html> (last visited Oct. 7, 2004).

element of the eligibility standard for the Part 1 attribution exemption.⁴⁹ In *Puget Sound*, the Tax Court identified three basic principles of a cooperative: (1) subordination of capital, both as regards control over the cooperative undertaking, and as regards the ownership of the cooperative's pecuniary benefits; (2) democratic control by the members; and (3) the vesting in and the allocation among the members of the excess of the operating revenues over the costs incurred in generating those revenues, and that this occur in proportion to the members' active participation in the cooperative endeavor.⁵⁰ The IRS has regarded the *Puget Sound* principles as "fundamental to cooperative operation" and has subsequently incorporated these principles into analysis of the tax treatment of rural telephone cooperatives.⁵¹

15. We find these principles of cooperative organization and operation are useful criteria for determining whether a rural telephone cooperative is a *bona fide* cooperative. We believe that this change will ensure that the benefits of this exemption are limited to *bona fide* rural telephone cooperatives while providing such entities with the flexibility to further the public interest in expanding telecommunications and other advanced services to the public in rural areas. This revision may enhance the ability of rural telephone cooperatives to participate in spectrum auctions, which, in turn, will promote the deployment of advanced telecommunications services in rural areas as Congress mandated in Section 309(j).⁵² Therefore, we amend Section 1.2110(b)(3)(iii)(a)(3) to require that an applicant (or its controlling interest) that seeks to exempt the gross revenues (or, if applicable for purposes of determining entrepreneur eligibility pursuant to Sections 1.2110(b)(1)(ii) and 24.709, the total assets) of its officers or

⁴⁹ See RCC Petition at 12-13; RCC May 4th *Ex Parte* at 5-9 (citing *Puget Sound*).

⁵⁰ *Puget Sound*, 44 T.C. at 307. Subordination of capital means that the control of the cooperative and ownership of the pecuniary benefits arising from the cooperative's business remain in the hands of the members of the cooperative rather than with non-patron equity investors in the cooperative. *Puget Sound*, 44 T.C. at 308; see also, Prv. Ltr. Rul. 02-24-017 (Jun. 14, 2002) (applying the *Puget Sound* principles). Subordination of capital has two components: (1) members control and own the savings or monetary benefits from cooperative that stay with them and (2) the cooperative must limit its return on capital to insure savings or monetary benefit go to its members rather than to shareholders. Internal Revenue Service, Internal Revenue Manual § 4.76.20.4, available at <http://www.irs.gov/irm/part4/ch51s19.html> (last visited Oct. 7, 2004). Democratic control is achieved by voting on a one-person, one-vote basis. *Puget Sound*, 44 T.C. at 308. Finally, the third principle is adhered to if the cooperative's net earnings or savings are distributed to the cooperative's patrons in proportion to the amount of business conducted with them. *Id.*; see also Prv. Ltr. Rul. 02-24-017 (Jun. 14, 2002) (applying the *Puget Sound* principles).

⁵¹ See, e.g., Tech. Adv. Mem. 99-080-038 (Feb. 26, 1999).

⁵² 47 U.S.C. § 309(j)(3)(A). In an effort to fulfill the rural service objectives set forth in Section 309(j), the Commission has also adopted a number of policies intended, among other things, to encourage the provision of spectrum-based services to rural areas. Specifically, these policies include: (1) the availability of small business bidding credits; (2) the designation of various sizes of geographic service areas for spectrum licenses; (3) the opportunity to obtain licenses through service area partitioning and spectrum disaggregation arrangements with existing licensees; and (4) the adoption of construction benchmark performance requirements. Generally, after notice and comment, we have addressed these policies in adopting service rules for particular spectrum bands. See *Part 1 Fifth Report and Order*, 15 FCC Rcd at 15,320-21, ¶ 52. The Commission has also recently adopted policies that will help to ensure that Americans living in sparsely populated areas will experience the breadth of wireless service offerings currently available in more densely populated areas and further the Commission's statutory mandate to make available, in a rapid and efficient manner, communications services to all Americans. See *Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services*, 2000 Biennial Regulatory Review Spectrum Aggregation Limits For Commercial Mobile Radio Services, Increasing Flexibility To Promote Access to and the Efficient and Intensive Use of Spectrum and the Widespread Deployment of Wireless Services, and To Facilitate Capital Formation, *Report and Order and Further Notice of Proposed Rulemaking*, 19 FCC Rcd 19,078 (2004).

directors from attribution under 1.2110(c) of our rules must demonstrate either that it is eligible for tax-exempt status under the Internal Revenue Code or that it operates pursuant to the cooperative principles set forth in *Puget Sound*.

16. Consistent with our approach in the *Part 1 Reconsideration Order* and our decision here, we grant three pending waiver requests filed by rural telephone cooperative applicants in Auction No. 49. Specifically, three winning bidders that are rural telephone cooperatives (or wholly-owned by rural telephone cooperatives) filed substantively identical requests for waiver of Section 1.2110(c)(2)(ii)(F).⁵³ In connection with their demonstrations of eligibility for designated entity bidding credits, these applicants argued that the gross revenues of the affiliates of the cooperative's officers and directors should not be attributed to the cooperative. They note that the outside business interests of the cooperative's officers and directors "have no impact on [the cooperative's] ability to raise capital or compete for FCC licenses" due to the cooperative structure under which they are organized.⁵⁴ We believe that waiver of the requirement that the gross revenues of entities controlled by a rural telephone cooperative's officers and directors are to be attributed to the applicant would be consistent with our decision to adopt an exemption for rural telephone cooperatives and would promote the deployment of additional wireless services in their particular communities and other nearby rural areas.⁵⁵ Accordingly, consistent with our decision here, we grant these waivers conditioned upon the submission to the Commission of information demonstrating the applicant's compliance with the factors adopted herein. In addition, petitioners Cable and Communications Corporation, Northeast Nebraska Telephone Company, and Poka Lambro Telecommunications, Ltd. will also be permitted to qualify for this exemption by submitting to the Commission information demonstrating the applicant's compliance with the factors set forth in Section 1.2110(b)(3)(iii)(a) as modified herein.

B. Showing of Cooperative Organization in the Absence of State Certification

17. Among the eligibility criteria for the exemption to our attribution rules for rural telephone cooperatives is the requirement that the applicant for the exemption (or its controlling interest) be validly organized as a cooperative pursuant to state law. RCC points out that the *Puget Sound* cooperative principles are not duplicative of this first element of the three-part qualification test because the validity of a cooperative as a legal entity is independent of the structural factors that make it highly unlikely that rural telephone cooperatives could engage in the kinds of sham transaction that the attribution rule is designed to protect against.⁵⁶

18. Upon further review, we clarify how we intend to apply this first element of Section 1.2110(b)(3)(iii) where there is no state incorporation statute specifically for cooperatives. In these circumstances, the applicant (or the controlling interest) must at the auction short-form application stage

⁵³ See Applications to Participate in an FCC Auction (FCC 175) of Adams Telecom, Inc., Grand River Communications Corporation, and WCTA Wireless, Inc for Auction No. 49. Short form applications for Auction No. 49 may be viewed on the Commission's auctions Web site at: <http://auctions.fcc.gov/>. See also FCC Applications for Wireless Telecommunications Bureau Radio Service Authorization (Form 601) of Adams, Grand River, and WCTA, Exhibit F (FCC File Nos. 0001370407, 0001355756, and 0001370628, respectively).

⁵⁴ See FCC Application for Wireless Telecommunications Bureau Radio Service Authorization (Form 601) of Adams, Exhibit F; FCC Application for Wireless Telecommunications Bureau Radio Service Authorization (Form 601) of Grand River, Exhibit F; and FCC Application for Wireless Telecommunications Bureau Radio Service Authorization (Form 601) of WCTA, Exhibit F.

⁵⁵ *Id.*

⁵⁶ RCC May 4th *Ex Parte* at 5-6.

certify that it is validly organized under the most closely applicable organizing statute, and that such organization is reflected in its articles of incorporation, by-laws, and/or other relevant organic documents. Copies of all such relevant documents must be submitted to the Commission by winning bidders relying on this exemption in connection with its long-form license application in order to receive a license. We believe that this clarification will provide flexibility for *bona fide* cooperatives to demonstrate their status in the absence of the possibility of state certification.

IV. PROCEDURAL MATTERS AND ORDERING CLAUSE

A. Regulatory Flexibility Analysis

19. As required by the Regulatory Flexibility Act, 5 U.S.C. § 604, the Commission has prepared a Supplemental Final Regulatory Flexibility Analysis for this *Second Part 1 Reconsideration Order*, set forth at Appendix B.

B. Paperwork Reduction Act Analysis

20. This *Second Order on Reconsideration of the Part 1 Fifth Report and Order* contains new or modified information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Pub. L. No. 104-13. It will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. OMB, the general public and other Federal agencies are invited to comment on the new or modified collection(s) contained in this proceeding.

C. Ordering Clauses

21. Accordingly, IT IS ORDERED that, pursuant to the authority granted in sections 4(i), 303(r) and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r) and 309(j), the petitions for reconsideration of the *Part 1 Reconsideration Order* filed by a group comprising National Telecommunications Cooperative Association, the Rural Telecommunications Group, the law firm of Blooston, Mordkofsky, Dickens, Duffy & Prendergast, and the law firm of Kraskin, Lesse & Cosson and a group comprising Cable & Communications Corporation, Northeast Nebraska Telephone Company, and Poka Lambro Telecommunications, Ltd. are, to the extent they are addressed herein, GRANTED.

22. IT IS FURTHER ORDERED that pursuant to the authority granted in 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. §§ 154(i), 155(b), 155(c)(1), 303(r), and 309(j), this *Second Order on Reconsideration of the Part 1 Fifth Report and Order*, is hereby ADOPTED and Part 1, Subpart Q of the Commission's rules are amended as set forth in Appendix A, effective 60 days after publication in the *Federal Register*. The information collection contained in these rules will become effective 70 days after publication in the *Federal Register*, following Office of Management and Budget approval, unless a notice published in the *Federal Register* stating otherwise.

23. IT IS FURTHER ORDERED that the requests of Adams Telecom, Inc., Cable and Communications Corporation, Northeast Nebraska Telephone Company, Poka Lambro Telecommunications, Ltd., S.E.I. Data, Inc., and WCTA Wireless, Inc. for waiver of 1.2110(c)(2)(ii)(F) as presented in their Applications to Participate in an FCC Auction (FCC Form 175) for Auction No. 49 are GRANTED conditioned upon the submission to the Commission of information demonstrating compliance with 47 C.F.R. § 1.2112(b)(2)(iv), as revised herein, and petitioners Cable and Communications Corporation, Northeast Nebraska Telephone Company, and Poka Lambro Telecommunications, Ltd. will also be permitted to qualify for this exemption by submitting to the Commission information demonstrating the applicant's compliance with 47 C.F.R. § 1.2112(b)(2)(iv), as revised herein.

24. IT IS FURTHER ORDERED that, pursuant to 47 U.S.C. § 155(c) and 47 C.F.R. § 0.331, the Chief of the Wireless Telecommunications Bureau IS GRANTED DELEGATED AUTHORITY to prescribe and set forth procedures for the implementation of the provisions adopted herein.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in cursive script that reads "Marlene H. Dortch".

Marlene H. Dortch
Secretary

APPENDIX A

Final Rules

Part 1 of Title 47 of the Code of Federal Regulations is revised to read as follows:

1. Amend § 1.2110 by revising paragraph (b)(3)(iii)(a) to read as follows:

§ 1.2110 Designated entities

(b) * * *

(3) * * *

(i) * * *

(ii) * * *

(iii) Rural telephone cooperatives.

(a) An applicant will be exempt from § 1.2110(c)(2)(ii)(F) for the purpose of attribution in § 1.2110(b)(1), if the applicant or a controlling interest in the applicant, as the case may be, meets all of the following conditions: (1) the applicant (or the controlling interest) is organized as a cooperative pursuant to state law; (2) the applicant (or the controlling interest) is a “rural telephone company” as defined by the Communications Act; and (3) the applicant (or the controlling interest) demonstrates either that it is eligible for tax-exempt status under the Internal Revenue Code or that it adheres to the cooperative principles articulated in *Puget Sound Plywood, Inc. v. Commissioner of Internal Revenue*, 44 T.C. 305 (1965). If, condition (1), above, cannot be met because the relevant jurisdiction has not enacted an organic statute that specifies requirements for organization as a cooperative, the applicant must show that it is validly organized and its articles of incorporation, by-laws, and/or other relevant organic documents provide that it operates pursuant to cooperative principles. * * *

(b) * * *

9. Revise § 1.2112 to read as follows:

§ 1.2112 Ownership disclosure requirements for applications.

(b) ***

(1) ***

(2) ***

(vi) List and summarize, if seeking the exemption for rural telephone cooperatives pursuant to § 1.2110, all documentation to establish eligibility pursuant to the factors listed under § 1.2110(b)(3)(iii)(a).

APPENDIX B

Second Supplemental Final Regulatory Flexibility Analysis

(Second Order on Reconsideration of the Part 1 Fifth Report and Order)

As required by the Regulatory Flexibility Act of 1980, as amended (RFA),⁵⁷ a Final Regulatory Flexibility Analysis (FRFA) was incorporated into the report and order section of the *Part 1 Fifth Report and Order* in WT Docket No. 97-82.⁵⁸ In addition, a Supplemental FRFA was incorporated into the *Part 1 Reconsideration Order*.⁵⁹ The Commission received two petitions for reconsideration in response to the *Part 1 Reconsideration Order*. This present second supplemental FRFA conforms to the RFA.⁶⁰

A. Need for, and objectives of, the *Second Order on Reconsideration of the Part 1 Fifth Report and Order*:

In May 2003, the Commission released its *Part 1 Reconsideration Order*, which addressed petitions received in response to the *Part 1 Fifth Report and Order* regarding the amendment of general competitive bidding rules for all auctionable services.⁶¹ Most pertinent for purposes of this *Second Order on Reconsideration of the Part 1 Fifth Report and Order*, the Commission in the *Part 1 Reconsideration Order* adopted a limited exemption from its general attribution rules for rural telephone cooperatives that meet specific conditions.⁶²

Based on the petitions and comments received in response to the *Part 1 Fifth Report and Order*, the Commission in its *Part 1 Reconsideration Order* adopted a narrow exemption for the officers and directors of a rural telephone cooperative so that the gross revenues of the affiliates of a rural telephone cooperative's officers and directors need not be attributed to the applicant.⁶³ Specifically, the exemption provided that the gross revenues of the affiliates of an applicant's officers and directors would not be attributed if either the applicant or a controlling interest, as the case may be, meets *all* of the following conditions: (1) the applicant (or the controlling interest) is validly organized as a cooperative pursuant to state law; (2) the applicant (or the controlling interest) is a "rural telephone cooperative" as defined by the Communications Act;⁶⁴ and (3) the applicant (or the controlling interest) is eligible for tax-exempt status under the Internal Revenue Code.⁶⁵ However, the exemption would not apply if the gross revenues or

⁵⁷ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. § 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

⁵⁸ Amendment of Part 1 of the Commission's Rules - Competitive Bidding Procedures, WT Docket No. 97-82, *Fifth Report and Order*, 15 FCC Rcd 15293, 15318 (2000) ("*Part 1 Fifth Report and Order*") (see FRFA at Appendix D).

⁵⁹ Amendment of Part 1 of the Commission's Rules - Competitive Bidding Procedures, WT Docket No. 97-82, *Second Order on Reconsideration of the Third Report and Order and Order on Reconsideration of the Fifth Report and Order*, 18 FCC Rcd 10,180 (2003) ("*Part 1 Reconsideration Order*").

⁶⁰ See 5 U.S.C. § 604.

⁶¹ *Part 1 Reconsideration Order*.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ 47 U.S.C. § 153(37).

⁶⁵ *Part 1 Reconsideration Order*.

other financial and management resources of the affiliates of the applicant's officers and directors (or the controlling interest's officers and directors) are available to the applicant.⁶⁶

The Commission received two petitions for reconsideration of the *Part 1 Reconsideration Order*.⁶⁷ Petitioners request reconsideration of the tax-exempt criteria that the Commission uses to determine eligibility for the attribution rule exemption. Specifically, petitioners seek removal of the requirement that rural telephone cooperatives have tax-exempt status pursuant to section 501(c)(12) of the Internal Revenue Code.⁶⁸ Petitioners suggest that this prerequisite be replaced by the requirement that the rural telephone cooperative applicant (or its controlling interest) adheres to the cooperative principles articulated by the U.S. Tax Court in *Puget Sound*. In the *Second Order on Reconsideration of the Part 1 Fifth Report and Order* we resolve the petitions for reconsideration filed in response to the *Part 1 Reconsideration Order*.

Based upon the petitions for reconsideration, we will permit a rural telephone cooperative applicant (or its controlling interest) to demonstrate that the rural telephone cooperatives in question is eligible for tax-exempt status pursuant to Section 501(c)(12) of the Internal Revenue Code or that it (or its controlling interest) adheres to the cooperative principles articulated in *Puget Sound*. The purpose of the exemption for rural telephone cooperatives, which is to identify the *bona fide* small businesses among rural telephone cooperatives and prevent sham small businesses rural telephone cooperatives from obtaining designated entity preferences. We have determined that a requirement that rural telephone cooperative be Section 501(c)(12) tax-exempt organizations may inadvertently exclude *bona fide* rural telephone cooperatives in some cases and may therefore undercut the purpose of the exemption.

Also, on its own motion, the Commission has decided that if the applicant is organized in a state that does not have rules or regulations specific to organizing an entity as a cooperative, the applicant may use its by-laws or other relevant documents to demonstrate that it a cooperative. This new provision provides a means by which applicants can demonstrate organization as a *bona fide* cooperative even if organized in a state that not designate specific conditions for cooperative organization.

B. Description and estimate of the number of small entities to which 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.⁶⁹ The RFA generally defines the term "small entity" as having the same meaning as the terms "small organization," "small business," and "small governmental jurisdiction."⁷⁰ The term "small business" has the same meaning as the term "small business concern" under the Small Business Act.⁷¹ A small business concern is one which: (1)

⁶⁶ *Id.*

⁶⁷ Petition for Partial Reconsideration filed by the National Telecommunications Cooperative Association ("NTCA"), Rural Telecommunications Group ("RTG"), the law firm of Blooston, Mordkofsky, Dickens, Duffy & Prendergast, and the law firm of Kraskin, Lesse & Cosson (jointly filed) (collectively the "Rural Cooperative Coalition" or "RCC Petition"); RCC *Ex Parte* Notice; Petition for Reconsideration filed by Cable & Communications Corporation, Northeast Nebraska Telephone Company, and Poka Lambro Telecommunications, Ltd. (jointly filed) ("Joint Petition).

⁶⁸ See RCC Petition *Id.* at note 7; Joint Petition *Id.* at note 7. See also 26 U.S.C. § 501(c)(12).

⁶⁹ 5 U.S.C. § 603(b)(3).

⁷⁰ 5 U.S.C. § 601(6).

⁷¹ 5 U.S.C. § 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 (continued...)

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

The rule modifications and clarifications adopted in the *Part 1 Reconsideration Order* are of general applicability to all services and do not apply on a service-specific basis. Therefore, this SFRFA provides a general analysis of the impact of the revised Part 1 rule on small businesses rather than a service by service analysis. Accordingly, the revised rules will apply to all entities that apply to participate in Commission auctions, including both small and large entities. The number of entities that may apply to participate in future Commission auctions is unknown. The number of small businesses that have participated in prior auctions has varied. In all of our auctions held to date, 1899 out of a total of 2432 qualified bidders have either claimed eligibility for small business bidding credits or self-reported status as a small business as that term has been defined under rules adopted by the Commission for specific services. (These figures do not generally include applicants for auctions of broadcast licenses where sized-based bidding preferences have not been available).

C. Description of the Projected Reporting, Record-keeping, and Other Compliance Requirements.

All license applicants that are rural telephone cooperative seeking an exemption from the attribution rules that are part of the Commission's general competitive bidding rules found in Part 1 of the Commission's rules are subject to the reporting and record-keeping requirements associated with qualifying for the exemption. These requirements apply in the same way to both large and small entities. Furthermore, applicants are required to apply for spectrum auctions by filing a short-form application (FCC Form 175) prior to the auction. Applicants are also required to file a long-form application (FCC Form 601) at the conclusion of the auction. Specifically, entities seeking status as a small business must disclose on their FCC Form 175s, FCC Form 601s, and on their application for assignment or transfer of control (FCC Form 603), separately and in the aggregate, the gross revenues of the applicant (or licensee), its affiliates, its controlling interests and affiliates of the applicant's controlling interests for each of the previous three years.

As a result of the actions taken in the, rural telephone cooperative auction applicants, or those controlled by rural telephone cooperatives, seeking an exemption from the requirement that the gross revenues of entities controlled by an applicant's officers and directors are attributed to the applicant must establish eligibility for this exemption based upon the factors listed above, which have been modified, in part, by the *Second Order on Reconsideration of the Part 1 Fifth Report and Order*.⁷²

D. Steps Taken to Minimize the 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,

(...continued from previous page)

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).

⁷² *Part 1 Reconsideration Order*.

standards; and (4) an exemption from coverage of the rule or any part thereof for small entities.⁷³ The Commission has considered the economic impact on small entities of the following modifications and clarifications adopted in the *Second Order on Reconsideration of the Part 1 Fifth Report and Order* and has taken steps to minimize the burdens on small entities.

Application of attribution rule to rural telephone cooperatives. Based on the petitions and comments received in response to the *Second Order on Reconsideration of the Part 1 Fifth Report and Order* the Commission modifies a narrow exemption for the officers and directors of a rural telephone cooperative that it adopted in the so that the rural telephone cooperative does not have to be tax-exempt entity pursuant to Section 501(c)(12) of the Internal Revenue Code in order to qualify for the exemption from the attribution rules for the Commission Part 1 competitive bidding rule. Specifically, the gross revenues of the affiliates of an applicant's officers and directors will not be attributed if either the applicant or a controlling interest, as the case may be, meets *all* of the following conditions: (1) the applicant (or the controlling interest) is validly organized as a cooperative pursuant to state law or, where there is no state law, the applicant must certify that it is organized according to commonly accepted cooperative principles as demonstrated by its by-laws, charter, or any other relevant document(s); (2) the applicant (or the controlling interest) is a "rural telephone company" as defined by the Communications Act;⁷⁴ and (3) the applicant (or the controlling interest) demonstrates either that it is eligible for tax-exempt status under the Internal Revenue Code or that it adheres to the cooperative principles articulated in *Puget Sound*. However, the exemption will not apply if the gross revenues or other financial and management resources of the affiliates of the applicant's officers and directors (or the controlling interest's officers and directors) are available to the applicant.

The Commission believes that this action will increase the number of rural telephone cooperatives that are eligible for small business status (and the corresponding bidding credits). Such a result will enhance the ability of rural telephone cooperatives to participate in spectrum auctions. This, in turn, will promote the deployment of advanced telecommunications services in rural areas as Congress mandated in Section 309(j).⁷⁵

E. Report to Congress.

The Commission will send a copy of the *Second Order on Reconsideration of the Fifth Report and Order*, including this SFRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.⁷⁶ In addition, the Commission will send a copy of the *Second Order on Reconsideration of the Fifth Report and Order*, including this SFRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *Second Order on Reconsideration of the Third Report and Order*

⁷³ See 5 U.S.C. § 603.

⁷⁴ 47 U.S.C. § 153(37).

⁷⁵ 47 U.S.C. § 309(j)(3)(A).

⁷⁶ See 5 U.S.C. § 801(a)(1)(A).

and SFRFA (or summaries thereof) will also be published in the Federal Register.⁷⁷

⁷⁷ See 5 U.S.C. § 604(b).

**STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN**

Re: Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures; Second Order on Reconsideration of the Fifth Report and Order; WT Docket No. 97-82

Soon after joining the Commission, I was pleased to work with the Chairman and the Wireless Telecommunications Bureau to adopt a narrow exemption from the auction attribution rules for rural telephone cooperatives to reflect the unique corporate and governance structure of our nation's cooperatives. These cooperatives play a critical role in ensuring that the latest telecommunications technologies are deployed in rural America.

Consistent with the request of petitioners at that time, we adopted a new rule that does not attribute the gross revenues of the affiliates of a cooperative's officers and directors when determining revenue levels for bidding credits provided that the cooperative meets specific conditions, one of which is tax-exempt status. The bottom line is that the exemption was intended to ensure that cooperatives are not unnecessarily denied access to bidding credits at upcoming spectrum auctions.

It now appears that our tax-exempt condition has the unintended consequence of disqualifying certain rural telephone cooperatives that provide telecommunications services to rural consumers who are not members of the cooperative. If a cooperative derives too much income from these ventures, it can lose its tax-exempt status, which would potentially jeopardize its ability to receive bidding credits.

The item rightly concludes that the tax-status of a cooperative does not determine whether or not it is a *bona fide* cooperative. Indeed, we want to encourage the provision of advanced telecommunications services to rural America, and cooperatives may be particularly well situated to extend their service offerings beyond their member shareholders.

Consequently, I am very pleased to support the decision to put in place a revised standard for the exemption. Our decision promotes the interests of cooperatives in expanding the scope of their telecommunications services while still ensuring that the benefits of this important exemption are limited to *bona fide* cooperatives. I thank the Bureau staff for resolving this unique issue by crafting an equitable resolution that will continue to promote the deployment of the latest wireless technologies in rural America.