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APPENDIX B

FINAL RULES

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

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

AUTHORITY: Secs. 4, 301, 302, 303, 309 and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. §§ 154, 301, 302, 303, 309 and 332, unless otherwise noted.

2. Section 24.204 of the Commission's Rules is amended by replacing references to "Section 24.305" and "Section 24.307" in subsections (f)(1) and (f)(2), respectively, with "§ 24.705" and "§ 24.707". These subsections will therefore read as follows:

§ 24.204 Cellular eligibility.

- (f) Cellular Divestiture. * * *

* * * * *

(1) The broadband PCS applicant shall certify on its short-form auction application, filed in accordance with § 24.705, that it and all parties to the application will come into compliance with the limitations on common ownership of cellular and broadband PCS interests set forth in this section.

(2) If such an applicant is a successful bidder, it must submit with its long-form application (see § 24.707) a signed statement describing its efforts to date and future plans to come into compliance with the limitations on common ownership of cellular and broadband PCS interests set forth in this section.

3. Part 24 is amended by adding a new subpart H consisting of §§ 24.701 through 24.720 to read as follows:

Subpart H - Competitive Bidding Procedures for Broadband PCS

Sec.

24.701 Broadband PCS subject to competitive bidding

24.702 Competitive bidding design for Broadband PCS licensing

24.703 Competitive bidding mechanisms

24.704 Withdrawal, default and disqualification penalties

- 24.705 Bidding application (FCC Form 175 and 175-S Short-Form)
- 24.706 Submission of upfront payments and down payments
- 24.707 Long-form applications
- 24.708 License grant, denial, default, and disqualification
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Subpart H - Competitive Bidding Procedures for Broadband PCS

§ 24.701 Broadband PCS subject to competitive bidding.

Mutually exclusive initial applications to provide broadband PCS service are subject to competitive bidding procedures. The general competitive bidding procedures found in 47 CFR Part 1, Subpart Q will apply unless otherwise provided in this part.

§ 24.702 Competitive bidding design for Broadband PCS licensing.

(a) The Commission will employ the following competitive bidding designs when choosing from among mutually exclusive initial applications to provide broadband PCS service:

- (1) Simultaneous multiple round auctions
- (2) Sequential auctions

(b) The Commission may design and test alternative procedures. The Commission will announce by Public Notice before each auction the competitive bidding design to be employed in a particular auction.

(c) The Commission may use combinatorial bidding, which would allow bidders to submit all or nothing bids on combinations of licenses, in addition to bids on individual licenses. The Commission may require that to be declared the high bid, a combinatorial bid must exceed the sum of the individual bids by a specified amount or percentage. Combinatorial bidding may be used with any type of auction design.

(d) The Commission may use single combined auctions, which combine bidding for two or more substitutable licenses and award licenses to the highest bidders until the available

licenses are exhausted. This technique may be used in conjunction with any type of auction.

§ 24.703 Competitive bidding mechanisms.

- (a) Sequencing. The Commission will establish and may vary the sequence in which broadband PCS licenses will be auctioned.
- (b) Grouping. In the event the Commission uses either a simultaneous multiple round competitive bidding design or combinatorial bidding, the Commission will determine which licenses will be auctioned simultaneously or in combination.
- (c) Reservation Price. The Commission may establish a reservation price, either disclosed or undisclosed, below which a license subject to auction will not be awarded.
- (d) Minimum Bid Increments. The Commission will, by announcement before or during an auction, require minimum bid increments in dollar or percentage terms.
- (e) Stopping Rules. The Commission will establish stopping rules before or during multiple round auctions in order to terminate an auction within a reasonable time.
- (f) Activity Rules. The Commission will establish activity rules which require a minimum amount of bidding activity. In the event that the Commission establishes an activity rule in connection with a simultaneous multiple round auction, each bidder will be entitled to request and will be automatically granted one waiver of such rule during each auction stage.
- (g) Suggested Minimum Bid. The Commission may establish suggested minimum bids on each license. Bids below the suggested minimum bid would count as activity under the activity rule only if no bids at or above the suggested minimum bid are received.

§ 24.704 Withdrawal, default and disqualification penalties.

- (a) When the Commission conducts a simultaneous multiple round auction pursuant to § 24.702(a)(1), the Commission will impose penalties on bidders who withdraw high bids during the course of an auction, who default on payments due after an auction closes, or who are disqualified.

(1) Bid withdrawal prior to close of auction. A bidder who withdraws a high bid during the course of an auction will be subject to a penalty equal to the difference between the amount bid and the amount of the winning bid the next time the license is offered by the Commission. No withdrawal penalty would be assessed if the subsequent winning bid exceeds the withdrawn bid. This penalty amount will be deducted from any

upfront payments or down payments that the withdrawing bidder has deposited with the Commission.

(2) **Default or disqualification after close of auction.** If a high bidder defaults or is disqualified after the close of such an auction, the defaulting bidder will be subject to the penalty in paragraph (1) plus an additional penalty equal to three (3) percent of the subsequent winning bid. If the subsequent winning bid exceeds the defaulting bidder's bid amount, the 3 percent penalty will be calculated based on the defaulting bidder's bid amount. These amounts will be deducted from any upfront payments or down payments that the defaulting or disqualified bidder has deposited with the Commission.

(b) When the Commission conducts sequential oral auctions pursuant to § 24.702(a)(2), the Commission may modify the penalties set forth in subsection (a) above to be paid in the event of bid withdrawal, default or disqualification; provided, however, that such penalties shall not exceed the penalties specified above.

(1) If a bid is withdrawn before the Commission has declared the bidding to be closed for the license bid on, no bid withdrawal penalty will be assessed.

(2) If a bid is withdrawn after the Commission has declared the bidding to be closed for the license bid on, the penalty specified in paragraph (a)(2) will apply.

§ 24.705 Bidding application (FCC Form 175 and 175-S Short-Form).

All applicants to participate in competitive bidding for broadband PCS licenses must submit applications on FCC Forms 175 and 175-S pursuant to the provisions of §§ 1.2105 and 24.813 of this Chapter. The Commission will issue a Public Notice announcing the availability of broadband PCS licenses and, in the event that mutually exclusive applications are filed, the date of the auction for those licenses. This Public Notice also will specify the date on or before which applicants intending to participate in a broadband PCS auction must file their applications in order to be eligible for that auction, and it will contain information necessary for completion of the application as well as other important information such as the materials which must accompany the Forms, any filing fee that must accompany the application or any upfront payment that will need to be submitted, and the location where the application must be filed.

§ 24.706 Submission of upfront payments and down payments.

(a) Where the Commission uses simultaneous multiple round auctions or oral sequential auctions, bidders will be required to submit an upfront payment in accordance with § 1.2106 of Part 1 of this Chapter and § 24.711(a)(1) of this Part.

(b) Winning bidders in an auction must submit a down payment to the Commission in accordance with § 1.2107(b) of Part 1 of this Chapter and § 24.711(a)(2) of this Part.

§ 24.707 Long-form applications.

Each winning bidder will be required to submit a long-form application on FCC Form 401, as modified, within ten (10) business days after being notified that it is the winning bidder. Applications on FCC Form 401 shall be submitted pursuant to the procedures set forth in Subpart I of this Part and § 1.2107(c) and (d) of Part 1 of this Chapter and any associated Public Notices. Only auction winners (and applicants seeking partitioned licenses pursuant to agreements with auction winners under § 24.714) will be eligible to file applications on FCC Form 401 for initial broadband PCS licenses in the event of mutual exclusivity between applicants filing Form 175. Winning bidders need not complete Schedule B to Form 401.

§ 24.708 License grant, denial, default, and disqualification.

(a) Except with respect to entities eligible for installment payments (see § 24.711 of this Part), each winning bidder will be required to pay the balance of its winning bid in a lump sum payment within five (5) business days following the award of the license. Grant of the license will be conditioned upon full and timely payment of the winning bid amount.

(b) A bidder who withdraws its bid subsequent to the close of bidding, defaults on a payment due or is disqualified will be subject to the penalties specified in § 1.2109 of Part 1 of this Chapter.

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

(a) General Rule.

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

(2) No application is acceptable for filing and no license shall be granted for frequency Block C or frequency Block F, if, at the time the application is filed, the applicant (or person holding an interest in the applicant) is an individual and he or she (or affiliates) has \$100 million or greater in personal net worth at the time the applicant's short-form (Form 175) application is filed.

(3) Any licensee awarded a license pursuant to this section (or pursuant to § 24.839(d)(2)) shall maintain its eligibility until at least five years from the date of initial license grant, except that increased gross revenues, increased total assets or personal net worth due to non-attributable equity investments (i.e., from sources whose revenues, total assets and personal net worth are not considered under paragraph (b)(4) of this section), debt financing, revenue from operations, business development or expanded service shall not be considered.

(b) Attribution and Aggregation of Gross Revenues, Total Assets, and Personal Net Worth.

(1) Except as specified in paragraphs (3) and (4), the gross revenues and total assets of the applicant (or licensee) and its affiliates, and other persons that hold interests in the applicant (or licensee) and their affiliates shall be considered on a cumulative basis and aggregated for purposes of determining whether the applicant (or licensee) is eligible for a license for frequency Block C or frequency Block F under this section.

(2) The personal net worth of individual applicants (or licensees) and other persons that hold interests in the applicant (or licensee), and their affiliates, if under the amount in paragraph (a)(2), shall not be considered for purposes of determining whether the applicant (or licensee) is eligible for a license for frequency Block C or frequency Block F under this section.

(3) Where an applicant (or licensee) is a consortium of small businesses, the gross revenues and total assets of each small business shall not be aggregated.

(4)(i) The gross revenues, total assets and personal net worth of a person that holds an interest in the applicant (or licensee) shall not be considered for purposes of determining financial eligibility so long as (A) such person holds no more than 25 percent of the applicant's (or licensee's) passive equity and is not a member of the applicant's (or licensee's) control group; and (B) the applicant (or licensee) has a control group that owns at least 25 percent of the applicant's (or licensee's) total equity and, if a corporation, holds at least 50.1 percent of the applicant's (or licensee's) voting interests.

(ii) The gross revenues, total assets and personal net worth of a person that holds an interest in the applicant (or licensee) shall not be considered for purposes of determining financial eligibility so long as (A) such person holds no more than 49.9 percent of the applicant's (or licensee's) passive equity and is not a member of the applicant's (or licensee's) control group; and (B) the applicant (or licensee) has a control group that consists entirely of members of minority groups and/or women and that owns at least 50.1 percent of the applicant's (or licensee's) total equity and, if a corporation, at least 50.1 percent of the applicant's (or licensee's) voting interests.

(iii) The gross revenues, total assets and personal net worth of a person that holds an interest in the applicant (or licensee) shall not be considered for purposes of determining financial eligibility so long as (A) such person owns no more than 25 percent of the applicant's (or licensee's) total equity, which shall include not more than 15 percent of the voting stock; (B) the applicant (or licensee) is a publicly traded corporation; and (C) the applicant (or licensee) has an eligible control group that holds at least 50.1 percent of the voting stock, if a corporation, and at least 25 percent of the applicant's (or licensee's) equity.

Note: Ownership interests shall be calculated on a fully diluted basis; all agreements such as warrants, stock options and convertible debentures will generally be treated as if the rights thereunder already have been fully exercised, except that the such agreements may not be used to appear to terminate or divest ownership interests before they actually do so.

(c) Short-Form Application Certification; Long-Form Application Disclosure.

(1) All applicants for a license for frequency Block C or frequency Block F shall certify on its short-form application (Form 175) that they are eligible to bid on and obtain licenses in those blocks pursuant to this section.

(2) In addition to the requirements in subpart I, all applicants that are winning bidders on frequency Blocks C and F shall, in an exhibit to their long-form applications --

(i) identify each member of the applicant's control group, regardless of the size of the member's total interest in the applicant, and each member's minority group or gender classification, if applicable;

(ii) disclose the gross revenues and total assets of the applicant and its affiliates, and other persons that hold interests in the applicant and their affiliates (including all members of the applicant's control group), unless exempted under paragraph (b)(4); and

(iii) certify that the personal net worth of the applicant (if an individual), each affiliates and each person that hold an interests in the applicant is less than \$100 million.

(d) Audits. Applicants and licensees claiming eligibility under this section shall be subject to random audits by the Commission.

(e) Definitions. The terms *affiliate*, *business owned by members of minority groups and women*, *consortium of small businesses*, *control group*, *gross revenues*, *members of minority groups*, *passive equity*, *personal net worth*, *publicly traded corporation*, and *total assets* used in this section are defined in § 24.720.

§ 24.710 Limitation on licenses won at auction for frequency Blocks C and F.

(a) No applicant may be deemed the winning bidder of more than 98 of the licenses available for frequency Blocks C and F. Any applicant who is the high bidder for more than 98 of the licenses available for frequency Blocks C and F shall be required to withdraw its bid(s) for a sufficient number of licenses to achieve compliance with this section and may be subject to bid withdrawal penalties under § 24.704.

(b) For purposes of subsection (a), licenses will be deemed to be won by the same bidder if an entity that controls or has the power to control any applicant that wins licenses at the auction, has the power to control any other applicant that wins licenses at the auction.

§ 24.711 Installment payments for licenses for frequency Blocks C and F.

(a) Except as provided in subsection (b), (c) and (d), an applicant that has \$75 million or less in gross revenues in each of the preceding two calendar years and that is a winning bidder for frequency Blocks C or F in a BTA market other than the fifty largest markets and any eligible applicant that is a winning bidder for frequency Blocks C or F in one of the fifty largest BTA markets, may pay the full amount of its winning bid in installments as follows:

(1) Each eligible bidder shall pay an upfront payment of \$0.015 per MHz per pop for the maximum number of licenses (in terms of MHz-pops) on which it intends to bid.

(2) Each winning bidder shall make a down payment equal to ten percent of their winning bids; a winning bidder shall bring its total amount on deposit with the Commission (including upfront payment) to five percent of its winning bids within five business days after the auction closes and the remainder of the down payment (five percent) shall be paid within five business days after the application required by § 24.809(b) is granted.

(3) Each eligible licensee shall pay the remainder of its winning bids in installment payments with (i) interest imposed based on the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted, plus 2.5 percent; (ii) interest-only payments for the first year; and (iii) principal and interest payments amortized over the remaining nine years of the license.

(4) For purposes of determining whether an applicant has \$75 million or less in gross revenues, gross revenues shall be attributed to the applicant and aggregated as provided in § 24.709(b), except that § 24.709(b)(4)(iii) shall not apply.

(b) An applicant that qualifies as a business owned by members of minority groups and/or women may pay the full amount of its winning bid in installments in the same manner as in paragraphs (a)(1) and (a)(2), except that interest-only payments may be paid for the first three years and interest shall be paid at the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted.

(c) An applicant that qualifies as a small business or as a consortium of small businesses may pay the full amount of its winning bid in installments in the same manner as in paragraphs (a)(1) and (a)(2), except that interest-only payments may be paid for the first two years.

(d) An applicant that qualifies as a small business owned by members of minority groups and/or women or as a consortium of small businesses owned by members of minority groups and/or women may pay the full amount of its winning bid in installments in the same manner as in paragraphs (a)(1) and (a)(2), except that interest-only payments may be paid for the first five years and interest shall be paid at the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted.

(e) Unjust Enrichment.

(1) If a licensee that utilizes installment financing under this section seeks to assign or transfer control of its license to an entity not meeting the eligibility standards for installment payments, the licensee must make full payment of the remaining unpaid principal and any unpaid interest accrued through the date of assignment or transfer as a condition of approval.

(2) If a licensee that utilizes installment financing under this section seeks to make any change in ownership structure that would result in the licensee losing eligibility for installment payments, the licensee shall first seek Commission approval and must make full payment of the remaining unpaid principal and any unpaid interest accrued through

the date of assignment or transfer as a condition of approval. Increases in gross revenues or total assets that result from equity investments that are not attributable to the licensee under § 24.709(b)(4), revenues from operations, business development or expanded service shall not be considered changes in ownership structure under this paragraph.

(3) If a licensee seeks to make any change in ownership that would result in the licensee qualifying for a less favorable installment plan under subsections (a), (b) or (c), the licensee shall seek Commission approval and must adjust its payment plan to reflect its new eligibility status under subsections (a), (b) or (c). A licensee may not switch its payment plan to a more favorable plan.

§ 24.712 Bidding credits for licenses for frequency Blocks C and F.

(a) A winning bidder that qualifies as a small business or a consortium of small businesses may use a bidding credit of ten percent to lower the cost of its winning bid.

(b) A winning bidder that qualifies as a business owned by members of minority groups and/or women may use a bidding credit of fifteen percent to lower the cost of its winning bid.

(c) A winning bidder that qualifies as a small business owned by members of minority groups and/or women or a consortium of small business owned by members of minority groups and/or women may use a bidding credit of twenty-five percent to lower the cost of its winning bid.

(d) Unjust Enrichment.

(1) If a licensee that utilizes a bidding credit under this section seeks to assign or transfer control of its license to an entity not meeting the eligibility standards for bidding credits or seeks to make any other change in ownership that would result in the licensee no longer qualifying for bidding credits under this section, the licensee must seek Commission approval and reimburse the government for the amount of the bidding credit as a condition of the approval of such assignment, transfer or other ownership change.

(2) If a licensee that utilizes a bidding credit under this section seeks to assign or transfer control of its license to an entity meeting the eligibility standards for lower bidding credits or seeks to make any other change in ownership that would result in the licensee qualifying for a lower bidding credit under this section, the licensee must seek Commission approval and reimburse the government for the difference between the amount of the bidding credit obtained by the licensee and the bidding credit for which the assignee, transferee or licensee is eligible under this section as a condition of the approval of such assignment, transfer or other ownership change.

§ 24.713 Tax certificates.

(a) Any non-controlling initial investor in a business owned by members of minority groups and/or women and who provides "start-up" financing, which allows such business to acquire a broadband PCS license(s), and any non-controlling investor who purchases an interest in a broadband PCS license held by a business owned by members of minority groups and/or women within the first year after license issuance, may, upon the sale of such investment or interest, request from the Commission a tax certificate.

Note: For purposes of this subsection, *non-controlling investor* means any person who is not part of the control group of a business owned by members of minority groups and/or women as defined in § 24.720(k).

(b) Any broadband PCS licensee who assigns or transfers control of its license to a business owned by members of minority groups and/or women may request that the Commission issue the licensee a tax certificate. Any licensee that obtains a broadband PCS license through the benefit of a tax certificates under this subsection shall not assign or transfer control of its license within one year of its license grant date, unless such assignee or transferee qualifies as a business owned by members of minority groups and/or women, which shall not assign or transfer control of the license within one year of the grant date of the assignment or transfer.

(c) Any licensee in the Domestic Public Cellular Radio Telecommunications Service who assigns or transfers control of its cellular license(s) to a business owned by members of minority groups and/or women may request that the Commission issue the licensee a tax certificate. Such tax certificates will only be issued if the principal purpose of the assignment or transfer of control is to allow the cellular licensee to become eligible for a broadband PCS license(s) beyond the limitations imposed on the cellular licensee by § 24.204 of this Part. Any licensee that obtains a cellular license through the benefit of a tax certificates under this subsection shall not assign or transfer control of its license within one year of its license grant date, unless such assignee or transferee qualifies as a business owned by members of minority groups and/or women, which shall not assign or transfer control of the license within one year of the grant date of the assignment or transfer.

§ 24.714 Eligibility for partitioned licenses.

(a) Notwithstanding § 24.202 of this Part, an applicant that is a rural telephone company, as defined in § 24.720(e), may be granted a broadband PCS license that is geographically partitioned from a separately licensed MTA or BTA, so long as the MTA or BTA applicant or licensee has voluntarily agreed (in writing) to partition a portion of the license to the rural telephone company.

(b) If partitioned licenses are being applied for in conjunction with a license(s) to be awarded through competitive bidding procedures --

(1) the applicable procedures for filing short-form applications and for submitting upfront payments and down payments contained in this Part and Part 1 of this Chapter shall be followed by the applicant, who must disclose as part of its short-form application all parties to agreement(s) with or among rural telephone companies to partition the license pursuant to this section, if won at auction (see 47 CFR § 1.2105(a)(2)(viii));

(2) each rural telephone company that is a party to an agreement to partition the license shall file a long-form application for its respective, mutually agreed-upon geographic area together with the application for the remainder of the MTA or BTA filed by the auction winner.

(c) If the partitioned license is being applied for as a partial assignment of the MTA or BTA license following grant of the initial license, request for authorization for partial assignment of a license shall be made pursuant to § 24.839 of this Part.

(d) Each application for a partitioned area (long-form initial application or partial assignment application) shall contain a partitioning plan that must propose to establish a partitioned area to be licensed that meets the following criteria:

- (1) conforms to established geopolitical boundaries (such as county lines);
- (2) includes the wireline service area of the rural telephone company applicant; and
- (3) is reasonably related to the rural telephone company's wireline service area.

Note: A partitioned service area will be presumed to be reasonably related to the rural telephone company's wireline service area if the partitioned service area contains no more than twice the population overlap between the rural telephone company's wireline service area and the partitioned area.

(e) Each licensee in each partitioned area will be responsible for meeting the construction requirements in its area (see § 24.203).

§ 24.720 Definitions.

(a) Scope. The definitions in this section apply to §§ 24.709-24.715 of this subpart, unless otherwise specified in those sections.

(b) Small Business; Consortium of Small Businesses.

(1) A *small business* is an entity that (i) together with its affiliates has average annual gross revenues that are not more than \$40 million for the preceding three calendar years; (ii) has no attributable investor or affiliate that has a personal net worth of \$40 million or more; (iii) has a control group all of whose members and affiliates are considered in determining whether the entity meets the \$40 million annual gross revenues and personal net worth standards; and (iv) such control group holds 50.1 percent of the entity's voting interest, if a corporation, and at least 25 percent of the entity's equity on a fully diluted basis, except that a business owned by members of minority groups and/or women (as

defined in subsection (c)) may also qualify as a small business if a control group that is 100 percent composed of members of minority groups and/or women holds 50.1 percent of the entity's voting interests, if a corporation, and 50.1 percent of the entity's total equity on a fully diluted basis and no single other investor holds more than 49.9 percent of passive equity in the entity. Ownership interests shall be calculated on a fully diluted basis; all agreements such as warrants, stock options and convertible debentures will generally be treated as if the rights thereunder already have been fully exercised, except that the such agreements may not be used to appear to terminate or divest ownership interests before they actually do so.

(2) For purposes of determining whether an entity meets the \$40 million gross revenues and \$40 million personal net worth standards in paragraph (1), gross revenues and personal net worth shall be attributed to the entity and aggregated as provided in § 24.709(b), except that § 24.709(b)(4)(iii) shall not apply.

(3) A *small business consortium* is a conglomerate organization formed as a joint venture between mutually-independent business firms, each of which individually satisfies the definition of a small business in paragraph (1).

(c) Business Owned by Members of Minority Groups and/or Women. A *business owned by members of minority groups and/or women* is an entity (i) that has a control group composed 100 percent of members of minority groups and/or women who are United States Citizens, and (ii) such control group owns and holds 50.1 percent of the voting interests, if a corporation, and (A) owns and holds 50.1 percent of the total equity in the entity, provided that all other investors hold passive interests; or (B) holds 25 percent of the total equity in the entity, provided that no single other investor holds more than 25 percent passive equity interests in the entity. Ownership interests shall be calculated on a fully diluted basis; all agreements such as warrants, stock options and convertible debentures will generally be treated as if the rights thereunder already have been fully exercised, except that the such agreements may not be used to appear to terminate or divest ownership interests before they actually do so.

(d) Small Business Owned by Members of Minority Groups and/or Women; Consortium of Small Businesses Owned by Members of Minority Groups and/or Women. A *small business owned by members of minority groups and/or women* is an entity that meets the definitions in both subsections (b) and (c). A *consortium of small businesses owned by members of minority groups and/or women* a conglomerate organization formed as a joint venture between mutually-independent business firms, each of which individually satisfies the definition of a small business in paragraph (b)(1) and subsection (c).

(e) Rural Telephone Company. A *rural telephone company* is a local exchange carrier having 100,000 or fewer access lines, including all affiliates.

(f) Gross Revenues. *Gross revenues* shall mean all income received by an entity, whether earned or passive, before any deductions are made for costs of doing business (e.g., cost

of goods sold), as evidenced by audited quarterly financial statements for the relevant period.

(g) Total Assets. *Total assets* shall mean the book value (except where generally accepted accounting principles (GAAP) require market valuation) of all property owned by an entity, whether real or personal, tangible or intangible, as evidenced by the most recent audited quarterly financial statements.

(h) Personal Net Worth. *Personal net worth* shall mean the market value of all assets (real and personal, tangible and intangible) owned by an individual, less all liabilities (including personal guarantees) owed by the individual in his individual capacity or as a joint obligor.

(i) Members of Minority Groups. *Members of minority groups* includes individuals of African American, Hispanic-surnamed, American Eskimo, Aleut, American Indian and Asian American extraction.

(j) Passive Equity. *Passive equity* shall mean (i) for corporations, non-voting stock or stock that includes no more than five percent of the voting equity; (ii) for partnerships, joint ventures and other non-corporate entities, limited partnership interests and similar interests that do not afford the power to exercise control of the entity.

(k) Control Group. A *control group* is an entity, or a group of individuals or entities that possesses de jure control and de facto control of an applicant or licensee, and as to which the applicant's or licensee's charters, bylaws, agreements and any other relevant documents (and amendments thereto) provide (i) that the entity and/or its members own unconditionally at least 50.1 percent of the total voting interests of a corporation; (ii) that the entity and/or its members receive at least 50.1 percent of the annual distribution of any dividends paid on the voting stock of a corporation; (iii) that, in the event of dissolution or liquidation of a corporation, the entity and/or its members are entitled to receive 100 percent of the value of each share of stock in its possession and a percentage of the retained earnings of the concern that is equivalent to the amount of equity held in the corporation; and (iv) that the entity and/or its members have the right to receive dividends, profits and regular and liquidating distributions from the business in proportion to its interest in the total equity of the applicant or licensee.

Note: Voting control does not always assure de facto control, such as, for example, when the voting stock of the control group is widely dispersed (see, e.g., § 24.270(1)(2)(iii)).

(l) Affiliate. (1) An individual or entity is an *affiliate* of (a) an applicant or (b) a person holding an attributable interest in an applicant under § 24.709 (both referred to herein as "the applicant") if such individual or entity --

- (i) directly or indirectly controls or has the power to control the applicant, or
- (ii) is directly or indirectly controlled by the applicant, or

(iii) is directly or indirectly controlled by a third party or parties that also controls or has the power to control the applicant, or

(iv) has an "identity of interest" with the applicant.

(2) Nature of *control* in determining affiliation.

(i) Every business concern is considered to have one or more parties who directly or indirectly control or have the power to control it. Control may be affirmative or negative and it is immaterial whether it is exercised so long as the power to control exists.

Example. An applicant owning 50 percent of the voting stock of another concern would have negative power to control such concern since such party can block any action of the other stockholders. Also, the bylaws of a corporation may permit a stockholder with less than 50 percent of the voting stock to block any actions taken by the other stockholders in the other entity. Affiliation exists when the applicant has the power to control a concern while at the same time another person, or persons, are in control of the concern at the will of the party or parties with the power to control.

(ii) Control can arise through stock ownership; occupancy of director, officer or key employee positions; contractual or other business relations; or combinations of these and other factors. A key employee is an employee who, because of his/her position in the concern, has a critical influence in or substantive control over the operations or management of the concern.

(iii) Control can arise through management positions where a concern's voting stock is so widely distributed that no effective control can be established.

Example. In a corporation where the officers and directors own various size blocks of stock totaling 40 percent of the corporation's voting stock, but no officer or director has a block sufficient to give him or her control or the power to control and the remaining 60 percent is widely distributed with no individual stockholder having a stock interest greater than 10 percent, management has the power to control. If persons with such management control of the other entity are persons with attributable interests in the applicant, the other entity will be deemed an affiliate of the applicant.

(3) Identity of interest between and among persons. Affiliation can arise between or among two or more persons with an identity of interest, such as members of the same family or persons with common investments. In determining if the applicant controls or has the power to control a concern, persons with an identity of interest will be treated as though they were one person.

Example. Two shareholders in Corporation Y each have attributable interests in the same PCS application. While neither shareholder has enough shares to individually control Corporation Y, together they have the power to control Corporation Y. The two shareholders with these common investments (or identity in interest) are treated as though they are one person and Corporation Y would be deemed an affiliate of the applicant.

(i) **Spousal Affiliation.** Both spouses are deemed to own or control or have the power to control interests owned or controlled by either of them, unless they are subject to a legal separation recognized by a court of competent jurisdiction in the United States. In calculating their net worth, investors who are legally separated must include their share of interests in property held jointly with a spouse.

(ii) **Kinship Affiliation.** Immediate family members will be presumed to own or control or have the power to control interests owned or controlled by other immediate family members. In this context "immediate family member" means father, mother, husband, wife, son, daughter, brother, sister, father- or mother-in-law, son- or daughter-in-law, brother- or sister-in-law, step-father or -mother, step-brother or -sister, step-son or -daughter, half brother or sister. This presumption may be rebutted by showing that (A) the family members are estranged, (B) the family ties are remote, or (C) the family members are not closely involved with each other in business matters.

Example: A owns a controlling interest in Corporation X. A's sister-in-law, B, has an attributable interest in a PCS application. Because A and B have a presumptive kinship affiliation, A's interest in Corporation X is attributable to B, and thus to the applicant, unless B rebuts the presumption with the necessary showing.

(4) **Affiliation through stock ownership.**

(i) An applicant is presumed to control or have the power to control a concern if he or she owns or controls or has the power to control 50 percent or more of its voting stock.

(ii) An applicant is presumed to control or have the power to control a concern even though he or she owns, controls or has the power to control less than 50 percent of the concern's voting stock, if the block of stock he or she owns, controls or has the power to control is large as compared with any other outstanding block of stock.

(iii) If two or more persons each owns, controls or has the power to control less than 50 percent of the voting stock of a concern, such minority holdings are equal or approximately equal in size, and the aggregate of these minority holdings is large as compared with any other stock holding, the presumption arises that each one of these persons individually controls or has the power to control the concern; however, such presumption may be rebutted by a showing that such control or power to control, in fact, does not exist.

(5) **Affiliation arising under stock options, convertible debentures, and agreements to merge.** Stock options, convertible debentures, and agreements to merge (including agreements in principle) are generally considered to have a present effect on the power to control the concern. Therefore, in making a size determination, such options, debentures, and agreements are generally treated as though the rights held thereunder had been exercised. However, an affiliate cannot use such options and debentures to appear to terminate its control over another concern before it actually does so.

Example 1. If company B holds an option to purchase a controlling interest in company A, who holds an attributable interest in a PCS application, the situation is

treated as though company B had exercised its rights and had become owner of a controlling interest in company A. The gross revenues of company B must be taken into account in determining the size of the applicant.

Example 2. If a large company, BigCo, holds 70% (70 of 100 outstanding shares) of the voting stock of company A, who holds an attributable interest in a PCS application, and gives a third party, SmallCo, an option to purchase 50 of the 70 shares owned by BigCo, BigCo will be deemed to be an affiliate of company A, and thus the applicant, until SmallCo actually exercises its option to purchase such shares. In order to prevent BigCo from circumventing the intent of the rule which requires such options to be considered on a fully diluted basis, the option is not considered to have present effect in this case.

Example 3. If company A has entered into an agreement to merge with company B in the future, the situation is treated as though the merger has taken place.

(6) Affiliation under voting trusts.

(i) Stock interests held in trust shall be deemed controlled by any person who holds or shares the power to vote such stock, to any person who has the sole power to sell such stock, and to any person who has the right to revoke the trust at will or to replace the trustee at will.

(ii) If a trustee has a familial, personal or extra-trust business relationship to the grantor or the beneficiary, the stock interests held in trust will be deemed controlled by the grantor or beneficiary, as appropriate.

(iii) If the primary purpose of a voting trust, or similar agreement, is to separate voting power from beneficial ownership of voting stock for the purpose of shifting control of or the power to control a concern in order that such concern or another concern may meet the Commission's size standards, such voting trust shall not be considered valid for this purpose regardless of whether it is or is not recognized within the appropriate jurisdiction.

(7) Affiliation through common management. Affiliation generally arises where officers, directors, or key employees serve as the majority or otherwise as the controlling element of the board of directors and/or the management of another entity.

(8) Affiliation through common facilities. Affiliation generally arises where one concern shares office space and/or employees and/or other facilities with another concern, particularly where such concerns are in the same or related industry or field of operations, or where such concerns were formerly affiliated, and through these sharing arrangements one concern has control, or potential control, of the other concern.

(9) Affiliation through contractual relationships. Affiliation generally arises where one concern is dependent upon another concern for contracts and business to such a degree that one concern has control, or potential control, of the other concern .

(10) Affiliation under joint venture arrangements.

(i) A joint venture for size determination purposes is an association of concerns and/or individuals, with interests in any degree or proportion, formed by contract, express or implied, to engage in and carry out a single, specific business venture for joint profit for which purpose they combine their efforts, property, money, skill and knowledge, but not on a continuing or permanent basis for conducting business generally. The determination whether an entity is a joint venture is based upon the facts of the business operation, regardless of how the business operation may be designated by the parties involved. An agreement to share profits/losses proportionate to each party's contribution to the business operation is a significant factor in determining whether the business operation is a joint venture.

(ii) The parties to a joint venture are considered to be affiliated with each other.

(m) Publicly Traded Corporation. A *publicly traded corporation* is a business entity organized under the laws of the United States whose shares, debt or other ownership interests are traded on an organized securities exchange within the United States.

4. Part 24 is amended by adding a new subpart I consisting of §§ 24.801 through 24.844 to read as follows:

Subpart I -- Interim Application, Licensing, and Processing Rules for Broadband PCS

Sec.

24.801 [Reserved]

24.802 [Reserved]

24.803 Authorization Required

24.804 Eligibility

24.805 Formal and Informal Applications

24.806 Filing of Broadband PCS Applications; Fees; Number of Copies

24.807 [Reserved]

24.808 [Reserved]

24.809 Standard Application Forms and Permissive Changes or Minor Modifications for
the Broadband Personal Communications Services

24.810 [Reserved]

24.811 Miscellaneous Forms

24.812 [Reserved]

24.813 General Application Requirements

24.814 [Reserved]

24.815 Technical Content of Applications

24.816 Station Antenna Structures

24.817 [Reserved]

24.818 [Reserved]

24.819 Waiver of Rules

24.820 Defective Applications

24.821 Inconsistent or Conflicting Applications

- 24.822 Amendment of Application to Participate in Auction for Licenses in the Broadband Personal Communications Services filed on FCC Form 175
- 24.823 Amendment of Application for Licenses in the Broadband Personal Communications Services (other than applications filed on FCC Form 175)
- 24.824 [Reserved]
- 24.825 Application for Temporary Authorizations
- 24.826 Receipt of Application; Applications in the Broadband Personal Communications Services filed on FCC Form 175 and other Applications in the Broadband Personal Communications Services
- 24.827 Public Notice Period
- 24.828 Dismissal and Return of Applications
- 24.829 Ownership Changes and Agreements to Amend or to Dismiss Applications or Pleadings
- 24.830 Opposition to Applications
- 24.831 Mutually Exclusive Applications
- 24.832 Consideration of Applications
- 24.833 [Reserved]
- 24.834 [Reserved]
- 24.835 [Reserved]
- 24.836 [Reserved]
- 24.837 [Reserved]
- 24.838 [Reserved]
- 24.839 Transfer of Control or Assignment of License
- 24.840 [Reserved]
- 24.841 [Reserved]
- 24.842 [Reserved]
- 24.843 Extension of Time to Complete Construction
- 24.844 Termination of Authorization

**Subpart I -- Interim Application, Licensing,
and Processing Rules for Broadband PCS**

§ 24.801 [Reserved]

§ 24.802 [Reserved]

§ 24.803 Authorization required.

No person shall use or operate any device for the transmission of energy or communications by radio in the services authorized by this part except as provided in this part.

§ 24.804 Eligibility.

(a) General. Authorizations will be granted upon proper application if:

(1) The applicant is qualified under all applicable laws and Commission regulations, policies and decisions;

(2) There are frequencies available to provide satisfactory service; and

(3) The public interest, convenience or necessity would be served by a grant.

(b) Alien ownership. A broadband PCS authorization to provide Commercial Mobile Radio Service may not be granted to or held by:

(1) Any alien or the representative of any alien.

(2) Any corporation organized under the laws of any foreign government.

(3) Any corporation of which any officer or director is an alien or of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof or any corporation organized under the laws of a foreign country.

(4) Any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens, or of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such license.

A broadband PCS authorization to provide Private Mobile Radio Service may not be granted to or held by a foreign government or a representative thereof.

§ 24.805 Formal and informal applications.

(a) Except for an authorization under any of the conditions stated in Section 308(a) of the Communications Act of 1934 (47 U.S.C. § 308(a)), the Commission may grant the following authorizations only upon written application received by it: station licenses; modifications of licenses; renewals of licenses; transfers and assignments of station licenses, or any right thereunder.

(b) Except as may be otherwise permitted by this part, a separate written application shall be filed for each instrument of authorization requested. Applications may be:

(1) "Formal applications" where the Commission has prescribed in this Part a standard form; or

(2) "Informal applications" (normally in letter form) where the Commission has not prescribed a standard form.

(c) An informal application will be accepted for filing only if:

- (1) A standard form is not prescribed or clearly applicable to the authorization requested;
- (2) It is a document submitted, in duplicate, with a caption which indicates clearly the nature of the request, radio service involved, location of the station, and the application file number (if known); and
- (3) It contains all the technical details and informational showings required by the rules and states clearly and completely the facts involved and authorization desired.

§ 24.806 Filing of Broadband PCS applications; Fees; Numbers of copies.

(a) As prescribed by §§ 24.705, 24.707 and 24.809 of this part, standard formal application forms applicable to broadband PCS may be obtained from either:

- (1) Federal Communications Commission, Washington, DC 20554; or
- (2) by calling the Commission's Forms Distribution Center, (202) 632-3676.

(b) Applications to participate in competitive bidding for broadband PCS service must be filed on FCC Form 175 in accordance with the rules in § 24.705 and Part 1, Subpart Q. In the event of mutual exclusivity between applicants filing FCC Form 175, only auction winners will be eligible to file subsequent long-form applications on FCC Form 401 to provide broadband PCS service. Mutually exclusive applications filed on FCC Form 175 are subject to competitive bidding under those rules. Broadband PCS applicants filing FCC Form 401 need not complete Schedule B.

(c) All applications for broadband PCS licenses (other than applications to participate in competitive bidding filed on FCC Form 175) shall be submitted for filing to:

Federal Communications Commission
Washington, DC 20554
Attention: Broadband PCS Processing Section

Applications requiring fees as set forth at Part 1, Subpart G of this chapter must be filed in accordance with § 0.401(b).

(d) All correspondence or amendments concerning a submitted application shall clearly identify the name of the applicant, applicant identification number or Commission file number (if known) or station call sign of the application involved, and may be sent directly to the Common Carrier Bureau, Broadband PCS Processing Section.

(e) Except as otherwise specified, all applications, amendments, correspondence, pleadings and forms (including FCC Form 175) shall be submitted on one original paper copy and with three microfiche copies, including exhibits and attachments thereto, and shall be signed as prescribed by § 1.743. Filings of five pages or less are exempt from the requirement to submit on microfiche, as are emergency filings such as letters requesting

special temporary authority. Those filing any amendments, correspondence, pleadings and forms must simultaneously submit the original hard copy which must be stamped "original". In addition to the original hard copy, those filing pleadings, including pleadings under § 1.2108 of the Rules, shall also submit two paper copies as provided in § 1.51 of the Rules.

(1) Microfiche copies. Each microfiche copy must be a copy of the signed original. Each microfiche copy shall be a 148mm X 105mm negative (clear transparent characters appearing on an opaque background) at 24X to 27X reduction for microfiche or microfiche jackets. One of the microfiche sets must be a silver halide camera master or a copy made on silver halide film such as Kodak Direct Duplicatory Film. The microfiche must be placed in paper microfiche envelopes and submitted in a B6 (125 mm x 176 mm) or 5 x 7.5 inch envelope. All applicants must leave Row "A" (the first row for page images) of the first fiche blank for in-house identification purposes. Each microfiche copy of pleadings shall include:

- (i) The month and year of the document;
- (ii) the name of the document;
- (iii) The name of the filing party;
- (iv) The file number, applicant identification number, and call sign, if assigned;
- (v) The identification number and date of the Public Notice announcing the auction in response to which the application was filed (if applicable).

Abbreviations may be used if they are easily understood.

(2) All applications and all amendments must have the following information printed on the mailing envelope, the microfiche envelope, and on the title area at the top of the microfiche:

- (i) The name of the applicant;
- (ii) The type of application (e.g., 30 MHz MTA, 30 MHz BTA, 10 MHz BTA);
- (iii) The month and year of the document;
- (iv) The name of the document;
- (v) The file number, applicant identification number, and call sign, if assigned; and
- (vi) The identification number and date of the Public Notice announcing the auction in response to which the application was filed (if applicable).

§ 24.807 [Reserved]

§ 24.808 [Reserved]

§ 24.809 Standard application forms and permissive changes or minor modifications for the Broadband Personal Communications Service.

(a) Applications to participate in competitive bidding for broadband PCS licenses must be filed on FCC Forms 175 and 175-S.

(b) Subsequent application by auction winners or non-mutually exclusive applicants for broadband PCS licenses under Part 24. FCC Form 401 ("Application for New or Modified Common Carrier Radio Station Under Part 22") shall be submitted by each auction winner for each broadband PCS license applied for on FCC Form 175. In the event that mutual exclusivity does not exist with respect to a license identified on an applicant's FCC Form 175, the Commission will so inform the applicant and the applicant will also file FCC Form 401. Blanket licenses are granted for each market frequency block. Applications for individual sites are not needed and will not be accepted. See § 24.11. Broadband PCS applicants filing FCC Form 401 need not complete Schedule B.

(c) Extensions of time and reinstatement. When a licensee cannot complete construction in accordance with the provisions of § 24.203, a timely application for extension of time (FCC Form 489) must be filed.

(d) License for mobile subscriber station -- These stations are considered to be associated with and covered by the authorization issued to the carrier serving the land mobile station. No additional authorization is required.

§ 24.810 [Reserved]

§ 24.811 Miscellaneous forms.

(a) Licensee qualifications. FCC Form 430 ("Common Carrier and Satellite Radio Licensee Qualifications Report") shall be filed by broadband Personal Communications Service licensees only as required by Form 490 (Application for Assignment or Transfer of Control Under Part 22).

(b) Renewal of station license. Except for renewal of special temporary authorizations, FCC Form 405 ("Application for Renewal of Station License") must be filed in duplicate by the licensee between thirty (30) and sixty (60) days prior to the expiration date of the license sought to be renewed.

§ 24.812 [Reserved]

§ 24.813 General application requirements.

(a) Each application (including applications filed on Forms 175 and 401) for a broadband PCS license or for consent to assign or transfer control of a broadband PCS license shall disclose fully the real party or parties in interest and must include in an exhibit the following information:

(1) A list of any business five percent or more of whose stock, warrants, options or debt securities are owned by the applicant or an officer, director, stockholder or key management personnel of the applicant. This list must include a description of each such business's principal business and a description of each such business's relationship to the applicant.

(2) A list of any party which holds a five percent or more interest in the applicant, or any entity in which a five percent or more interest is held by another party which holds a five percent or more interest in the applicant (e.g., If Company A owns 5% of Company B (the applicant) and 5% of Company C, then Companies A and C must be listed on Company B's application).

(3) A list of the names, addresses, citizenship and principal business of any person holding five percent or more of each class of stock, warrants, options or debt securities together with the amount and percentage held, and the name, address, citizenship and principal place of business of any person on whose account, if other than the holder, such interest is held. If any of these persons are related by blood or marriage, include such relationship in the statement.

(4) In the case of partnerships, the name and address of each partner, each partner's citizenship and the share or interest participation in the partnership. This information must be provided for all partners, regardless of their respective ownership interests in the partnership. A signed and dated copy of the partnership agreement must be included in the application.

(b) Each application for a broadband PCS license must:

(1) Submit the information required by the Commission's Rules, requests and application forms;

(2) Be maintained by the applicant substantially accurate and complete in all significant respects in accordance with the provisions of § 1.65 of this chapter;

(3) Show compliance with and make all special showings that may be applicable;

(c) Where documents, exhibits, or other lengthy showings already on file with the Commission contain information which is required by an application form, the application may specifically refer to such information, if:

(1) The information previously filed is over one A4 (21 cm x 29.7 cm) or 8.5 x 11 inch (21.6 cm x 27.9 cm) page in length, and all information referenced therein is current and accurate in all significant respects under § 1.65 of this chapter; and

(2) The reference states specifically where the previously filed information can actually be found, including mention of:

(i) The station call sign or application file number whenever the reference is to station files or previously filed applications; and

(ii) The title of the proceeding, the docket number, and any legal citations, whenever the reference is to a docketed proceeding.

However, questions on an application form which call for specific technical data, or which can be answered by a "yes" or "no" or other short answer shall be answered as appropriate and shall not be cross-referenced to a previous filing.

(d) In addition to the general application requirements of Subpart F and §§ 1.2105, 24.813 and 24.815 of this part, applicants shall submit any additional documents, exhibits, or signed written statements of fact:

(1) As may be required by these rules; and

(2) As the Commission, at any time after the filing of an application and during the term of any authorization, may require from any applicant, permittee or licensee to enable it to determine whether a radio authorization should be granted, denied or revoked.

(e) Except when the Commission has declared explicitly to the contrary, an informational requirement does not in itself imply the processing treatment of decisional weight to be accorded the response.

(f) All applicants (except applicants filing FCC Form 175) are required to indicate at the time their application is filed whether or not a Commission grant of the application may have a significant environmental impact as defined by § 1.1307 of the Commission's rules. If answered affirmatively, the requisite environmental assessment as prescribed in § 1.1311 of this chapter must be filed with the application and Commission environmental review must be completed prior to construction. See § 1.1312 of this chapter. All broadband PCS licensees are subject to a continuing obligation to determine whether subsequent construction may have a significant environmental impact prior to undertaking such construction and to otherwise comply with § 1.1301 et seq. of the Commission's Rules. See § 1.1312.

§ 24.814 [Reserved]

§ 24.815 Technical content of applications; maintenance of list of station locations.

(a) All applications required by this part shall contain all technical information required by the application forms or associated Public Notice(s). Applications other than initial applications for a broadband PCS license must also comply with all technical requirements of the rules governing the broadband PCS (see Subparts C and E of this Part as appropriate). The following paragraphs describe a number of general technical requirements.

(b) Each application (except applications for initial licenses filed on Form 175) for a license for broadband PCS must comply with the provisions of §§ 24.229-24.238 of the Commission's Rules.

(c)-(i) [Reserved]

(j) The location of the transmitting antenna shall be considered to be the station location. Broadband PCS licensees must maintain a current list of all station locations, which must describe the transmitting antenna site by its geographical coordinates and also by conventional reference to street number, landmark, or the equivalent. All such coordinates shall be specified in terms of degrees, minutes, and seconds to the nearest second of latitude and longitude.

§ 24.816 Station Antenna Structures.

(a) Unless the broadband PCS licensee has received prior approval from the FCC, no antenna structure, including radiating elements, tower, supports and all appurtenances, may be higher than 61 m (200 feet) above ground level at its site.

(b) Unless the broadband PCS licensee has received prior approval from the FCC, no antenna structure that is located either at an airport or heliport that is available for public use and is listed in the Airport Directory of the current Airman's Information Manual or in either the Alaska or Pacific Airman's Guide and Chart Supplement, or at an airport or heliport under construction that is the subject of a notice or proposal on file with the FAA and, except for military airports, it is clearly indicated that the airport will be available for public use, or at an airport or heliport that is operated by the armed forces of the United States, or at a place near any of these airports or heliports, may be higher than:

(1) 1 m above the airport elevation for each 100 m from the airport runway longer than 1 km within 6.1 km of the antenna structure.

(2) 2 m above the airport elevation for each 100 m from the nearest runway shorter than 1 km within 3.1 km of the antenna structure.

(3) 4 m above the airport elevation for each 100 m from the nearest landing pad within 1.5 km of the antenna structure.

(c) A broadband PCS station antenna structure no higher than 6.1 m (20 feet) above ground level at its site or no higher than 6.1 m above any natural object or existing manmade structure, other than an antenna structure, is exempt from the requirements of paragraphs (a) and (b) of this section.

(d) Further details as to whether an aeronautical study and/or obstruction marking and lighting may be required, and specifications for obstruction marking and lighting, are contained in Part 17 of the FCC Rules, Construction, Marking and Lighting of Antenna Structures. To request approval to place an antenna structure higher than the limits specified in paragraphs (a), (b), and (c) of this section, the licensee must notify the Federal Aviation Administration (FAA) on FAA Form 7460-1 and the FCC on FCC Form 854.

§§ 24.817-24.818 [Reserved]

§ 24.819 Waiver of rules.

(a) Requests for waiver.

(1) A waiver of these rules may be granted upon application or by the Commission on its own motion. Requests for waivers shall contain a statement of reasons sufficient to justify a waiver. Waivers will not be granted except upon an affirmative showing:

(i) That the underlying purpose of the rule will not be served, or would be frustrated, by its application in a particular case, and that grant of the waiver is otherwise in the public interest; or

(ii) That the unique facts and circumstances of a particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest. Applicants must also show the lack of a reasonable alternative.

(2) If the information necessary to support a waiver request is already on file, the applicant may cross-reference to the specific filing where it may be found.

(b) Denial of waiver, alternate showing required. If a waiver is not granted, the application will be dismissed as defective unless the applicant has also provided an alternative proposal which complies with the Commission's rules (including any required showings).

§ 24.820 Defective applications.

(a) Unless the Commission shall otherwise permit, an application will be unacceptable for filing and will be returned to the applicant with a brief statement as to the omissions or discrepancies if:

(1) The application is defective with respect to completeness of answers to questions, informational showings, execution or other matters of a formal character; or

(2) The application does not comply with the Commission's rules, regulations, specific requirements for additional information or other requirements.

See also § 1.2105 of the Commission's Rules.

(b) Some examples of common deficiencies which result in defective applications under paragraph (a) of this section are:

(1) The application is not filled out completely and signed;

(2)-(4) [Reserved]

(5) The application (other an application filed on FCC Form 175) does not include an environmental assessment as required for an action that may have a significant impact upon the environment, as defined in § 1.1307 of this chapter.

(6) [Reserved]

(7) The application is filed prior to the Public Notice issued under § 24.705 of this part announcing the application filing date for the relevant auction or after the cutoff date prescribed in that Public Notice.

(c) [Reserved]

(d) If an applicant is requested by the Commission to file any documents or any supplementary or explanatory information not specifically required in the prescribed application form, a failure to comply with such request within a specified time period will be deemed to render the application defective and will subject it to dismissal.

§ 24.821 Inconsistent or conflicting applications.

While an application is pending and undecided, no subsequent inconsistent or conflicting application may be filed by the same applicant, its successor or assignee, or on behalf or for the benefit of the same applicant, its successor or assignee.

§ 24.822 Amendment of application to participate in auction for licenses in the Broadband Personal Communications Services filed on FCC Form 175.

(a) The Commission will provide bidders a limited opportunity to cure defects in FCC Form 175 specified herein except for failure to sign the application and to make certifications, defects which may not be cured. See also § 1.2105 of the Commission's Rules.

(b) In the broadband PCS, the only amendments to FCC Form 175 which will be permitted are minor amendments to correct minor errors or defects such as typographical errors. All other amendments to FCC Form 175, such as changes in the information supplied pursuant to § 24.813(a) or changes in the identification of parties to bidding consortia, will be considered to be major amendments. An FCC Form 175 which is amended by a major amendment will be considered to be newly filed and cannot be resubmitted after applicable filing deadlines. See also § 1.2105 of the Commission's Rules.

§ 24.823 Amendment of applications for licenses in the Broadband Personal Communications Services (other than applications filed on FCC Form 175).

(a) Amendments as of right. A pending application may be amended as a matter of right if the application has not been designated for hearing.

(1) Amendments shall comply with § 24.829, as applicable; and

(2) Amendments which resolve interference conflicts or amendments under § 24.829 may be filed at any time.

(b) The Commission or the presiding officer may grant requests to amend an application designated for hearing only if a written petition demonstrating good cause is submitted and properly served upon the parties of record.

(c) Major amendments, minor amendments. The Commission will classify all amendments as minor except in the cases listed below. An amendment shall be deemed to be a major amendment subject to § 24.827 if it proposes a substantial change in ownership or control.

(d) If a petition to deny (or other formal objection) has been filed, any amendment, request for waiver or other written communication shall be served on the petitioner, unless waiver of this requirement is granted pursuant to paragraph (e) of this section. See also § 1.2108 of the Commission's Rules.

(e) The Commission may waive the service requirements of paragraph (d) of this section and prescribe such alternative procedures as may be appropriate under the circumstances to protect petitioners' interests and to avoid undue delay in a proceeding, if an applicant submits a request for waiver which demonstrates that the service requirement is unreasonably burdensome.

(f) Any amendment to an application shall be signed and shall be submitted in the same manner, and with the same number of copies, as was the original application. Amendments may be made in letter form if they comply in all other respects with the requirements of this chapter.

(g) An application will be considered to be a newly-filed application if it is amended by a major amendment (as defined in this section), except in the following circumstances:

(1) [Reserved]

(2) [Reserved]

(3) The amendment reflects only a change in ownership or control found by the Commission to be in the public interest;

(4) [Reserved]

(5) The amendment corrects typographical transcription or similar clerical errors which are clearly demonstrated to be mistakes by reference to other parts of the application, and whose discovery does not create new or increased frequency conflicts;

§ 24.824 [Reserved]

§ 24.825 Application for temporary authorizations.

(a) In circumstances requiring immediate or temporary use of facilities, request may be made for special temporary authority to install and/or operate new or modified equipment. Any such request may be submitted as an informal application in the manner set forth in § 24.805 and must contain full particulars as to the proposed operation including all facts sufficient to justify the temporary authority sought and the public interest therein. No such request will be considered unless the request is received by the Commission at least 10 days prior to the date of proposed construction or operation or, where an extension is sought, at least 10 days prior to the expiration date of the existing temporary authorization. The Commission may accept a late-filed request upon due showing of sufficient reasons for the delay in submitting such request.

(b) Special temporary authorizations may be granted without regard to the 30-day public notice requirements of § 24.827(b) when:

(1) The authorization is for a period not to exceed 30 days and no application for regular operation is contemplated to be filed;

(2) The authorization is for a period not to exceed 60 days pending the filing of an application for such regular operation;

(3) The authorization is to permit interim operation to facilitate completion of authorized construction or to provide substantially the same service as previously authorized; or

(4) The authorization is made upon a finding that there are extraordinary circumstances requiring operation in the public interest and that delay in the institution of such service would seriously prejudice the public interest.

(c) Temporary authorizations of operation not to exceed 180 days may be granted under the standards of Section 309(f) of the Communications Act where extraordinary circumstances so require. Extensions of the temporary authorization for a period of 180 days each may also be granted, but the applicant bears a heavy burden to show that extraordinary circumstances warrant such an extension.

(d) In cases of emergency found by the Commission, involving danger to life or property or due to damage of equipment, or during a national emergency proclaimed by the president or declared by the Congress or during the continuance of any war in which the United States is engaged and when such action is necessary for the national defense or safety or otherwise in furtherance of the war effort, or in cases of emergency where the Commission finds that it would not be feasible to secure renewal applications from existing licensees or otherwise to follow normal licensing procedure, the Commission will grant radio station authorizations and station licenses, or modifications or renewals thereof, during the emergency found by the Commission or during the continuance of any such national emergency or war, as special temporary licenses, only for the period of emergency or war requiring such action, without the filing of formal applications.

§ 24.826 Receipt of application; Applications in the Broadband Personal Communications Services filed on FCC Form 175 and other applications in the Broadband Personal Communications Services.

(a) All applications for the initial provision of broadband PCS must be submitted on FCC Forms 175 and 175-S. Mutually exclusive initial applications in the broadband Personal Communications Services are subject to competitive bidding. FCC Form 401 ("Application for New or Modified Common Carrier Radio Station Under Part 22") must be submitted by each winning bidder for each broadband PCS license for which application was made on FCC Form 175. In the event that mutual exclusivity does not exist between applicants for a broadband PCS license that have filed FCC Form 175, the sole applicant will be required to file FCC Form 401. The aforementioned Forms 175, 175-S, and 401 are subject to the provisions of 47 CFR Part 1, Subpart Q ("Competitive Bidding Proceedings") and Subpart H of this Part. Blanket licenses are granted for each market frequency block. Applications for individual sites are not needed and will not be accepted. See § 24.11.

(b) Applications received for filing are given a file number. The assignment of a file number to an application is merely for administrative convenience and does not indicate the acceptance of the application for filing and processing. Such assignment of a file number will not preclude the subsequent return or dismissal of the application if it is found to be not in accordance with the Commission's Rules.

(c) Acceptance of an application for filing merely means that it has been the subject of a preliminary review as to completeness. Such acceptance will not preclude the subsequent return or dismissal of the application if it is found to be defective or not in accordance with the Commission's rules. (See § 24.813 for additional information concerning the filing of applications.)

§ 24.827 Public Notice Period.

- (a) At regular intervals, the Commission will issue a public notice listing:
- (1) The acceptance for filing of all applications and major amendments thereto;
 - (2) Significant Commission actions concerning applications listed as acceptable for filing;
 - (3) Information which the Commission in its discretion believes of public significance. Such notices are intended solely for the purpose of informing the public and do not create any rights in an applicant or any other person.
 - (4) Special environmental considerations as required by Part 1 of this chapter.

(b) The Commission will not grant any application until expiration of a period of thirty (30) days following the issuance date of a public notice listing the application, or any major amendments thereto, as acceptable for filing; provided, however, that the Commission will not grant an application filed on Form 401 filed either by a winning

bidder or by an applicant whose Form 175 application is not mutually exclusive with other applicants, until the expiration of a period of forty (40) days following the issuance of a public notice listing the application, or any major amendments thereto, as acceptable for filing. See also § 1.2108 of the Commission's Rules.

(c) As an exception to paragraphs (a)(1), (a)(2) and (b) of this section, the public notice provisions are not applicable to applications:

(1) For authorization of a minor technical change in the facilities of an authorized station where such a change would not be classified as a major amendment (as defined by § 24.823) were such a change to be submitted as an amendment to a pending application;

(2) For issuance of a license subsequent to a radio station authorization or, pending application for a grant of such license, any special or temporary authorization to permit interim operation to facilitate completion of authorized construction or to provide substantially the same service as would be authorized by such license;

(3) For extension of time to complete construction of authorized facilities (see § 24.203;

(4) For temporary authorization pursuant to § 24.825(b);

(5) [Reserved]

(6) For an authorization under any of the proviso clauses of Section 308(a) of the Communications Act of 1934 (47 U.S.C. 308(a));

(7) For consent to an involuntary assignment or transfer of control of a radio authorization; or

(8) For consent to a voluntary assignment or transfer of control of a radio authorization, where the assignment or transfer does not involve a substantial change in ownership or control.

§ 24.828 Dismissal and return of applications.

(a) Except as provided under § 24.829, any application may be dismissed without prejudice as a matter of right if the applicant requests its dismissal prior to designation for hearing or, in the case of applications filed on Forms 175 and 175-S, prior to auction. An applicant's request for the return of his application after it has been accepted for filing will be considered to be a request for dismissal without prejudice. Applicants requesting dismissal of their applications may be subject to penalties contained in § 1.2104 of the Commission's Rules. Requests for dismissal shall comply with the provisions of § 24.829 as appropriate.

(b) A request to dismiss an application without prejudice will be considered after designation for hearing only if:

(1) A written petition is submitted to the Commission and is properly served upon all parties of record, and

(2) The petition complies with the provisions of § 24.829 (whenever applicable) and demonstrates good cause.

(c) The Commission will dismiss an application for failure to prosecute or for failure to respond substantially within a specified time period to official correspondence or requests for additional information. Dismissal shall be without prejudice if made prior to designation for hearing or prior to auction, but dismissal may be made with prejudice for unsatisfactory compliance with § 24.829 or after designation for hearing or after the applicant is notified that it is the winning bidder under the auction process.

§ 24.829 Ownership changes and agreements to amend or to dismiss applications or pleadings.

(a) Applicability. Subject to the provisions of § 1.2105 of the Commission's Rules (Bidding Application and Certification Procedures; Prohibition of Collusion), this section applies to applicants and all other parties interested in pending applications who wish to resolve contested matters among themselves with a formal or an informal agreement or understanding. This section applies only when the agreement or understanding will result in:

(1) A major change in the ownership of an applicant to which §§ 24.823(c) and 24.823(g) apply or which would cause the applicant to lose its status as a designated entity under § 24.709, or

(2) The individual or mutual withdrawal, amendment or dismissal of any pending application, amendment, petition or other pleading.

(b) Policy. Parties to contested proceedings are encouraged to settle their disputes among themselves. Parties that, under a settlement agreement, apply to the Commission for ownership changes or for the amendment or dismissal of either pleadings or applications shall at the time of filing notify the Commission that such filing is the result of an agreement or understanding.

(c) The provisions of § 22.927 of the Commission's Rules will apply in the event of the filing of petitions to deny or other pleadings or informal objections filed against broadband PCS applications. The provisions of § 22.928 of the Commission's Rules will apply in the event of dismissal of broadband PCS applications. The provisions of § 22.929 of the Commission's Rules will apply in the event of threats to file petitions to deny or other pleadings or informal objections against broadband PCS applications.

§ 24.830 Opposition to applications.

(a) Petitions to deny (including petitions for other forms of relief) and responsive pleadings for Commission consideration must comply with § 1.2108 and must:

(1) Identify the application or applications (including applicant's name, station location, Commission file numbers and radio service involved) with which it is concerned;

(2) Be filed in accordance with the pleading limitations, filing periods, and other applicable provisions of §§ 1.41 through 1.52 except where otherwise provided in § 1.2108;

(3) Contain specific allegations of fact which, except for facts of which official notice may be taken, shall be supported by affidavit of a person or persons with personal knowledge thereof, and which shall be sufficient to demonstrate that the petitioner (or respondent) is a party in interest and that a grant of, or other Commission action regarding, the application would be prima facie inconsistent with the public interest;

(4) Be filed within thirty (30) days after the date of public notice announcing the acceptance for filing of any such application or major amendment thereto (unless the Commission otherwise extends the filing deadline); and

(5) Contain a certificate of service showing that it has been mailed to the applicant no later than the date of filing thereof with the Commission.

(b) A petition to deny a major amendment to a previously-filed application may only raise matters directly related to the amendment which could not have been raised in connection with the underlying previously-filed application. This subsection does not apply, however, to petitioners who gain standing because of the major amendment.

§ 24.831 Mutually exclusive applications.

(a) The Commission will consider applications for broadband PCS licenses to be mutually exclusive if they relate to the same geographical boundaries (MTA or BTA) and are timely filed for the same frequency block.

(b) Mutually exclusive applications filed on Form 175 for the initial provision of broadband PCS are subject to competitive bidding in accordance with the procedures in Subpart H and in Part 1, Subpart Q.

(c) An application will be entitled to comparative consideration with one or more conflicting applications only if the Commission determines that such comparative consideration will serve the public interest.

(d)-(j) [Reserved]

§ 24.832 Consideration of applications.

(a) Applications for an instrument of authorization will be granted if, upon examination of the application and upon consideration of such other matters as it may officially notice, the Commission finds that the grant will serve the public interest, convenience and necessity. See also § 1.2108 of the Commission's Rules.

(b) The grant shall be without a formal hearing if, upon consideration of the application, any pleadings or objections filed, or other matters which may be officially noticed, the Commission finds that:

(1) The application is acceptable for filing and is in accordance with the Commission's rules, regulations and other requirements;

(2) The application is not subject to a post-auction hearing or to comparative consideration pursuant to § 24.831 with another application(s);

(3) A grant of the application would not cause harmful electrical interference to an authorized station;

(4) There are no substantial and material questions of fact presented; and

(5) The applicant is qualified under current FCC regulations and policies.

(c) If the Commission should grant without a formal hearing an application for an instrument of authorization which is subject to a petition to deny filed in accordance with § 24.830, the Commission will deny the petition by the issuance of a Memorandum Opinion and Order which will concisely state the reasons for the denial and dispose of all substantial issues raised by the petition.

(d) Whenever the Commission, without a formal hearing, grants any application in part, or subject to any terms or conditions other than those normally applied to applications of the same type, it shall inform the applicant of the reasons therefor, and the grant shall be considered final unless the Commission revises its action (either by granting the application as originally requested, or by designating the application for a formal evidentiary hearing) in response to a petition for reconsideration which:

(1) Is filed by the applicant within thirty (30) days from the date of the letter or order giving the reasons for the partial or conditioned grant;

(2) Rejects the grant as made and explains the reasons why the application should be granted as originally requested; and

(3) Returns the instrument of authorization.

(e) The Commission will designate an application for a formal hearing, specifying with particularity the matters and things in issue, if upon consideration of the application, any pleadings or objections filed or other matters which may be officially noticed, the Commission determines that:

(1) A substantial and material question of fact is presented (see also § 1.2108);

(2) The Commission is unable for any reason to make the findings specified in paragraph (a) of this section and the application is acceptable for filing, complete and in accordance with the Commission's rules, regulations and other requirements; or

(3) The application is entitled to comparative consideration (under § 24.831) with another application (or applications).

(f) The Commission may grant, deny or take other action with respect to an application designated for a formal hearing pursuant to paragraph (e) or Part 1 of this Chapter.

(g) [Reserved]

(h) Reconsideration or review of any final action taken by the Commission will be in accordance with Subpart A of Part 1 of this Chapter.

§ 24.833 - 24.838 [Reserved]

§ 24.839 Transfer of Control or Assignment of License.

(a) Approval required. Authorizations shall be transferred or assigned to another party, voluntarily (for example, by contract) or involuntarily (for example, by death, bankruptcy or legal disability), directly or indirectly or by transfer of control of any corporation holding such authorization, only upon application and approval by the Commission. A transfer of control or assignment of station authorization in the broadband Personal Communications Service is also subject to §§ 24.711(e), 24.712(d), 24.713(b) (unjust enrichment) and 1.2111(a) (reporting requirement).

(1) A change from less than 50% ownership to 50% or more ownership shall always be considered a transfer of control.

(2) In other situations a controlling interest shall be determined on a case-by-case basis considering the distribution of ownership and the relationships of the owners, including family relationships.

(b) Forms required.

(1) Assignment.

(i) FCC Form 490 shall be filed to assign a license or permit.

(ii) In the case of involuntary assignment, FCC Form 490 shall be filed within thirty (30) days following the event giving rise to the assignment.

(2) Transfer of control.

(i) FCC Form 490 shall be submitted in order to transfer control of a corporation holding a license or permit.

(ii) In the case of involuntary transfer of control, FCC Form 490 shall be filed within thirty (30) days following the event giving rise to the transfer.

(3) Form 430. Whenever an application must be filed under paragraph (a)(1) or (2) of this section, the assignee or transferee shall file FCC Form 430 ("Common Carrier Radio License Qualification Report") unless an accurate report is on file with the Commission.

(4) Notification of completion. The Commission shall be notified by letter of the date of completion of the assignment or transfer of control.

(5) If the transfer of control of a license is approved, the new licensee is held to the original construction requirement of § 24.203.

(c) In acting upon applications for transfer of control or assignment, the Commission will not consider whether the public interest, convenience and necessity might be served by the transfer or assignment of the authorization to a person other than the proposed transferee or assignee.

(d) Restrictions on Assignments and Transfers of Licenses for Frequency Blocks C and F. No assignment or transfer of control of a license for frequency Block C or frequency Block F will be granted unless --

(1) the application for assignment or transfer of control is filed after five years from the date of the initial license grant;

(2) the application for assignment or transfer of control is filed after three years from the date of the initial license grant and the proposed assignee or transferee meets the eligibility criteria set forth in § 24.709;

(3) the application is for partial assignment of a partitioned service area to a rural telephone company pursuant to § 24.714 and the assignee meets the eligibility criteria set forth in § 24.709; or

(4) the application is for an involuntary assignment or transfer of control to a bankruptcy trustee appointed under involuntary bankruptcy, an independent receiver appointed by a court of competent jurisdiction in a foreclosure action, or, in the event of death or disability, to a person or entity legally qualified to succeed the deceased or disabled person under the laws of the place having jurisdiction over the estate involved; provided that, the applicant requests a waiver pursuant to this paragraph.

(e) If the assignment or transfer of control of a license is approved, the assignee or transferee is subject to the original construction requirement of § 24.203.

§§ 24.840 - 24.842 [Reserved]

§ 24.843 Extension of time to complete construction.

(a) If construction is not completed within the time period set forth in § 24.203, the authorization will automatically expire. Before the period for construction expires an application for an extension of time to complete construction (FCC Form 489) may be filed. See subsection (b) of this section. Within 30 days after the authorization expires an application for reinstatement may be filed on FCC Form 489.

(b) Extension of Time to Complete Construction. An application for extension of time to complete construction may be made on FCC Form 489. Extension of time requests must be filed prior to the expiration of the construction period. Extensions will be granted only if the licensee shows that the failure to complete construction is due to causes beyond its control.

(c) An application for modification of an authorization (under construction) does not extend the initial construction period. If additional time to construct is required, an FCC Form 489 must be submitted.

(d) [Reserved]

§ 24.844 Termination of authorization.

(a) Termination of authorization.

(1) All authorizations shall terminate on the date specified on the authorization or on the date specified by these rules, unless a timely application for renewal has been filed.

(2) If no application for renewal has been made before the authorization's expiration date, a late application for renewal will be considered only if it is filed within thirty (30) days of the expiration date and shows that the failure to file a timely application was due to causes beyond the applicant's control. During this 30-day period, a reinstatement application must be filed on FCC Form 489. Service to subscribers need not be suspended while a late-filed renewal application is pending, but such service shall be without prejudice to Commission action on the renewal application and any related sanctions. See also § 24.16 (Criteria for Comparative Renewal Proceedings).

(b) Termination of special temporary authorization. A special temporary authorization shall automatically terminate upon failure to comply with the conditions in the authorization.

(c) [Reserved]

FCC 94-285

PP Docket No. 93-253

FIFTH MEMORANDUM OPINION AND ORDER

Released: November 23, 1994

By the Commission: Chairman Hundt and Commissioners Barrett and Ness issuing separate statements.

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I. INTRODUCTION

1. By this action, we resolve petitions for reconsideration or clarification of our rules governing competitive bidding for "entrepreneurs' block" licenses in the 2 GHz band Personal Communications Service (broadband PCS).¹ Twenty-six petitions were received, as well as 17 oppositions and 8 replies.² Specifically, in this *Fifth Memorandum Opinion and Order*, we resolve issues associated with our entrepreneurs' block rules, as well as other provisions we established to ensure that small businesses, rural telephone companies and businesses owned by minorities and women (collectively termed "designated entities") have meaningful opportunities to participate in the provision of broadband PCS. Our goal in this proceeding is to ensure that designated entities have the opportunity to obtain licenses at auction as well as the opportunity to have meaningful involvement in the management and building of our nation's broadband PCS infrastructure. Thus, as we describe below, we make certain modifications to our rules so that they will better serve these goals.

2. When the new broadband PCS auction rules were adopted in the *Fifth Report and Order*, the Commission declared its intent to meet fully the statutory objective set forth by Congress in Section 309(j) of the Communications Act.³ In particular, we observed that it was the mandate of Congress that the Commission should "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given an opportunity to participate in the provision of spectrum-based services."⁴ We also noted that Congress has directed us to "promote economic opportunity and competition and ensure that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants."⁵ With these congressional directives in mind, we established the entrepreneurs' blocks and designated entity provisions contained in the *Fifth Report and Order*, which are now under reconsideration.

¹ The Commission designated frequency blocks C (1895-1910/1975-1990 MHz) and F (1890-1895/1970-1975 MHz) as "entrepreneurs' blocks". See *Fifth Report and Order* in PP Docket No. 93-253, FCC 94-178 (released July 15, 1994), reprinted at 59 Fed. Reg. 37,566 (July 22, 1994) (*Fifth Report and Order*). We also address herein petitions for reconsideration or clarification filed in response to the Commission's *Order on Reconsideration*, FCC 94-217 (released August 15, 1994), summarized, 59 Fed. Reg. 43,062 (August 22, 1994).

² A list of parties filing petitions for reconsideration, oppositions, replies and *ex parte* submissions is contained in Appendix A.

³ See 47 U.S.C. § 309(j).

⁴ See *Fifth Report and Order*, FCC 94-178, at ¶ 12. See also 47 U.S.C. § 309(j)(4)(D).

⁵ See *Fifth Report and Order*, FCC 94-178, at ¶ 9. See also 47 U.S.C. § 309(j)(3)(B).

3. Although we wish to "fine-tune" some aspects of our rules, we generally conclude that the "entrepreneurs' block" concept and the special provisions for designated entities adopted in the *Fifth Report and Order* are the most efficient and effective means to fulfill our statutory mandate to provide for a diverse and competitive broadband PCS marketplace. In particular, we have adopted measures to ensure opportunities for meaningful participation by minority and women-owned businesses in the emerging broadband PCS marketplace by providing that such entities are eligible for bidding credits, installment payments, and the benefits of tax certificates, and by adopting eligibility rules that accommodate noncontrolling equity investment.

4. On reconsideration of the *Fifth Report and Order*, we weigh the recommendations of those who have asked us to modify our rules. While we conclude that for the most part our rules will remain unchanged, we find that some rule modifications are necessary to further empower businesses owned by women and minorities and designated entities generally to participate in broadband PCS. Also, our rules need to be clarified in some instances to provide entities wishing to participate in the entrepreneurs' blocks with greater certainty and a better understanding of what is expected of them. In general, our rule changes will grant designated entities, particularly minority and women-owned applicants, additional flexibility in how they raise capital and structure their businesses. Minority-owned applicants, for example, should be able to draw more readily upon the financial resources and expertise of other successful minority business enterprises. Our revised rules seek to accommodate the many existing minority and women-owned firms that want to enter the PCS market, but whose existing corporate structures do not meet the criteria for entry prescribed in the *Fifth Report and Order*. Thus, experienced minority and women entrepreneurs, who are likely to succeed in the broadband PCS marketplace, are not inadvertently barred from participating in the entrepreneurs' block under our new rules. In sum, our revised rules permit entrepreneurs' block applicants to structure themselves in a way that better reflects the realities of raising capital in today's markets, and to obtain the necessary management and technical expertise for their PCS businesses.

5. As we indicated above, a primary objective on reconsideration is to ensure that our rules promote diversity and competition in the PCS marketplace of the future. In this regard, we believe a special effort must be made to enable minority and women-owned enterprises to enter, compete and ultimately succeed in the broadband PCS market. These designated entities face the most formidable barriers to entry, foremost of which is lack of access to capital. In our effort to provide opportunities for minorities and women to participate in PCS via the auctions process, we strive for a careful balance. On one hand, our rules must provide applicants with the flexibility they need to raise capital and structure their businesses to compete once they win licenses. On the other hand, our rules must ensure that control of the broadband PCS applicant, both as a practical and legal matter, as well as a meaningful measure of economic benefit, remain with the designated entities our regulations are intended to benefit.

6. After reviewing the record, we amend or clarify our entrepreneurs' block rules in

several respects.⁶ We emphasize that these changes constitute a refinement of our original entrepreneurs' block rules adopted in the *Fifth Report and Order* that will further advance our objectives of promoting competition and diversity in the broadband PCS marketplace. In summary, we have decided to:

- Modify the rules to allow certain noncontrolling investors who do not qualify for the entrepreneurs' block or as small businesses to be investors in an applicant's control group. Allow entities that are controlled by minorities and/or women, but that have investors that are neither minorities nor women, to be part of the control group.
- Retain the requirement that a designated entity's control group own at least 25 percent of the applicant's total equity, but require that only 15 percent be held by controlling members of the control group that are minorities, women or small/entrepreneurial business principals. The composition of the principals of the control group determines whether the applicant qualifies for bidding credits, installment payments and reduced upfront payments. The minimum 15 percent may be held unconditionally, or in the form of options, provided these options are exercisable at any time, solely at the holder's discretion, and at an exercise price less than or equal to the current market valuation of the underlying shares at the time of filing FCC Form 175 (short-form). The remaining 10 percent of the applicant's equity may be held in the form of either stock options or shares, and we will allow certain investors that are not women, minorities or small business/entrepreneurial principals to hold interests in such shares or options that are part of the control group's equity. Thus, the 10 percent portion may be any combination of the following: (1) stock options or shares held by investors in the control group that are women, minorities, small businesses, or entrepreneurs; (2) management stock options or shares held by individuals who are members of an applicant's management team (which could include individuals who are not minorities or women or who have affiliates that exceed the entrepreneurs' blocks or small business size standards); (3) shares or stock options held by existing investors of businesses in the control group that have been operating and earning revenues for two years prior to December 31, 1994; or (4) shares or stock options held by noncontrolling institutional investors. Three years after the date of license grant, the 25 percent minimum equity requirement would be reduced so that the principals in the control group would be required to retain voting control and at least a 10 percent equity interest in the licensee.
- Modify the alternative equity option available to applicants controlled by women and/or minorities (*viz.*, a 50.1 percent equity investment in the applicant with other non-attributable investor(s) holding no more than a 49.9 percent interest) to provide

⁶ Our rule amendments are attached as Appendix B. We delegate to the appropriate Bureau the authority to revise and create forms as needed to ensure that PCS applicants comply with our rules. See 47 C.F.R. §§ 0.201-0.204. See also 47 U.S.C. § 155(c).

that 30 percent of the applicant's equity must be held by principals of the control group that are minorities or women, and may also be in the form of options as described above. The remaining 20.1 percent may be made up of shares and/or options held by investors that are not minorities or women under the same criteria described above. After three years from the date of license grant, the women and/or minority principals of the control group must hold at least 20 percent of the total equity in the licensee and voting control.

- Amend our rules to provide that when the sole member of the control group is a firm or corporation that was operating and earning revenues for at least two years prior to December 31, 1994, qualifying principals will only be required to own a 10 percent equity interest in the applicant from the outset (or 20 percent if the 49.9 percent investor option available to women and/or minorities is used).
- Exempt applicants that are small, publicly-traded corporations with widely dispersed voting stock ownership from the control group requirement if the company is not controlled by any entity or group of shareholders holding a controlling interest in the company's voting stock. As the applicant, such a company therefore must own all the equity and voting stock to qualify for the exemption. Amend our rule to define a small, publicly-traded corporation with widely dispersed voting power as a business entity in which no person (as defined by the Federal securities laws) (1) owns more than 15 percent of the equity; or (2) has the power to control the election of more than 15 percent of the members of the board of directors.
- Simplify our rules by eliminating (a) the \$100 million personal net worth cap for all attributable investors investing in applicants for entrepreneurs' block licenses, and (b) the \$40 million dollar personal net worth cap for all attributable investors in an applicant seeking to qualify as a small business.
- Create a limited exception to our affiliation rules that would exclude the gross revenues and assets of affiliates controlled by minority investors or enterprises that are members of the applicant's control group from our financial caps that are the entry criteria for the entrepreneurs' block and are utilized to qualify as a small business. Exempt applicants affiliated with Alaska Native Corporations and Indian tribes from the same financial caps, except create a rebuttable presumption that revenues derived from gaming, pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.*, will be included in determining whether such an applicant qualifies as an "entrepreneur" and as a "small business."
- Clarify that persons or entities that are affiliates of one another or that have an "identity of interests" will be treated as though they were one person or entity and their ownership interests aggregated for purposes of determining compliance with our equity requirements. Thus, for example, if two entities have formed a joint venture or a consortium to apply for PCS licenses in the A and B frequency blocks, they will

be treated as a single entity and their separate interests will be aggregated when investing in the same entrepreneurs' block applicant.

- Define control of the applicant for purposes of entrepreneurs' block licenses by looking at traditional standards for determining *de facto* and *de jure* control and, in addition, provide guidelines for establishing and maintaining *de facto* control.
- Clarify the scope of permissible management agreements between noncontrolling investors (or others) and entrepreneurs' block applicants.
- Clarify that rights of first refusal, supermajority voting rights and other such "standard terms" used to protect investments of noncontrolling shareholders do not individually trigger transfers of control. The Commission will review such provisions in the aggregate, in light of the totality of the circumstances, to determine whether they will be deemed to confer and/or relinquish control. A critical factor in such analysis will be whether the provisions involved vary from the recognized standard under our case law. Under no circumstances may such provisions operate to force the designated entity to transfer its equity or control.
- Amend the attribution rules by raising the amount of voting interest that qualifies as nonattributable from 15 percent to 25 percent. This change allows existing companies with established financial structures the opportunity to compete in the entrepreneurs' blocks, and does not sacrifice the objective of retaining control in the control group (which must still retain at least a 50.1 percent voting interest). Clarify that under our amended rule, the maximum permissible nonattributable ownership interest that a noncontrolling investor may hold is equal to, but no greater than, 25 percent of the total equity of the applicant (which may include no more than 25 percent of the applicant's voting stock).
- Clarify that rights of first refusal will not be considered on a fully-diluted basis for purposes of calculating the ownership levels held by investors in an applicant. Also, stock "puts" exercisable after the expiration of the license holding period are generally not attributable to shareholders holding such options until their exercise date. Stock "calls" held by investors, on the other hand, are immediately attributable holdings.
- Maintain bidding credits at current levels.
- Offer installment payments for all entrepreneurs' blocks licensees, regardless of applicant or BTA size. For companies that are not minority or women-owned and have revenues between \$75 million and \$125 million, create a new class of installment payments, with slightly less generous terms.
- Extend the period in which small businesses owned by minorities and/or women are

allowed to make interest-only payments from five to six years.

- Clarify that we will permit entrepreneurs' block licensees to transfer entrepreneurs' block licenses after their third year of ownership, to other entrepreneurs' block licensees even if the licensee has grown beyond our size limitations to qualify as an entrepreneur or small business. In years four and five, and subject to applicable unjust enrichment provisions, entrepreneurs' block licensees may transfer licenses to any entity that either holds other entrepreneurs' block licenses or that satisfies the eligibility criteria at the time of transfer.
- Retain the rule that limits the number of entrepreneurs' block licenses any single entity may purchase at 10 percent of the total entrepreneurs' block licenses.
- Clarify the definition of "members of minority groups" to be consistent with the definition of minority used in other contexts.
- Provide guidance on issues associated with an entrepreneurs' block licensee's financial insolvency or in the event of default on installment payments to the Commission.

II. BACKGROUND

7. On August 10, 1993, the Omnibus Budget Reconciliation Act of 1993 (the Budget Act) added Section 309(j) to the Communications Act of 1934, as amended, 47 U.S.C. § 309(j).⁷ This section gives the Commission express authority to employ competitive bidding procedures to select among mutually exclusive applications for certain initial licenses. In the *Second Report and Order* in this proceeding, the Commission exercised its authority by determining that broadband PCS licenses should be awarded through competitive bidding and prescribed a broad menu of competitive bidding rules and procedures to be used for all auctionable services.⁸ We re-examined certain aspects of these general rules and procedures in the *Second Memorandum Opinion and Order* (released August 15, 1994).⁹

8. In the *Fifth Report and Order*, we established specific competitive bidding rules

⁷ See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002 (a), 107 Stat. 388 (1993).

⁸ *Second Report and Order* in PP Docket No. 93-253, 9 FCC Rcd 2348 (1994) (*Second Report and Order*).

⁹ *Second Memorandum Opinion and Order* in PP Docket No. 93-253, FCC-94-215 (released Aug. 15, 1994) (*Second Memorandum Opinion and Order*).

for broadband PCS.¹⁰ We also decided in the *Fifth Report and Order* to conduct three separate auctions for broadband PCS licenses: the first for the 99 available broadband PCS licenses in MTA blocks A and B; the second for the 986 broadband PCS licenses in BTA blocks C and F (the "entrepreneurs' blocks"); and, the third for the remaining 986 broadband PCS licenses in BTA blocks D and E.¹¹ The rules adopted in the *Fifth Report and Order* address auction methodology, application and payment procedures, and other regulatory safeguards.¹² In addition, we established the entrepreneurs' block licenses to insulate smaller applicants from bidding against very large, well-financed entities.¹³ We also supplemented our entrepreneurs' block regulations with other special provisions designed to offer meaningful opportunities for designated entity participation in broadband PCS. In particular, we made bidding credits and installment payment options available to those entrepreneurs and designated entities that, according to the record of this proceeding, have demonstrated historic difficulties accessing capital.¹⁴ Additionally, we extended the benefits of our tax certificate policies to broadband PCS minority and women applicants to promote participation by these designated entities in the service.¹⁵ We also adopted attribution rules that

¹⁰ The *Third Report and Order* in this docket established competitive bidding rules for narrowband PCS. See *Third Report and Order* in PP Docket No. 93-253, 9 FCC Rcd 2941 (1993), *recon. Third Memorandum Opinion and Order and Further Notice of Proposed Rule Making*, FCC 94-219 (released Aug. 17, 1994). Also, in a recent *Order*, we reconsidered on our own motion several aspects of our narrowband PCS competitive bidding rules. See *Order on Reconsideration* in PP Docket No. 93-253, FCC 94-240 (released Sept. 22, 1994) (*Order on Reconsideration*). The *Fourth Report and Order* in this docket established competitive bidding rules for the Interactive Video and Data Service (IVDS). See *Fourth Report and Order*, 9 FCC Rcd 2330 (1994).

¹¹ See *Fifth Report and Order*, FCC 94-178, at ¶ 37. When we crafted our broadband PCS licensing rules in Gen. Docket 90-314, we divided the licensed broadband PCS spectrum into three 30 MHz blocks (A, B, and C) and three 10 MHz blocks (D, E, and F). We also designated two different service areas: 493 Basic Trading Areas (BTAs) and 51 Major Trading Areas (MTAs). The 493 BTAs and 51 MTAs used in our broadband PCS licensing rules have been adapted from the Rand McNally 1992 Commercial Atlas and Marketing Guide, 123rd Edition, at 38-39. See *Second Report and Order* in Gen. Docket No. 90-314, 8 FCC Rcd 7700 (1993), *recon. Memorandum Opinion and Order*, 9 FCC Rcd 4957 (1994), *Order on Reconsideration*, 9 FCC Rcd 4441 (1994), *on further recon. Third Memorandum Opinion and Order*, FCC 94-265 (released Oct. 19, 1994).

¹² *Fifth Report and Order*, FCC 94-178, at ¶¶ 24-91.

¹³ *Id.* at ¶¶ 113-118.

¹⁴ *Id.* at ¶¶ 130-141.

¹⁵ *Id.* at ¶¶ 142-145.

accommodate passive equity investment in designated entities, but ensure that control of the applicant resides in the intended beneficiaries of the special provisions.¹⁶ Furthermore, we reduced the upfront payment required of bidders in the entrepreneurs' block.¹⁷ Finally, we established partitioning rules to allow rural telephone companies to expedite the availability of offerings in rural areas.¹⁸

9. After the release of the *Fifth Report and Order*, we adopted on our own motion an *Order on Reconsideration*, which made two changes to our competitive bidding rules for broadband PCS concerning our attribution and affiliation requirements.¹⁹ Specifically, we exempted from entrepreneurs' block affiliation rules, entities owned and controlled by Indian tribes or Alaska Regional or Village Corporations. We also decided to permit nonattributable investors in a corporate applicant to own up to 15 percent of the corporation's voting stock, provided that the applicant's control group retains at least 25 percent of the equity and 50.1 percent of the voting stock. We applied this change to investors in both publicly-traded corporate applicants and applicants that are not publicly-traded. Most recently, however, we adopted a *Fourth Memorandum Opinion and Order* in this docket, in which we addressed issues raised in petitions for reconsideration of the *Fifth Report and Order* that involve our broadband PCS competitive bidding rules governing auction methodology, application and payment procedures, and regulatory safeguards to prevent anticompetitive practices among bidders.²⁰ In the instant *Fifth Memorandum Opinion and Order*, we resolve remaining matters in the petitions for reconsideration concerning our entrepreneurs' block rules, including our provisions for designated entities.

III. DISCUSSION

A. Concept of Entrepreneurs' Blocks

1. Authority and Amount of Spectrum

¹⁶ *Id.* at ¶¶ 158-168.

¹⁷ *Id.* at ¶¶ 154-155.

¹⁸ *Id.* at ¶¶ 158-153.

¹⁹ See *Order on Reconsideration*, PP Docket No. 93-253, FCC 94-217 (released Aug. 15, 1994).

²⁰ See *Fourth Memorandum Opinion and Order* in PP Docket 93-253, FCC 94-246 (released Oct. 19, 1994). On November 17, 1994, we released an *Order*, which modified certain aspects of our stopping and anti-collusion rules, and preserved the right to change the timing of the entrepreneurs' block auctions. See *Memorandum Opinion and Order* in PP Docket No 93-253, FCC 94-295 (released Nov. 17, 1994).

10. Background. In the *Fifth Report and Order*, the Commission designated a portion of the broadband PCS spectrum available at auction for qualified entrepreneurs.²¹ Eligible entrepreneurs can bid on BTA licenses in the C (30 MHz) and F (10 MHz) blocks.²² In addition, entrepreneurs who fall within one of the four statutory "designated entity" categories (*i.e.*, small businesses, rural telephone companies, and businesses owned by members of minority groups and/or women) are eligible for additional benefits to enable them to acquire broadband PCS licenses.²³

11. Petitions. The Association of Independent Designated Entities (AIDE) contends that the Commission exceeded its statutory authority in establishing the entrepreneurs' blocks because they potentially benefit entities that fall outside of the four designated entity groups enumerated by Congress.²⁴ AIDE maintains that the entrepreneurs' blocks reduce meaningful opportunities for smaller designated entities to participate in PCS by forcing them to bid against "entrepreneurs" that may not qualify as designated entities. AIDE further argues that the Commission impermissibly restricted the availability of financial incentives to designated entities for use only in Blocks C and F.²⁵ Instead, AIDE requests that the Commission make its financial incentives for designated entities available for every auctionable broadband PCS license.²⁶ The United States Interactive & Microwave Television Association and the United States Independent Personal Communication Association (USIMTA/USIPCA) (filing jointly) support the entrepreneurs' block concept, but encourage the Commission to provide additional broadband PCS spectrum exclusively for designated entities.²⁷ Citing Congress' concern about the historical impediments that small, minority and women-owned businesses have encountered, USIMTA/USIPCA maintain that "it would not be unreasonable" to set

²¹ *Fifth Report and Order*, FCC 94-178 at ¶¶ 118-129. An applicant's eligibility to participate in the entrepreneurs' blocks is based on its size as measured by specified financial caps. See discussion *infra* at ¶¶ 17-45.

²² *Id.* at ¶¶ 121, 127.

²³ *Id.* at ¶¶ 130-155. See discussion *infra* at ¶¶ 97-113.

²⁴ AIDE Petition for Reconsideration (AIDE Petition), filed Aug. 22, 1994, at 13-15. AIDE maintains that small business consortia, passive investors, and entrepreneurs that meet the eligibility restrictions would improperly benefit under the Commission's entrepreneur block scheme.

²⁵ *Id.* at 16-17.

²⁶ *Id.* at 17.

²⁷ United States Interactive & Microwave Television Association and United States Independent Personal Communication Association Petition for Reconsideration (USIMTA/USIPCA Petition), filed Aug. 22, 1994, at 3.

aside up to one-half of the available PCS spectrum.²⁸ Finally, GTE Service Corporation (GTE) requests the Commission eliminate the entrepreneurs' blocks and instead allow designated entities to "partner" with major investors and be eligible for more generous bidding credits.²⁹ Additionally, GTE contends that our entrepreneurs' block scheme unduly restricts the ability of cellular carriers to participate in the provision of PCS.³⁰ Specifically, GTE contends that this scheme, combined with the PCS-cellular crossownership restrictions, will effectively limit eligibility for many cellular operators to 20 MHz of spectrum on the D and E blocks.³¹

12. **Decision.** Contrary to AIDE's contention, it is within our statutory authority to establish the entrepreneurs' blocks, for which parties other than designated entities are eligible to apply for or invest in, and we believe that this scheme will provide meaningful opportunities for designated entities to participate in the provision of broadband PCS. Accordingly, we will retain the entrepreneurs' block structure set forth in the *Fifth Report and Order*. In establishing a competitive bidding process for the provision of spectrum-based services, Congress gave the Commission broad authority to adopt bidding procedures and policies, so long as certain objectives are fulfilled. Specifically, Congress mandated that the Commission "promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women."³² Thus, the language of the statute allows us to consider other entities in order to ensure that licenses are widely dispersed among a variety of licensees,³³ so long as we also, among other statutory objectives, ensure that designated entities are given

²⁸ *Id.* at 3-4.

²⁹ GTE Service Corporation Petition for Reconsideration (GTE Petition), filed Aug. 22, 1994, at 10-11. (Under GTE's proposal, designated entities would be eligible for a sliding scale of bidding credits that corresponds to the level of outside investment in the applicant.)

³⁰ GTE Petition at 2.

³¹ GTE Petition at 4.

³² See 47 U.S.C. § 309(j)(3)(B).

³³ We believe the term "including" used in Section 309(j)(3)(B) of the Communications Act is a term of enlargement, not limitation, intended to convey that other entities are includable together with, rather than excluded from the categories of designated entities so long as legislative intent is satisfied. See 2A Sutherland, Statutory Construction § 47.23 (4th ed. 1984).

the opportunity to participate in the provision of broadband PCS.³⁴

13. The entrepreneurs' blocks approach adopted in our *Fifth Report and Order* achieves the statute's objectives by creating significant opportunities for designated entities and other entrepreneurs to ensure that licenses are widely disbursed to entities that can rapidly deploy broadband PCS services. As discussed more fully *infra*, we are making additional changes to our rules (including eliminating the personal net worth cap and liberalizing our affiliation rules for individual minority investors) to help designated entities overcome particularly intractable historic difficulties in accessing capital. To satisfy Congress' directive, we established the entrepreneurs' blocks in conjunction with a package of benefits that are narrowly tailored to provide significant opportunities to designated entities and those entrepreneurs that lack access to capital.

14. We disagree with USIMTA/USIPCA who requests that the Commission provide additional spectrum for entrepreneurs' blocks.³⁵ Our existing allotment, which comprises one-third of the total amount of licensed broadband PCS spectrum, is sufficient to ensure that designated entities and other entrepreneurs have significant opportunities to participate in the PCS marketplace. We therefore deny petitioners' various requests for modification to our entrepreneurs' block provisions.

15. We also reject AIDE's proposal to make bidding credits and other special provisions available to all designated entities bidding on all of the broadband PCS frequency blocks (not just the C and F blocks).³⁶ Our existing approach of limiting these special provisions to the entrepreneurs' blocks, coupled with changes we are making today are narrowly tailored to meet Congress' objective of ensuring that designated entities have the opportunity to participate in broadband PCS. The record does not support broadening this relief to include additional frequency blocks, nor is there substantial support for broadening the availability of special provisions generally.

16. Similarly, we do not accept GTE's argument that we should do away with the entrepreneurs' blocks and instead offer bidding credits as well as other special provisions across all broadband PCS frequency blocks. As we already explained in the *Fifth Report and Order*, in our judgment we do not anticipate designated entities to realize meaningful opportunities for participation in broadband PCS unless we supplement bidding credits and other special provisions with a limitation on the size of the entities designated entities will

³⁴ 47 U.S.C. § 309(j)(4)(D).

³⁵ USIMTA/USIPCA petition at 3-4.

³⁶ See Omnipoint Communications Inc. Opposition, filed Sept. 9, 1994, at 7-12; Columbia PCS Opposition, filed Sept. 9, 1994, at 2-3; Black Entertainment Television Holdings, Inc. Opposition, filed Sept. 9, 1994, at 7 (opposing GTE's proposal to eliminate entrepreneurs' blocks).

bid against. Without the insulation of the entrepreneurs' block, the record strongly supports the conclusion that measures such as bidding credits will prove ineffective for broadband PCS. We also disagree with GTE's contention that our entrepreneurs' block plan unduly restricts the ability of cellular carriers to provide PCS. We believe that the public interest benefits of establishing an entrepreneurs' block outweigh the need to provide additional opportunities for cellular operators as GTE describes. Moreover, our rules do allow cellular operators such as GTE to take noncontrolling interests in designated entities and gain opportunities in the entrepreneurs' block. We have recently relaxed the cellular-PCS crossownership rules to facilitate such opportunities.³⁷

2. Gross Revenues and Other Financial Caps

a. Gross Revenues and Total Assets

17. Background. In the *Fifth Report and Order*, the Commission established eligibility rules for the entrepreneurs' blocks based, in part, on an applicant's gross revenues. To bid in the entrepreneurs' blocks, the applicant, its attributable investors (*i.e.*, members of its control group and investors holding 25 percent or more of the applicant's total equity), and their respective affiliates must cumulatively have gross revenues of less than \$125 million in each of the last two years and total assets of less than \$500 million at the time the applicant files its Form 175 ("short-form" application).³⁸ We pointed out in the *Fifth Report and Order* that the \$125 million gross revenues limit corresponds roughly to the Commission's definition of a "Tier 2," or medium-sized local exchange carrier (LEC) and would include virtually all of the independently-owned rural telephone companies.³⁹ Additionally, to qualify for the special provisions accorded small businesses, the applicant (including attributable investors and affiliates), must cumulatively have less than \$40 million in gross revenues averaged over the last three years.

18. Petitions. MasTec, Inc. (MasTec) argues that the Commission's gross revenues test is misleading when applied across the board to all applicants because the gross revenues of investors operating in different industries will not convey the same information about size or the ability to attract capital.⁴⁰ The Telephone Electronics Corporation (TEC) notes that the discontinuity between gross revenues and the ability to attract capital is particularly acute

³⁷ See *Third Memorandum Opinion and Order* in Gen. Docket 90-314, FCC 94-265 (released Oct. 19, 1994), at ¶¶ 33-34.

³⁸ *Fifth Report and Order*, FCC 94-178 at ¶ 121. See also 47 C.F.R. § 24.709(a)(1).

³⁹ *Fifth Report and Order*, FCC 94-178 at ¶ 123 n. 99. See also 47 C.F.R. §§ 32.11 (a), (e) (Tier 2 definition).

⁴⁰ MasTec, Incorporated Petition for Reconsideration (MasTec Petition), filed Aug. 22, 1994, at ¶ 7.

where the entity in question is involved in a volume-intensive business with high operating costs and small profit margins (such as TEC's interexchange resale carriers).⁴¹ Accordingly, TEC argues that the Commission's gross revenue criteria are not rationally related to their stated purpose and should be eliminated.⁴²

19. Several petitioners request that the Commission modify its gross revenues test, but disagree whether the limits should be liberalized or made more restrictive. For example, MasTec encourages the Commission to modify its designated entity criteria to include those minority businesses which are too small to compete outside of the entrepreneur blocks, but too large to qualify for the entrepreneurs' blocks.⁴³ The National Paging and Personal Communications Association (NPPCA) and USIMTA/USIPCA urge the Commission to reduce the gross revenues cap.⁴⁴ Specifically, NPPCA requests that the Commission reduce the gross revenues limit to \$75 million and the total assets limit to \$250 million.⁴⁵ NPPCA maintains that these modifications are needed because the present size standards encourage mid-sized companies to refrain from bidding in competitively unrestricted auctions and to compete, instead, against designated entities in the entrepreneurs' block auctions.⁴⁶

20. As an alternative to increasing the gross revenues cap, Omnipoint Communications, Inc. (Omnipoint) and the National Association of Black Owned Broadcasters, Inc. (NABOB) argue that the "aggregation rule," under which the Commission will aggregate the gross revenues and total assets of the applicant, attributable investors and all affiliates in order to determine whether the applicant complies with the financial caps,⁴⁷ should be eliminated.⁴⁸ Omnipoint contends that a "multiplier approach," employed in other areas of Commission practice, should be used to determine compliance with the financial

⁴¹ Telephone Electronics Corporation Petition for Reconsideration (TEC Petition), filed Aug. 22, 1994, at 18-23.

⁴² *Id.*

⁴³ MasTec Petition at ¶ 6.

⁴⁴ National Paging & Personal Communications Association Petition for Reconsideration (NPPCA Petition), filed Aug. 22, 1994, at 6-7; USIMTA/USIPCA Petition at 5-6.

⁴⁵ NPPCA Petition at 7.

⁴⁶ *Id.*

⁴⁷ *Fifth Report and Order*, FCC 94-178 at ¶ 121; *see also id.* at ¶¶ 158-168 (discussing attribution rules for the entrepreneurs' blocks).

⁴⁸ NABOB Petition for Reconsideration (NABOB Petition), filed Aug. 15, 1994, at 4-5; Omnipoint Petition for Reconsideration (Omnipoint Petition), filed Aug. 22, 1994, at 6-8.

caps.⁴⁹ Under this approach, the revenues and assets attributed to an applicant would be based on the revenues and assets of each attributable investor, multiplied by the percentage ownership interest in the applicant held by that investor.

21. Cellular Telecommunications Industry Association (CTIA) requests that the Commission prescribe specific dates for measuring the financial thresholds to determine entrepreneurs' block eligibility.⁵⁰ Specifically, CTIA requests clarification that gross revenues will be measured from the two years preceding September 23, 1993.⁵¹ CTIA maintains that our current rules, referring only to the "last two calendar years," are ambiguous.⁵²

22. Black Entertainment Television Holdings, Inc. (BET), Roland A. Hernandez (Hernandez), Columbia PCS, Inc. (Columbia PCS), and Omnipoint all request that we clarify our rules governing growth by entrepreneurs' block licensees and their attributable investors during the five-year holding period.⁵³ Our rule, promulgated in the *Fifth Report and Order*, states that "[a]ny licensee . . . shall maintain its eligibility [for the entrepreneurs' blocks] until at least five years from the date of initial license grant, except that increased gross revenues, increased total assets or personal net worth due to non-attributable equity investments . . . , debt financing, revenue from operations, business development or expanded service shall not be considered."⁵⁴ Petitioners ask us to clarify whether the following types of growth in assets, revenues, or personal net worth would result in a licensee's forfeiture of eligibility: (1) growth of applicant beyond the size limits by means of mergers or takeovers; (2) any control group member's growth beyond the size limits by means of appreciation of attributable investments or growth of attributable businesses; and (3)

⁴⁹ Omnipoint Petition at 7-8.

⁵⁰ Cellular Telecommunications Industry Association Petition for Reconsideration (CTIA Petition), filed Aug. 22, 1994, at 10-11.

⁵¹ *Id.* at 6. September 23, 1993 is the date the Commission adopted its broadband PCS service rules order. See *Second Report and Order* in Gen. Docket No. 90-314, 8 FCC Rcd 7700 (1993).

⁵² CTIA Petition at 6. See 47 C.F.R. § 24.709(a)(1); *Fifth Report and Order*, FCC 94-178 at ¶ 156.

⁵³ BET Petition for Reconsideration, filed Aug. 22, 1994, at 17 (BET Petition); Hernandez Petition for Reconsideration, filed Aug. 22, 1994, at 4 (Hernandez Petition); Columbia, PCS Petition for Reconsideration, filed Aug. 22, 1994, at 4 (Columbia PCS Petition) (We note that Columbia PCS has changed its corporate name to "GO Communications, Inc."); Omnipoint Petition at 3.

⁵⁴ See 47 C.F.R. § 24.709(a)(3).

affiliates' or attributable investors' growth beyond the size limits, by means of mergers or takeovers.

23. Decision. We will retain a single gross revenues size standard, which is an established method for determining size eligibility for various kinds of federal programs that aid smaller businesses.⁵⁵ We anticipate that applicants will, in many instances, have several investors and that these investors will be drawn from various segments of the economy rather than from a single industry group such as telecommunications. The financial characteristics of these industry groups will vary widely,⁵⁶ and keying the size standard to each investor entity in question is thus administratively unworkable. A gross revenues test is a clear measure for determining the size of a business, and will produce the most equitable result for entrepreneurs' block applicants as a whole.

24. We will also retain the existing gross revenues and total assets limits for the entrepreneurs' blocks and for small business size status. We find the arguments of those who oppose any reduction in the gross revenues limit most persuasive.⁵⁷ BET, for example, supports the balance it perceives the Commission has struck between small and mid-sized firms by adopting a \$125 million gross revenues test. We agree with BET that a decrease in the gross revenue limit would eliminate many mid-sized firms from entrepreneurs' block participation while not substantially raising the level of competition in the blocks. Conversely, an increase in the gross revenue limit would not necessarily provide for greater capital access for applicants. We believe our \$125 million gross revenues test represents an appropriate benchmark for entry into the entrepreneurs' block, given our interest in including firms that, while not large in comparison to other telecommunications companies, are likely to have the financial resources to compete against larger competitors on the MTA blocks.

⁵⁵ All federal agencies base eligibility of small businesses (or minority small businesses) to bid on a government contract set aside on the (single) size standard set forth in the solicitation. *See, e.g.*, 13 C.F.R. § 121.902. Eligibility for financial assistance from Small Business Investment Companies sponsored by the Small Business Administration is determined by a single size standard applicable across the board to all applicants or by the size standard applicable to the applicant's primary business activity. *See* 13 C.F.R. § 121.802. Size status for receiving surety guarantees or assistance under SBA's Small Business Innovation Research Program is also determined by a single, applicant-wide size standard. *See* 13 C.F.R. § 121.802(a)(3) and 121.1202, respectively.

⁵⁶ The *Standard Industrial Classification Manual*, upon which the Small Business Administration bases its industry size standards, identifies over 800 industry groups to which specific Standard Industrial Classification Codes are assigned. *Standard Industrial Classification Code Manual*, Office of Management and Budget, Executive Office of the President, 1987 ed.

⁵⁷ Omnipoint Petition at 6-8; BET Opposition at 17-18.

25. In addition, we will retain the aggregation methodology to assess the size of an applicant, with certain exceptions discussed *infra*. We reject NABOB's proposal to eliminate our aggregation rule and we cannot adopt Omnipoint's proposal to determine entrepreneurs' block eligibility and small business size status by separately evaluating the assets and revenues of each attributable investor. Aggregating the gross revenues and total assets of all attributable investors in and affiliates of the applicant is central to an accurate size determination, and consistent with the Small Business Administration's (SBA's) approach to similar determinations.⁵⁸ Viewing gross revenues and assets of each investor in isolation could result in very large entities bidding for these licenses. We reject Omnipoint's suggestion that a multiplier approach be used to make these size determinations. A multiplier is appropriate to arrive at an accurate determination of ownership interest in an applicant or licensee.⁵⁹ In this context, however, we are not concerned with ownership, but instead seek to make a financially-based size determination in order to assess whether an applicant is eligible for significant governmental benefits.

26. We agree with CTIA that clarification is required concerning the two-year period in order to provide applicants with a uniform way to measure gross revenues for purposes of qualifying for the entrepreneurs' blocks.⁶⁰ For the initial entrepreneurs' block auctions involving broadband PCS, companies should use audited financial statements for each of the two calendar years ending December 31, 1993 or, if audited financial statements are not prepared on a calendar-year basis, data from audited financial statements for their two most recently completed fiscal years. Therefore, if applicants and their investors do not have audited statements ending on December 31, 1993, they will have to use one annual statement ending at a later date (sometime in 1994). This approach will enable the Commission to obtain timely financial data while providing applicants with some degree of flexibility in their financial reporting practices. For subsequent entrepreneurs' block auctions (*i.e.*, license re-auctioning), we will require applicants to use their last two annual audited financial statements to determine compliance with the financial caps. Newly-formed companies should use the audited financial statements of their predecessors in interests, or financial statements current as of the time their short-form application is filed that are certified by the applicant as accurate.

27. Clarification is also needed with respect to the issue of growth and takeovers of an entrepreneurs' block licensee or its investors. We clarify our rules to the extent necessary to indicate what types of growth will jeopardize an applicant's continued eligibility as an entrepreneurs' block licensee during the holding period. A licensee could not maintain its eligibility if a member of its control group were itself taken over, effecting a transfer of control of the licensee during the license holding period. However, an attributable investor

⁵⁸ *Fifth Report and Order*, FCC 94-178, ¶¶ 158, 201-207.

⁵⁹ *See, e.g.*, ¶ 71 *infra*.

⁶⁰ CTIA Petition at 10. *See also* MasTec Opposition at 16.

would not affect the licensee's continuing eligibility for the entrepreneurs' block if another of the investor's affiliates grew or its investments appreciated during the holding period. Our rules consider such growth either to be revenue from the investor's operations or to be normal business development and, in either case, fully permissible. If an attributable investor is taken over or purchased by another entity, the other entity steps into the shoes of the original investor and its assets and revenues will be considered under the continued eligibility rule. However, if an affiliate of the applicant is taken over by (or sold to) another entity, the other entity's assets and revenues would not be considered, so long as no new affiliation arrangement between the applicant and the other entity is created by the takeover or sale. That is, in most cases, the affiliation with the applicant would be severed by such a takeover and the gain from the sale of the affiliates' assets would have already been taken into account by the initial consideration of such assets at the time of application.⁶¹ We emphasize that we have a strong interest in seeing entrepreneurs grow and succeed in the PCS marketplace. Thus, normal projected growth of gross revenues and assets, or growth such as would occur as a result of a control group member's attributable investments appreciating, or as a result of a licensee acquiring additional licenses (*see* discussion *infra* at paragraph 126 on holding period) would not generally jeopardize continued eligibility as an entrepreneurs' block licensee.

b. Personal Net Worth

28. Background. In addition to the gross revenues and assets caps, the *Fifth Report and Order* also established a personal net worth limit to determine eligibility for bidding in the entrepreneurs' blocks.⁶² The current rules require that persons that are applicants, attributable investors in the applicant and all of their respective affiliates who are themselves individuals each have less than \$100 million in personal net worth. Additionally, the rules require that if the applicant seeks to qualify as a small business each individual in the control group, attributable investors and all affiliates who are individuals, must have less than \$40 million in personal net worth.⁶³

29. Petitions. BET requests the Commission relax the personal net worth limits applicable to attributable investors in minority-owned firms.⁶⁴ BET argues that eliminating

⁶¹ Thus, for example, if Applicant A is affiliated with Corporation B and that corporation sells its business to Corporation C, the income derived from the sale would not affect Applicant A's continued eligibility, unless a new affiliation arrangement arises between Applicant A and Corporation C.

⁶² See *Fifth Report and Order*, FCC 94-178 at ¶ 115; 47 C.F.R. § 24.709(a)(2).

⁶³ *Id.* See also 47 C.F.R. § 24.720 (defining "small business" for purposes of bidding on the entrepreneurs' blocks).

⁶⁴ BET Petition at 16-17.

the personal net worth standard would help ensure participation by minority and women-owned businesses by allowing successful individuals to bring their experience to bear in the PCS marketplace.⁶⁵ At the same time, BET argues that this measure would ensure that relatively small, minority and women-owned enterprises have a meaningful opportunity to participate in the provision of PCS.⁶⁶ TEC also requests the Commission liberalize its personal net worth standard to permit an attributable individual investor to hold up to \$125 million in personal net worth.⁶⁷ MasTec claims that net worth/net revenue definitions are overly restrictive and will exclude those minority businesses that can best survive and succeed in the competitive PCS market.⁶⁸

30. Decision. We will eliminate the personal net worth limits (both for the entrepreneurs' blocks and for small business size status) for all applicants, attributable investors, and affiliates. The obstacles faced by minorities and minority-controlled businesses in raising capital are well-documented in this proceeding and are not necessarily confined to minorities with limited personal net worth.⁶⁹ Therefore, we agree with the view that the personal net worth requirements should be eliminated in the case of minority-controlled applicants seeking to qualify for entrepreneurs' block licenses. However, rather than eliminate the personal net worth limits for minorities only, we will eliminate the requirement for all applicants because personal net worth limits are difficult to apply and enforce and may be easily manipulated. We do not believe that eliminating the personal net worth limits will facilitate significant encroachment by "deep pockets" that can be accessed by wealthy individuals through affiliated entities because, in those instances where access to such resources would create an unfair advantage, the affiliation rules, discussed *infra*, will continue to apply and require that such an entity's assets and revenues be included in determining an applicant's size. Thus, we emphasize that we believe the affiliation rules make the personal net worth rules largely unnecessary since most wealthy individuals are likely to have their wealth closely tied to ownership of another business.

c. Treatment of Affiliates

31. Background. The *Fifth Report and Order* sets forth specific affiliation rules for identifying all individuals and entities whose gross revenues and assets must be aggregated with those of the applicant in determining whether the applicant exceeds the financial caps

⁶⁵ See *id.*; see also BET *ex parte* comments, filed Nov. 3, 1994, at 4.

⁶⁶ BET *ex parte* comments, filed Nov. 3, 1994, at 4.

⁶⁷ TEC Petition at 23-25.

⁶⁸ MasTec Petition at 2.

⁶⁹ See, e.g., *Fifth Report and Order*, FCC 94-178 at ¶ 100.

for the entrepreneurs' blocks (or for small business size status).⁷⁰ The affiliation rules were adapted from those used by the SBA for purposes of assessing size status and consequent eligibility to participate in SBA's loan, procurement and minority enterprise programs.

32. Specifically, our rules identify which individuals or entities will be found to control or be controlled by the applicant or an attributable investor by specifying which ownership interests or other criteria will give rise to a finding of control and consequent affiliation. In the August 15, 1994 *Order on Reconsideration* (discussed *supra* at paragraph nine), we exempted Indian tribes and Alaska Regional and Village Corporations (hereafter "Indian tribes") from the affiliation rules for purposes of determining eligibility to participate in bidding on the entrepreneurs' blocks.⁷¹

33. Petitions. BET and others argue that we did not provide adequate notice or opportunity to comment on the possibility of the Commission adopting affiliation rules for all entrepreneurs' block participants (specifically, minorities and women).⁷² BET argues that we have thus violated the notice and comment requirements of the Administrative Procedure Act (APA), and that the Commission is required to issue a *Further Notice* prior to adopting the affiliation rules.⁷³ BET also contends that the affiliation rules add unnecessary complexity to the broadband auction rules and that they make it very difficult, if not impossible, for potential bidders to tailor their pre-existing business relationships and ownership structures to our eligibility requirements.

34. Several parties have filed petitions for reconsideration of our *Order on Reconsideration*.⁷⁴ On reconsideration of the *Fifth Report and Order*, several petitioners also

⁷⁰ *Fifth Report and Order*, FCC 94-178 at ¶¶ 201-207.

⁷¹ *Order on Reconsideration*, FCC 94-217 at ¶¶ 3-7. As we indicated in our *Order on Reconsideration*, we apply the term "Indian tribe" as it is statutorily defined in 25 U.S.C. § 450b(e) to include "any Indian tribe, band nation, or other organized groups or community, including any Alaska Native Village or regional corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act, which is recognized as eligible for special programs and services provided by the United States to Indians because of their status as Indians." *Id.* at ¶¶ 4 and n.7.

⁷² BET Petition at 19-22. *See also* AIDE Petition at 19-22; Minnesota Equal Access Network Services, Inc. and South Dakota Network, Inc., Comments and Partial Opposition (MEANS/SDN Opposition), filed Sept. 9, 1994, at 10-11.

⁷³ BET Petition at 20.

⁷⁴ *See* BET Petition for Reconsideration of *Order* (filed Sept. 21, 1994); Cook Inlet Region, Inc., Petition for Clarification (Cook Inlet Petition)(filed Aug. 22, 1994). *See also* AIDE Petition for Reconsideration (filed Sept. 21, 1994) (seeking reconsideration of voting

challenge the limited exemption granted to Indian tribes or request that generic exemptions be granted for other applicants.⁷⁵ BET and MasTec oppose any special treatment for a particular minority group, arguing that the exemption accorded Indian tribes creates an imbalance of bidding power in favor of tribally-owned entities and will skew the broadband PCS auction results. Cook Inlet Region, Inc. (Cook Inlet) argues that the exemption for Indian tribes should be expanded to encompass eligibility for treatment as a small business for purposes of bidding credits and installment payments because: (1) Indian tribes are congressionally recognized as particularly disadvantaged; (2) such an exemption applies when determining size status for SBA's programs; and, (3) substantial legal constraints with respect to tribal property and businesses preclude their use to raise capital or to cross-subsidize other tribally-owned entities.⁷⁶

35. More specifically, Cook Inlet asserts that Indian tribes and Native corporations deserve special treatment because they face legal constraints that differ from other minority-owned businesses.⁷⁷ According to Cook Inlet, Federal law prohibits Native corporations from pledging their stock as collateral for loans, issuing new stock to raise funds in traditional capital markets, or utilizing the majority of the revenues from their land holdings to invest in new enterprises.⁷⁸ Thus, Cook Inlet contends that Indian tribes and Native corporations should be exempt from both the affiliation rules and the small business test because Native corporations cannot utilize their assets or revenues to fund new business ventures in the same way other corporations can.⁷⁹ In reply, BET asserts that Alaska Regional Corporations still enjoy significantly greater access to capital than other minority-owned entities participating in the bidding for the entrepreneurs' block licenses despite any restrictions they might have on their assets.⁸⁰

36. TEC seeks an exemption from the affiliation rules for rural telephone companies, arguing that regulatory and corporate barriers prohibit small telephone companies like TEC from shifting broadband PCS costs to their affiliated resellers and that courts have found

equity change in *Order on Reconsideration*); AMP Opposition to Petition for Reconsideration (filed Oct. 17, 1994) (same).

⁷⁵ BET Petition at 5-6; MasTec Petition at 7-12.

⁷⁶ See Cook Inlet Petition at 1-2.

⁷⁷ Cook Inlet Opposition to Petition for Reconsideration (Cook Inlet Opposition), filed Oct. 14, 1994, at 1.

⁷⁸ *Id.*

⁷⁹ *Id.* at 1-2. See also Cook Inlet *ex parte* comments, filed Oct. 26, 1994, at 2.

⁸⁰ *Id.*

questions of affiliation to be irrelevant where such barriers to cross-subsidization exist.⁸¹ MEANS/SDN suggests a more narrowly tailored exception that would exempt centralized equal access providers (*i.e.*, a consortia of rural telephone companies that provide centralized equal access and other sophisticated information services) from the Commission's affiliation rules.⁸² MEANS/SDN argues that this modification would allow the consortia to bring their considerable expertise and efficiencies to bear in the deployment of broadband PCS.⁸³

37. Decision. After considering petitioners' various concerns, we will not eliminate the affiliation rules. As explained fully below, however, we create a limited exception to our affiliation rules that will apply when an attributable minority investor or enterprise in an applicant or an applicant's control group has controlling interests in other concerns. We also revise our treatment of Indian tribes under our affiliation rules to more narrowly tailor our application of these rules to the unique status of these minority groups.

38. As an initial matter, we do not believe that promulgation of the affiliation rules violated the notice and comment requirements of the Administrative Procedures Act. Our *Notice of Proposed Rule Making* in this docket⁸⁴ alerted petitioners to the fact that the Commission was considering SBA's size standards which, by their terms (as set forth in the *Notice*), incorporate the concept of affiliation in determining a firm's small business size status.⁸⁵ The question of affiliation is integral to the concept of size status, by whatever means size status is assessed. Without affiliation rules, large firms may unfairly avail themselves of the preferences intended for small businesses and other designated entities since they have an incentive to create subsidiaries (that would have access to the parent's substantial resources) to compete against *bona fide* applicants in the entrepreneurs' blocks. Adoption of affiliation rules similar to those used by the SBA is a logical outgrowth of the Commission's decision to impose a gross revenues test for small businesses and to consider SBA's size standards in establishing that test.⁸⁶ It was reasonable for petitioners to conclude

⁸¹ TEC Petition at 14-15.

⁸² MEANS/SDN Opposition at 5-11.

⁸³ *Id.*

⁸⁴ See *Notice of Proposed Rule Making* in PP Docket No. 93-253, 8 FCC Rcd 7635, 7647 at ¶ 77 and n. 51, 78 (1993) (*Notice*).

⁸⁵ See 13 C.F.R. 121.802 (a)(2). See also 13 C.F.R. § 121.401 (a) (which provides that "... size determinations shall include the applicant concern and all its domestic and foreign affiliates). See also Cook Inlet Petition at 2.

⁸⁶ Rules adopted as a "logical outgrowth" of a *Notice of Proposed Rule Making* satisfy our APA notice requirements. See *Public Service Commission of the District of Columbia v. FCC*, 906 F.2d 713, 717 (D.C. Cir. 1990); *Small Refiner Lead Phase-Down Task Force v.*

that such rules would be applied in assessing eligibility for the entrepreneurs' blocks and for small business size status. Thus, sufficient opportunity to comment was provided on the affiliation rules since they play an integral role in any determination of size status. Moreover, we see no advantage in seeking additional comment on the affiliation rules since petitioners, such as BET, had a full and fair opportunity to suggest modifications to our affiliation rules, some of which we adopt on reconsideration. A *Further Notice* could also substantially delay the auction of entrepreneurs' block licenses.

39. Furthermore, we decline to adopt the suggestion that we eliminate the affiliation rules on the grounds that these rules are unduly complex or overburdensome.⁸⁷ Affiliation rules are an established and essential element in determining an applicant's compliance with a gross revenues (or other) size standard. Their use ensures that all financial and other resources available to a company will be considered in assessing its size status. The Commission's affiliation rules, in conjunction with its attribution rules, are intended to include in this calculation: (1) all individuals and entities that directly or indirectly control the applicant, any member of its control group, or any other investor having an attributable interest in the applicant; (2) any other entities also controlled by such individual or entity; (3) all entities over which the applicant has direct control or indirect control through an intermediary; and (4) all other entities over which a member of its control group or any other attributable investor has direct or indirect control. Elimination of the affiliation rules would result in an underassessment of an applicant's size and would present an unrealistic picture of the applicant's need for bidding credits, reduced upfront payments and installment payments.

40. We are persuaded, however, that a limited exception to our affiliation rules is appropriate for minority-owned applicants and applicants owned by a combination of minorities and women.⁸⁸ The exception will apply to affiliates controlled by investors who are members of minority groups who are attributable members of an applicant's control group. Under the exception, the gross revenues and assets of affiliates that the minority investor controls will not be counted in determining the applicant's compliance with the financial caps, both for purposes of the entry into the entrepreneurs' block and for purposes of the applicant qualifying as a small business.

41. This exception will permit minority investors that control other concerns to be

EPA, 705 F.2d 506, 547 (D.C. Cir. 1983). An agency must be free to adopt a final rule not described exactly in the *Notice*, where the difference involved is "sufficiently minor," otherwise, agencies could not change a rule in response to valid comments without beginning the rulemaking anew. See *National Cable Television Assoc., Inc. v. FCC*, 747 F.2d 1503, 1507 (D.C. Cir. 1984).

⁸⁷ Omnipoint Petition at 17; BET Petition at 21; Mankato Citizens Telephone Company Opposition (Mankato Opposition), 2-3.

⁸⁸ MasTec Petition at 7; BET Petition at 5-6.

members of an applicant's control group and to bring their management skills and financial resources to bear in its operation without the assets and revenues of those other concerns being counted as part of the applicant's total assets and revenues. By making such an exception, we further our goal of addressing traditional problems minorities have of accessing capital. As we documented in the *Fifth Report & Order*, minorities have faced and continue to face unique barriers to capital from traditional, non-minority sources.⁸⁹ To raise capital for a new business venture, therefore, minorities need the ability to draw upon the financial strength and business experience of successful minorities and minority-owned businesses within their own communities; they may not have access to any other source of funds on which to draw.⁹⁰ Moreover, this exception permits minority applicants to pool their resources with other minority-owned businesses and draw on the expertise of those who have faced similar barriers to raising capital in the past.⁹¹ We therefore conclude that further tailoring of our affiliation rules to the specific capital formation problems of minorities is necessary to avoid eliminating a traditional source of capital for minority businesses -- the

⁸⁹ *Fifth Report and Order*, FCC 94-178 at ¶¶ 98 - 100.

⁹⁰ *Id.* at ¶ 100 ("African American business borrowers have difficulty raising capital mainly because they have less equity to invest, they receive fewer loan dollars per dollar of equity investment, and they are less likely to have alternate loan sources . . .")(citing Testimony of Dr. Timothy Bates, Visiting Fellow, The Woodrow Wilson Center, before the U.S. House of Representatives, Committee on Small Business, Subcommittee on Minority Enterprise, Finance, and Urban Development, May 20, 1994).

⁹¹ See, e.g., Ellis, B., "Black Community Needs to Focus on Capital Formation," *The Philadelphia Tribune*, May 20, 1994, at 6A ("[R]ecent immigrants (in the African-American community) have utilized family and friends as a means of pooling their savings, -- i.e., to form capital); Lee, E., "Korean American Grocers All Over the Country Hit Hard By Recession and Crime," *AsianWeek*, Dec. 17, 1993, Vol. 15, No. 17 at 1 ("[F]amily members often employed [in Korean-owned businesses] and informal Korean credit organizations give many business owners their starts . . ."); Lesly, E., and Mallory, M., "Inside the Black Business Network," *Business Week*, Nov. 29, 1993, at 70 ("African Americans are forming pools of capital and new opportunities that are helping to overcome traditional barriers to success."); Miller, Y., "Improvements Seen in Minority Business Loans," *Bay State Banner*, Nov. 21, 1993, Vol. 29, No. 14, at 1 ("Many entrepreneurs in the minority community have their business cash flow tied up in their personal assets and expenses . . ."); Stone, S., "Why Can't We All Get Along? Many Blacks, Koreans Find Understanding," *The Philadelphia Tribune*, Nov. 23, 1993, Vol. 110, No. 100 at 1a ("Koreans don't usually go to banks....What they have done is form their own [credit] pools Chinese-Americans also have lending pools; many Jamaicans have the same thing."); Wynter, L., "Understanding Capital is Key to Getting It," *Emerge*, Aug. 31, 1993, Vol. 9, No. 4, at 22 (minority venture capital firm finances several black-owned firms including Essence Communications and Earl G. Graves, Ltd).

minority community itself. We note that this exception applies only to affiliates controlled by minority investors in the applicant or members of the applicant's control group. The exception does not apply to affiliates of such investors or businesses that control the applicant or that have an attributable interest in the applicant. Thus, a minority-owned firm that exceeds the financial caps would not be able to create a subsidiary to participate in a PCS applicant's control group.⁹²

42. As we established in our *Order on Reconsideration*, we treat Indian tribes differently under our affiliation rules for purposes of our entrepreneurs' block financial caps because of their unique legal status.⁹³ Specifically, we exclude the gross revenues and total assets of Indian tribes in our calculations for purposes of determining whether an affiliated applicant satisfies our entrepreneurs' block financial caps.⁹⁴ After considering the arguments of petitioners, we also will exclude generally the revenues of Indian tribes in our calculations for purposes of determining small business eligibility.⁹⁵

43. In response to MasTec's and BET's concerns about special treatment for a particular minority group, we clarify that we exempt Indian tribes generally from our affiliation rules because Congress has imposed unique legal constraints on the way they can utilize their revenues and assets.⁹⁶ Cook Inlet contends that, while other minority-owned businesses can issue debt and equity securities and pledge their assets and securities to raise capital, the real and personal property interests held by Alaska Native Corporations are subject to a number of constraints -- both legal and cultural -- that affect their ability to manage and dispose of property.⁹⁷ For example, under the Alaska Native Claims Settlement Act, 43 U.C.S § 1601 *et seq.*, the stock held by Native corporations is subject to strict

⁹² For example, if M, an attributable minority investor in the applicant, controls Corporation C with assets of \$500 million, but Corporation C does not control applicant A and is not an attributable investor in Applicant A, the assets and revenues of Corporation C will not be counted in assessing A's compliance with the financial caps for either the entrepreneurs' blocks or small business size status. On the other hand, if M Corporation, a minority-owned company with an attributable interest in Applicant A, is controlled by Corporation C in the above example, or is under common control with Corporation C, the assets and revenues of M Corporation's affiliates are attributable.

⁹³ *Order on Reconsideration*, FCC 94-217 at ¶ 1.

⁹⁴ *Id.*

⁹⁵ Cook Inlet Petition at 1-3; BET Opposition at 5-6.

⁹⁶ See MasTec Petition at 7-12; BET Petition at 5-6; BET Petition for Reconsideration of *Order* at 3-4.

⁹⁷ Cook Inlet Opposition at 1-2.

alienability restrictions - it cannot be sold, pledged, mortgaged, or otherwise encumbered.⁹⁸ Thus, Native corporations are precluded from two of the most important means of raising capital enjoyed by virtually every other corporation: (1) the ability to pledge stock of the company against ordinary borrowings, and (2) the ability to issue new stock or debt securities.⁹⁹ In addition, assets held by Indian tribes include land holdings that cannot be used as collateral for purposes of raising capital, because the land holdings are owned in trust by the federal government or are subject to a restraint on alienation in the government's favor.¹⁰⁰ Congress has not placed similar legal constraints on the assets and revenues of enterprises owned by any other minority group. We agree with Cook Inlet that such legal restraints on assets and revenues place Indian tribes at a disadvantage vis-a-vis other minority groups with similar revenues and assets.¹⁰¹ Finally, as we noted in our *Order on Reconsideration*, Congress has mandated that the SBA determine the size of a business concern owned by a tribe without regard to the concern's affiliation with the Indian tribe.¹⁰² Our policy mirrors this congressional mandate.

44. After considering the record, however, we have determined that gaming revenues generally are not subject to the same types of legal restrictions as other revenues received by Indian tribes.¹⁰³ Therefore, we establish a rebuttable presumption that revenues derived from gaming pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.*, will be included in our calculations when determining whether an applicant that is affiliated with an Indian tribe qualifies for the entrepreneurs' block or as a small business. Cook Inlet has set forth several reasons why we should treat gaming revenues differently from other types of Indian tribe revenues. First, these revenues were not part of the tribal economic picture when Congress enacted the SBA tribal exception to the affiliation rule in 1970.¹⁰⁴ Second, the Indian Gaming Regulatory Act provides certain Indian tribes with a non-traditional source of revenue that could be very substantial.¹⁰⁵ Cook Inlet also asserts that gaming revenues are not subject to the same types of legal and governmental controls as other revenues received

⁹⁸ Cook Inlet Petition for Further Clarification, filed Sept. 7, 1994, at 4.

⁹⁹ *Id.* 4-5.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Order on Reconsideration*, FCC 94-217 at ¶ 4.

¹⁰³ Cook Inlet *ex parte* comments, filed Oct. 31 1994, at 2.

¹⁰⁴ Cook Inlet *ex parte* comments, filed Oct. 31, 1994, at 2.

¹⁰⁵ *Id.*

by Indian tribes, and therefore are more analogous to the revenues of non-Indian entities.¹⁰⁶ Furthermore, Congress granted the SBA (whose rules inspired our affiliation rules) flexibility to treat tribal and other affiliations with exceptional revenues differently if such revenues would create an "unfair competitive advantage."¹⁰⁷ Gaming revenues generated by tribal organizations, appear to be exceptional revenues that if not included, create an unfair competitive advantage in the auctioning of broadband PCS entrepreneurs' block licenses. Thus, we will include such gaming revenues in our calculations when determining eligibility for the entrepreneurs' block and for small business status, unless the entrepreneurs' block applicant establishes that it will not receive an unfair competitive advantage, because significant legal constraints restrict its ability (or an affiliate's ability) to access and utilize revenues from gaming.

45. Finally, we decline to create an exception to our affiliation rules for rural telephone companies.¹⁰⁸ We are concerned that relaxing our rules would unfairly match large rural telephone companies, with greater access to capital, against entrepreneurs and designated entities (including small and medium-size rural telephone companies). We note in this regard, that rural telephone companies already enjoy substantial regulatory benefits (*e.g.*, access to Rural Electrification Administration loans, discussed *infra* at paragraph 111) affecting available capital in comparison to other designated entities.¹⁰⁹ Moreover, we observe that rural telephone companies will be permitted to acquire partitioned licenses at any time after the close of auctions. We believe that existing measures will thereby achieve our goal of facilitating the rapid deployment of PCS to rural areas. At MEANS/SDN's request, however, we clarify that a centralized equal access provider (*i.e.*, a group of rural telephone companies that provide centralized equal access and other sophisticated information services)¹¹⁰ will not be deemed an affiliate of each of its constituent members. Based on the record, it does not appear that such entities control their constituent members or that each of the members control the centralized equal access providers. Thus, for example, if two or more of MEANS' members form a consortium of small businesses that apply for the

¹⁰⁶ *Id.*

¹⁰⁷ As we noted in our *Order on Reconsideration*, Section 7(j)(10)(J) of the Small Business Act gives the SBA the discretion to consider tribal and other affiliations if it determines that one or more such tribally-owned businesses has obtained, or is likely to obtain, a substantial unfair competitive advantage within an industry category. See 15 U.S.C. § 636(j)(10)(J)(ii)(11).

¹⁰⁸ TEC Petition at 14-15 (requesting exemption from the affiliation rules).

¹⁰⁹ BET Opposition, at 16-17.

¹¹⁰ See, *e.g.*, 47 C.F.R. § 69.112(i) (citing to *Transport Rate Structure and Pricing*, CC Docket No. 91-214, FCC 920442, 7 FCC Rcd 7002 (1992), *modified*, 8 FCC Rcd 5370, 5287 (1993) for description of "centralized equal access providers").

entrepreneurs' blocks, MEANS itself would not be attributed to each one of the small businesses. We agree with MEANS that this clarification will contribute to the efficient deployment of broadband PCS in rural areas.

B. Designated Entity Definitions

1. Minority and Women-Owned Businesses

46. Background. In the *Fifth Report and Order*, we adopted the definition of the term "members of minority groups" as set forth in our *Second Report and Order* in this docket.¹¹¹ Thus, we defined "members of minority groups" as "... individuals of African-American, Hispanic-surnamed, American Eskimo, Aleut, American Indian and Asian American extraction."¹¹²

47. Petition. Karl Brothers requests that the Commission amend its definition of "members of minority groups" to include businesses owned by individuals with disabilities.¹¹³ Specifically, Karl Brothers suggest the Commission adopt the standard established in the SBA Section 8(a) program to determine who should qualify for designated entity status. According to Karl Brothers, this SBA program includes businesses owned by disabled individuals under a "means" and "socially disadvantaged" test. Karl Brothers maintains that the congressional mandate to give special preference to minority groups is not limited to just ethnic minorities, but should include other historically disadvantaged minorities. Karl Brothers maintains that Congress was merely giving examples of groups to be included in the definition of minorities, not limiting the definition to ethnic groups only. Karl Brothers contends that there is no statutory language excluding other disadvantaged groups.¹¹⁴

48. Decision. After considering Karl Brothers' request, we will not include persons with disabilities in the definition of minorities for purposes of bidding on the entrepreneurs' blocks and obtaining the special provisions available to minority applicants. The record in this proceeding does not contain any evidence that demonstrates that firms owned by persons with disabilities have more difficulty accessing capital than any other small business. In this

¹¹¹ See *Fifth Report and Order*, FCC 94-178 at n. 157. See also *Second Report and Order*, 9 FCC Rcd 2348, 2397 n.209, quoting *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 FCC 2d 979, 980 n.8 (1978) and citing *Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 92 FCC 2d 849, 849 n.1 (1982); 47 C.F.R. § 1.2110(b)(2)).

¹¹² *Fifth Report and Order*, FCC 94-178 at n. 157. See 47 C.F.R. § 24.720(i).

¹¹³ Karl Brothers Petition for Reconsideration (Karl Brothers Petition), filed August 22, 1994, at 3.

¹¹⁴ *Id.*

respect, the record of this proceeding on the difficulties that minorities, women and small businesses, in general, have experienced accessing capital strongly supports the special provisions we adopted for these groups.¹¹⁵ Moreover, individuals with disabilities are not expressly named as a designated entity in Section 309(j)(4)(D) of the Communications Act, and there is no indication in the legislative record of the statute that Congress intended to expand this group of beneficiaries to include any group or individual that can demonstrate that it is "socially disadvantaged" similar to the SBA Section 8(a) approach described by the Karl Brothers.¹¹⁶ Unlike the Small Business Act, Section 309(j)(4)(D) of the Communications Act does not contain the term "socially disadvantaged." Compare 47 U.S.C. § 309(j)(4)(D) with 15 U.S.C. § 637(a)(1), (4) and (5). We note that even in the SBA context, that agency presumes eligibility for Section 8(a) status for minority groups (which are defined in racial and ethnic terms), but firms owned by persons with disabilities must demonstrate that they are "socially disadvantaged" in order to gain entry into the program. Also, the SBA's denial of Section 8(a) status for firms owned by persons with disabilities where such "social disadvantage" has not been established, has been upheld in court.¹¹⁷

49. Additionally, there is no indication that in enacting Section 309(j)(4)(D) Congress intended to expand the definition of "members of minority groups" to include classes of persons other than racial or ethnic groups, such as those listed in the preceding subsection, Section 309(i).¹¹⁸ We further observe that in no other Commission context, have we included disabled persons in the categories of groups that comprise our definition of minorities. Making such a change here, without clear statutory and legislative support to do so, would therefore be inconsistent with our traditional application of the definition, which we believe should be uniform in all licensing contexts.¹¹⁹

¹¹⁵ See *Fifth Report and Order*, FCC 94-178 at ¶¶ 93-112.

¹¹⁶ See Karl Brothers Petition at 2-5.

¹¹⁷ See *Doe v. Heatherly*, 671 F. Supp. 1081 (D. Md. 1978), *aff'd* 854 F.2d 1316 (4th Cir. 1988).

¹¹⁸ 47 U.S.C. § 309(i)(3)(C)(ii). Below, we revise our definition of "members of minority groups" to conform to this statutory definition. In interpreting this definition in the past, we have taken a restrictive view of the categories of minorities included in this definition and limited its expansion. See *Third Report and Order*, Gen. Docket No. 81-768, 102 FCC 2d 1401 (1985).

¹¹⁹ See *In re Petition of Paralyzed Veterans Of America, et. al, to Amend Regulations Facilitating Minority Ownership of Broadcast Facilities to Include the Physically Handicapped*, Memorandum Opinion and Order, FCC 85-651, 59 Rad. Reg. 2d (P&F) 1353 (released Dec. 16, 1985), *petition for review dismissed as untimely*, *California Assoc. of the Physically Handicapped, Inc. v. FCC*, 833 F.2d 1333 (9th Cir. 1987).

50. We wish to emphasize also, that it is highly likely that most firms owned by individuals with disabilities will be eligible to bid in the entrepreneurs' block and for an installment payment option if they meet the required gross revenues and total assets test. Such firms may also be eligible for "enhanced" installment payments and bidding credits if they qualify as small businesses under our rules. Indeed, absent a substantial record that demonstrates firms owned by persons with disabilities have any more difficulty accessing capital than any other small business, we find that we cannot accommodate the Karl Brothers request.

51. We also note that we have before us a Petition for Rulemaking filed by David J. Lieto (Lieto Petition), which requests that the Commission amend Section 1.2110 of the Commission's rules to provide that disabled individuals are within the minority group categories and are thus entitled to the benefits associated with being a designated entity under the Commission's auction rules.¹²⁰ As stated above, we believe that our existing rules provide opportunities for individuals with disabilities to participate in the entrepreneurs' block, and that there is no direct statutory or record support for Lieto's request. Furthermore, Lieto has failed to provide a record comparable to that for women and minorities demonstrating that disabled individuals experience difficulties accessing capital that are unique to their status. Accordingly, we decline to initiate a rulemaking at this time, and hereby dismiss the Lieto Petition.

52. In response to numerous inquiries,¹²¹ however, we revise the definition of "members of minority groups" slightly to conform with the definition of minority used in other contexts.¹²² Thus, Section 24.720(i) of the Commission's rules shall read as follows: "Members of minority groups include Blacks, Hispanics, American Indians, Alaskan Natives, Asians, and Pacific Islanders."¹²³ We have also been asked to clarify the meaning of

¹²⁰ See David J. Lieto Petition for Rulemaking, filed September 21, 1994, at 2-3.

¹²¹ We received several inquiries about the definition of "members of minority groups" from participants in the FCC PCS seminars, which provided an overview of the PCS rules and procedures. The seminar series included sessions held in the following locations: Washington, D.C. (Aug. 29, 1994); Chicago (Aug. 22, 1994); Denver (Aug. 24, 1994); San Francisco (Aug. 26, 1994).

¹²² See, e.g., *Broadcast Equal Employment Opportunity Rules and FCC Form 395*, 70 FCC 2d 1466, 1473 (1979); 47 C.F.R. §§ 73.3555(d)(3)(iv), 1.1621(b); see also 47 U.S.C. § 309(i)(3)(c)(ii); Race and Ethnic Standards for Federal Statistics and Administration Reporting, OMB Statistical Policy Directive No. 15 (1977).

¹²³ In a separate *Order*, we shall be making the same correction to the definition of minority groups used in the generic auction rules (see 47 C.F.R. § 1.2110(b)(2)) and the narrowband auction rules (see 47 C.F.R. § 24.320(f)).

particular categories in the definition of minority. Again, for consistency, we shall use the same category descriptions the Commission has relied on in other contexts.¹²⁴ These categories are as follows :

- a. Black. A person having origins in any of the black racial groups of Africa.
- b. Hispanic. A person of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish Culture or origin, regardless of race.
- c. American Indian or Alaskan Native. A person having origins in any of the original peoples of North America, and who maintains cultural identification through tribal affiliations or community recognition.
- d. Asian or Pacific Islander. A person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands. This area includes, for example, China, India, Japan, Korea, the Philippine Islands, and Samoa.

To address any specific claims or allegations regarding an individual race or origin, we will follow existing Commission precedent.¹²⁵ To the extent that prior Commission cases do not provide adequate guidance in specific cases, we may look to cases developed under minority programs in other federal agencies, such as the Office of Management and Budget (OMB) and the SBA.

2. Small Business Consortia

53. Background. In the *Fifth Report and Order* the Commission allowed a consortium of small businesses to qualify collectively for the preferences available to a small business if each business within the consortium individually satisfies the definition of a small business designated entity.¹²⁶ The Commission defined a small business designated entity as any company that, together with attributable investors and affiliates, has average gross revenues for the three preceding years of not in excess of \$40 million.¹²⁷ We defined "consortium of small businesses" as a conglomerate organization formed as a joint venture

¹²⁴ See *Broadcast Equal Employment Opportunity Rules and FCC Form 395*; see also "Instructions for Completing FCC Forms 395-A & 395-M," Section V (Race/Ethnic Categories).

¹²⁵ See, e.g., *Lone Cypress Radio Assoc. Inc.*, 7 FCC Rcd 4403 (Rev. Bd. 1992), and cases cited therein; See also *Storer Broadcasting Co.*, 87 FCC 2d 190, 191-93 (1981).

¹²⁶ *Fifth Report and Order*, FCC 94-178 at ¶ 180. See also 47 C.F.R. § 24.720(b)(3)).

¹²⁷ *Fifth Report and Order*, FCC 94-178 at ¶ 175. See also 47 C.F.R. § 24.720(b)(1).

among mutually-independent business firms, each of which individually satisfies the definition of a small business.¹²⁸ In the *Second Report and Order*, we concluded that consortia should not always be entitled to qualify for measures designed specifically for designated entities.¹²⁹ In the *Fifth Report and Order*, however, we stated that for the auctioning of broadband PCS, it is especially necessary to allow small businesses to pool their resources in this manner to help them overcome capital formation problems.¹³⁰ Thus, our rules provide that if a consortium's members are all small businesses (*i.e.*, defined as companies that do not have average yearly gross revenues for the preceding three years in excess of \$40 million), the consortium as a whole will qualify for designated entity provisions for small businesses.

54. Petitions. Omnipoint requests that the Commission allow small businesses to form a single corporate applicant (rather than a joint venture) and get the same treatment as consortia.¹³¹ BET requests that the Commission eliminate the preferences available to small business consortia.¹³²

55. Decision. We believe the current preferences for small business consortia are adequate and necessary to ensure that small businesses have sufficient opportunities to participate in the broadband PCS auctions. Accordingly, we deny BET's request to eliminate the small business consortia preferences. As we observed in the *Fifth Report and Order*, allowing small businesses to pool their resources in this manner is necessary to help them overcome capital formation problems and ensure their participation in the provision of broadband PCS. We believe that small, rural telephone companies, in particular, are expected to use this mechanism to compete in some of the smaller markets.

56. We also deny Omnipoint's request that small businesses be allowed to form a single corporate applicant that would be afforded the same treatment as consortia. The concept of a consortium is that each small business participant remains a distinct corporate entity independent of other consortium members and that each member has rights and obligations similar, or equal to, those held by participants in other types of joint ventures. Allowing a group of small businesses to apply as one corporate applicant and receive the benefits of our consortia rule would disadvantage small, independent businesses wishing to bid as a group under our rule, but who cannot restructure as a corporate applicant and could tend to dilute each member's influence and insulate their responsibilities in the venture. We

¹²⁸ *Fifth Report and Order*, FCC 94-178 at ¶ 179. See also 47 C.F.R. § 24.720(b)(3).

¹²⁹ *Second Report and Order*, FCC 94-61 at ¶ 286.

¹³⁰ *Fifth Report and Order*, FCC 94-178 at ¶ 180.

¹³¹ Omnipoint Petition at 9.

¹³² BET Petition at 7.

believe that such a change would also eviscerate our small business eligibility size requirement. We wish to clarify, however, that we intend to examine the qualifications of each consortium member to ensure that each is a *bona fide* small business. In this regard, it is assumed that each concern should be an entity "organized for profit" and not for the sole purpose of qualifying as part of a small business consortia. This is consistent with SBA's long-standing definition of "business concern." See 43 C.F.R. § 121.403(a), *Small Business Size Standards*, 54 Fed. Reg. 52634 (Dec. 21, 1989).

57. On another issue, BET contends that the \$40 million gross revenues standard fails to comply with an SBA requirement that any size standard proposed by a federal agency that varies from SBA's standard be "proposed after an opportunity for public notice and comment" and be "approved by the Administrator [of the SBA]."¹³³ We believe we have fully met our notice and comment obligations, both under the Administrative Procedures Act and the Small Business Act, in this proceeding. We solicited comment on a range of size options, and received comment that included SBA's recommendation for a \$40 million gross revenues cap (which we ultimately adopted). Indeed, we recently obtained SBA's approval of the \$40 million size standard.¹³⁴

C. Eligibility Requirements

1. Minimum Equity Limit for the Control Group

58. Background. In the *Fifth Report and Order*, the Commission adopted a methodology for assessing an applicant's compliance with the financial caps for the entrepreneurs' blocks and for small business size status based on the distinction between: (a) noncontrolling investors (whose financial status would not be attributed to the applicant); and (b) investors holding interests in the control group of the applicant.¹³⁵ The gross revenues, assets and personal net worth limits of attributable investors (*i.e.*, those with more than 25 percent equity) and *all* control group members, regardless of the size of their individual interests, are included in assessing an applicant's compliance with the financial caps.¹³⁶ To qualify as a women or minority-owned business, the Commission further required that the control group be composed entirely of women and minorities.¹³⁷ The control group

¹³³ See 15 U.S.C. § 632(a)(2)(A) and (C). BET Reply to Oppositions to Petitions for Reconsideration, filed Sept. 22, 1994, at 7-8.

¹³⁴ See Letter to William Kennard, FCC General Counsel, from Philip Lader, SBA Administrator, Nov. 9, 1994 (responding to Aug. 19, 1994 request for size approval).

¹³⁵ *Fifth Report and Order*, FCC 94-178 at ¶¶ 158-59.

¹³⁶ *Id.* See also *Order on Reconsideration*, FCC 94-217 at 5-6.

¹³⁷ *Fifth Report and Order*, FCC 94-178 at ¶¶ 160-62, 181-92.

requirement ensures that designated entity and entrepreneur principals retain control of the applicant and own a substantial financial interest in the venture. At the same time, it enables noncontrolling investors outside the control group to provide essential capital to an applicant without their revenues, assets or net worth being attributed to the applicant or their non-minority or male status disqualifying the applicant.

59. The Commission adopted two control group options in the *Fifth Report and Order*.¹³⁸ Under the first option, passive investors are permitted to own up to 75 percent of the applicant's total equity, so long as: (1) no investor holds more than 25 percent of the applicant's passive equity (which was subsequently defined to include up to 15 percent of a corporation's voting stock); and (2) in the case of a corporate applicant, at least 50.1 percent of the voting stock is held by the control group.¹³⁹ In the case of partnership applicants, the control group must own all the general partnership interests.¹⁴⁰ The Commission determined that this minimum equity level strikes an appropriate balance between the competing considerations of permitting qualified bidders to raise capital and ensuring that designated entities receive a significant economic benefit from the venture.¹⁴¹ The Commission extended an alternate option to qualified women or minority-owned businesses. Under this option, the Commission would permit a single investor in a women or minority-owned applicant to own up to 49.9 percent of the passive equity (which we subsequently defined to include up to 15 percent of a corporation's voting stock), so long as the control group holds the remaining 50.1 percent of the equity. As with the first option, the control group is required to retain control and, in the case of a corporate applicant, hold at least 50.1 percent of the voting stock.¹⁴² Also, ownership interests are to be calculated on a fully diluted basis.

60. Petitions. Petitions filed by BET, Columbia PCS, CTIA, EATEL, Lehman Brothers and Omnipoint variously address the Commission's restrictions on the composition of an applicant's control group.¹⁴³ Specifically, petitioners request clarification that our attribution rules and definitions of minority and women-owned business be interpreted to

¹³⁸ *Id.* at ¶¶ 158-163. As discussed *infra* at ¶ 65, one of the options is available only to women and minority-owned businesses.

¹³⁹ *Id.* at ¶ 158.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at ¶ 159.

¹⁴² *Id.* at ¶ 160. See *Order on Reconsideration*, FCC 94-217 at ¶ 10.

¹⁴³ BET Petition at 15-16; Columbia PCS Petition at 2-5; CTIA Petition at 4-10; EATELCORP, Inc. Petition for Reconsideration, (EATEL Petition), filed Aug. 22, 1994, at 3-7; Lehman Brothers Petition for Reconsideration (Lehman Bros. Petition), filed Aug. 22, 1994, at 4-5; Omnipoint Petition at 15-16.

permit "nonqualifying" noncontrolling investors *within* the control group.¹⁴⁴ "Nonqualifying" investors, as petitioners describe, are investors that are neither women nor minorities, or investors that if attributed would cause the applicant to exceed the financial caps. EATEL argues that to do otherwise may preclude participation by existing companies whose existing corporate structures would disqualify an applicant absent significant expenditures for corporate restructuring. EATEL maintains that existing entities have the greatest amount to offer applicants in terms of financial and technical resources.¹⁴⁵ Petitioners also request that the Commission allow a limited amount of equity investment in the control group to help the applicant comply with the 25 percent minimum equity requirement. Columbia PCS, for example, advocates adoption of a bright-line test that would require at least a 75 percent equity and a 100 percent voting interest in the control group to be held by "qualifying" entities.¹⁴⁶ Columbia PCS maintains that designated entities will be unable to raise sufficient capital unless this clarification is made.¹⁴⁷ EATEL and CTIA maintain that the 100 percent equity requirement for minority and women-owned control groups is too restrictive for entities already in existence. Instead, they argue that businesses which are in fact *controlled* by women and/or minorities, but which have numerous non-controlling shareholders (including some that are neither women nor minorities), should be eligible for the preferences we adopted for minority and women-owned businesses.¹⁴⁸ BET also requests clarification that a control group may be comprised of a single individual.¹⁴⁹

61. Omnipoint, Columbia PCS, CTIA and Lehman Brothers contend that the 25 percent minimum equity ownership restriction is too high and that designated entities will face insurmountable difficulties arranging financing if it is not reduced.¹⁵⁰ To remedy this problem, Lehman Brothers proposes two alternative solutions. First, for publicly-traded companies, Lehman proposes that public shareholders with less than 5 percent equity should be counted towards the control group's 25 percent equity threshold. Lehman maintains that this proposal would permit control group equity to be diluted by new shareholders, but not

¹⁴⁴ BET Petition at 16; Columbia PCS Petition at 2-4; EATEL Petition at 2-4; Lehman Bros. Petition at 4-5; Omnipoint Petition at 16.

¹⁴⁵ EATEL Petition at 5-6.

¹⁴⁶ Columbia PCS Petition at 2-4.

¹⁴⁷ *Id.* at 2.

¹⁴⁸ EATEL Petition at 6-7; CTIA Petition at 9-10.

¹⁴⁹ BET Petition at 16.

¹⁵⁰ Omnipoint Petition at 9-10; Lehman Bros. Petition at 3; Columbia PCS Petition at 2.

below a minimum equity level (Lehman recommends 10 percent).¹⁵¹ Second, Lehman suggests that all designated entities should be permitted to dilute their 25 percent equity interests in the following circumstances: (a) not earlier than one year after license grant, to dilute control group equity to a total of not less than 20 percent; (b) not earlier than two years, to dilute control group equity to a total of not less than 15 percent; and (c) not earlier than three years to dilute control group equity to a total of not less than 10 percent. Lehman argues that this proposal would provide designated entities efficient access to capital, thereby improving their competitive position.¹⁵² CTIA recommends that an applicant should be eligible to bid on the C and F blocks with at least 10 percent equity.¹⁵³ Lehman Brothers also requests that the Commission modify its control group definition to provide that members of the control group receive dividends, profits and regular and liquidating distributions in proportion to the actual possession of equity held, rather than in proportion to their interest in the total equity of the applicant. Lehman Brothers contends that our rules could be interpreted to mean that such distributions must be paid on options held but not exercised by control group members, rather than on the basis of actual shares held.¹⁵⁴

62. Decision. After considering the record, and as described below, we modify our rules to allow certain noncontrolling investors who do not qualify for the entrepreneurs' block or as a small business to be investors in an applicant's control group. We also allow entities that are controlled by minorities and/or women, but that have investors that are neither minorities nor women, to be part of the control group. We agree with petitioners that some accommodation should be made in our regulations to allow participation in an applicant's control group by existing firms controlled by designated entities or entrepreneurs that have investors that, if attributed, would cause the applicant to exceed the small business or entrepreneurs' blocks financial caps or, for minority or women-owned applicants, investors that are not minorities or women.¹⁵⁵ We will therefore modify our definition of a minority and women-owned business to include preexisting companies that are controlled by women or minorities but have noncontrolling investors in the control group who are not minorities or women. Similarly, we will allow preexisting companies that, in aggregate, meet our entrepreneurs' block and small business size standards to be members of the control group even if one or more of the noncontrolling investors in those companies would disqualify the company based on its gross revenues or total assets. We believe that these rule

¹⁵¹ Lehman Bros. Petition at 4. See also Impulse *ex parte* comments, filed Oct. 12, 1994, at 1-4 (arguing that a 25% minimum equity requirement, if maintained throughout the life of the venture, would severely limit normal capital formation by designated entities).

¹⁵² *Id.* at 5.

¹⁵³ CTIA Petition at 9.

¹⁵⁴ See Lehman Bros. Petition at 6-8. See also 47 C.F.R. § 24.720(k)(iv).

¹⁵⁵ EATEL Petition at 5-7; Columbia PCS Petition at 2-4.

changes will provide a reasonable balance between the need to ensure that designated entities have a significant economic investment in the applicant and the financing realities of a PCS venture.

63. We also agree with petitioners that it is not optimal to require the qualifying control group members to hold at least 25 percent of the applicant's equity. The record indicates that in many cases, designated entities and entrepreneurial principals will have limited capital to contribute to the applicant's equity and that noncontrolling investors will be unwilling to advance funds to enable the designated entity (even one with management expertise) to reach the 25 percent threshold.¹⁵⁶ Thus, without some modifications to our rules, designated entities could face insurmountable difficulties in arranging financing. We therefore conclude that we should modify our rules to address petitioners' concerns, while balancing the need to ensure meaningful equity participation by "qualifying" control group members.¹⁵⁷

64. Specifically, we will retain the 25 percent minimum equity requirement for the control group, but we will require only 15 percent (*i.e.*, 60 percent of the control group's 25 percent equity holdings) to be held by qualifying, controlling principals in the control group (*i.e.*, minorities, women or small/entrepreneurial business principals).¹⁵⁸ For example, if the applicant seeks minority or women-owned status, the 15 percent equity, as well as 50.1 percent of the voting stock of the control group and all of its general partnership interests, must be owned by control group members who are minorities and/or women. If the applicant seeks small business status, 15 percent of the equity, as well as 50.1 percent of the control group's voting stock and all of its general partnership interests, must be held by control group members who, in the aggregate, qualify as a small business.¹⁵⁹ With regard to establishing control of the applicant by qualified investors, where the control group is composed of both qualifying and nonqualifying members, the qualifying members in the control group must have 50.1 percent of the voting stock and all general partnership interests within the control group, and maintain *de facto* control of the control group. The control

¹⁵⁶ AirTouch *ex parte* comments, filed Oct. 12, 1994, at 2; Columbus Grove Telephone Co., *ex parte* comments, filed Oct. 5, 1994, at 2.

¹⁵⁷ See Appendix C (chart illustrating changes to the control group's voting and ownership thresholds).

¹⁵⁸ See Media Communications Partners *ex parte* comments, filed Oct. 11, 1994, at 7-8.

¹⁵⁹ For instance, if a preexisting company wants to qualify as a small business control group, its gross revenues and total assets will be added to the gross revenues and assets of each of its controlling shareholders and to those of all affiliates. The resulting sum must be under \$40 million in gross revenues and \$500 million in total assets. The gross revenues and total assets of the company's preexisting, noncontrolling shareholders will be ignored, however.

group, in turn, must hold 50.1 percent of the voting stock and all general partnership interests of the PCS applicant. Thus, qualifying members of the control group will have *de jure* and *de facto* control of both the control group and, indirectly, the applicant. The composition of the principals of the control group and their legal and active control of the applicant determines whether the applicant qualifies for bidding credits, installment payments and reduced upfront payments. The 15 percent minimum equity amount may be held in the form of options, provided these options are exercisable at any time, solely at the holder's discretion, and at an exercise price equal to or less than the current market valuation of the underlying shares at the time of short-form filing. The remaining 10 percent (*i.e.*, 40 percent of the control group's minimum equity holdings) may be held in the form of either stock options or shares, and we will allow certain investors that are not minorities, women, small businesses or entrepreneurs to hold interests in such shares or options. Specifically, we will allow the 10 percent portion to be held in the form of shares or stock options by qualifying investors or by any of the following entities which may not comply with the entrepreneurs' block requirements (*e.g.* investors who are not minorities or women or investors, and/or their affiliates, that exceed the entrepreneurs' block or small business size thresholds): (1) individuals who are members of an applicant's management team; (2) existing investors of businesses in the control group that were operating and earning revenues for two years prior to December 31, 1994; or (3) noncontrolling institutional investors.¹⁶⁰

65. As discussed *supra* at paragraph 59, the Commission also adopted an alternative to the 25 percent minimum equity requirement for minority and women-owned businesses, which permits a single investor to hold as much as 49.9 percent of its equity, provided the control group holds at least 50.1 percent. Several petitioners have expressed similar concerns with respect to the need to revise the 50.1 percent requirement.¹⁶¹ Therefore, in tandem with, and for the same reasons as, the modifications to the 25 percent equity requirement, we make similar modifications to the rules governing the 50.1 percent minimum equity requirement. Accordingly, where a minority or women-owned business uses the 50.1 percent minimum equity option, we will require only 30 percent of the total equity to be held by the principals of the control group that are minorities or women. The 30 percent may be held in the form of options, provided these options are exercisable at any time, solely at the holder's discretion, and at an exercise price equal to or less than the current market valuation of the underlying shares at the time of short-form filing. The remaining 20.1 percent may be made up of shares and/or options held by investors that are not women or minorities under similar criteria described in paragraph 64 above. That is, the 20.1 percent portion of the control group's equity may be held in the form of shares or stock options by qualifying investors or by any of the following entities which may not comply with the entrepreneurs' block requirements (*e.g.* investors who are not minorities or women or investors, and/or

¹⁶⁰ See note 162 *infra* (explaining definition of institutional investors).

¹⁶¹ See, *e.g.*, BET Petition at 16; Columbia PCS Petition at 2-3; Omnipoint Petition at 9.