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§ 24.701 Broadband PCS subject to competitive bidding.

Mutually exclusive initial applications for broadband PCS service licenses are subject to competitive bidding. The general competitive bidding procedures set forth in part 1, subpart Q of this chapter will apply unless otherwise provided in this subpart.

[67 FR 45367, July 9, 2002]

§§ 24.702–24.708 [Reserved]

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

(a) *General rule for licenses offered for closed bidding.* (1) No application is acceptable for filing and no license shall be granted to a winning bidder in closed bidding for frequency block C or frequency block F, unless the applicant, together with its affiliates and persons or entities that hold interests in the applicant and their affiliates, have had gross revenues of less than $125 million in each of the last two years and total assets of less than $500 million at the time the applicant's short-form application (Form 175) is filed.

(2) Any licensee awarded a license won in closed bidding pursuant to the eligibility requirements of this section (or pursuant to § 24.839(a)(2)) shall maintain its eligibility until at least five years from the date of initial license grant, except that a licensee's (or other attributable entity's) increased gross revenues or increased total assets due to nonattributable equity investments (i.e., from sources whose gross revenues and total assets are not considered under paragraph (b) of this section), debt financing, revenue from operations or other investments, business development, or expanded service shall not be considered.

(3) Tiers. (i) For purposes of determining spectrum to which the eligibility requirements of this section are applicable, the BTA service areas (see § 24.202(b)) are divided into two tiers according to their population as follows:

(A) *Tier 1:* BTA service areas with population equal to or greater than 2.5 million;

(B) *Tier 2:* BTA service areas with population less than 2.5 million.

(ii) For Auction No. 35, the population of individual BTA service areas will be based on the 1990 census. For auctions beginning after the start of Auction No. 35, the population of individual BTA service areas will be based on the most recent available decennial census.

(4) Application of eligibility requirements. (i) The following categories of licenses will be subject to closed bidding pursuant to the eligibility requirements of this section in auctions that begin after the effective date of this paragraph.

(A) For Tier 1 BTAs, one of the 10 MHz C block licenses (1895–1900 MHz paired with 1975–1980 MHz);

(B) For Tier 2 BTAs, two of the 10 MHz C block licenses (1895–1900 MHz paired with 1975–1980 MHz; 1900–1905 MHz paired with 1980–1985 MHz) and all 15 MHz C block licenses.

(ii) Notwithstanding the provisions of paragraph (a)(4)(i) of this section, any C block license for operation on spectrum that has been offered, but not won by a bidder, in closed bidding in any auction beginning on or after March 23, 1999, will not be subject in a subsequent auction to closed bidding pursuant to the eligibility requirements of this section.

(5) Special rule for licensees disaggregating or returning certain spectrum in frequency block C.

(i) In addition to entities qualifying for closed bidding under paragraph (a)(1) of this section, any entity that was eligible for and participated in the auction for frequency block C, which began on December 18, 1995, or the reauction for frequency block C, which began on July 3, 1996, will be eligible to bid for C block licenses offered in closed bidding in any reauction of frequency block C spectrum that begins within two years of March 23, 1999.

(ii) In cases of merger, acquisition, or other business combination of entities, where each of the entities is eligible to bid for C block licenses offered in closed bidding in any reauction of C block spectrum on the basis of the eligibility exception set forth in paragraph (a)(5)(i) of this section, the resulting entity will also be eligible for the exception specified in paragraph (a)(5)(i) of this section.

(iii) In cases of merger, acquisition, or other business combination of entities, where one or more of the entities are ineligible for the exception set forth in paragraph (a)(5)(i) of this section, the resulting entity will not be eligible pursuant to paragraph (a)(5)(i) of this section unless an eligible entity possesses *de jure* and *de facto* control over the resulting entity.

(iv) The following restrictions will apply for any reauction of frequency block C spectrum conducted after March 24, 1998:

(A) Applicants that elected to disaggregate and surrender to the Commission 15 MHz of spectrum from any or all of their frequency block C licenses, as provided in Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, Second Report and Order and Further Notice of Proposed Rule Making, WT Docket No. 97–82, 12 FCC Rcd 16,436 (1997), as modified by the Order on Reconsideration of the Second Report and Order, WT Docket No. 97–82, FCC 98–46 (rel. Mar. 24, 1998), will not be eligible to apply for such disaggregated spectrum until 2 years from the start of the reauction of that spectrum.

(B) Applicants that surrendered to the Commission any of their frequency block C licenses, as provided in Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, Second Report and Order and Further Notice of Proposed Rule Making, WT Docket No. 97–82, 12 FCC Rcd 16,436 (1997), as modified by the Order on Reconsideration of the Second Report and Order, WT Docket No. 97–82, FCC 98–46 (rel. Mar. 24, 1998), will not be eligible to apply for the licenses that they surrendered to the Commission until 2 years from the start of the reauction of those licenses if they elected to apply a credit of 70% of the down payment they made on those licenses toward the prepayment of licenses they did not surrender.

(b) *Exceptions to general rule*—(1) *Scope.* The following provisions apply to licenses acquired in Auctions No. 5, 10, 11 or 22, or pursuant to § 24.839(a)(2) or (a)(3) prior to October 30, 2000.

(i) *Small business consortia.* 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.

(ii) *Publicly-traded corporations.* Where an applicant (or licensee) is a publicly traded corporation with widely dispersed voting power, the gross revenues and total assets of a person or entity that holds an interest in the applicant (or licensee), and its affiliates, shall not be considered.

(iii) *25 Percent equity exception.* The gross revenues and total assets of a person or entity that holds an interest in the applicant (or licensee), and its affiliates, shall not be considered so long as:

(A) Such person or entity, together with its *affiliates,* holds only *nonattributable equity* equaling no more than 25 percent of the applicant's (or licensee's) total equity;

(B) Except as provided in paragraph (b)(1)(v) of this section, such person or entity is not a member of the applicant's (or licensee's) *control group;* and

(C) The applicant (or licensee) has a *control group* that complies with the minimum equity requirements of paragraph (b)(1)(v) of this section, and, if the applicant (or licensee) is a corporation, owns at least 50.1 percent of the applicant's (or licensee's) voting interests, and, if the applicant (or licensee) is a partnership, holds all of its general partnership interests.

(iv) *49.9 Percent equity exception.* The *gross revenues* and *total assets* of a person or entity that holds an interest in the applicant (or licensee), and its affiliates, shall not be considered so long as:

(A) Such person or entity, together with its *affiliates,* holds only *nonattributable equity* equaling no more than 49.9 percent of the applicant's (or licensee's) total equity;

(B) Except as provided in paragraph (b)(1)(vi) of this section, such person or entity is not a member of the applicant's (or licensee's) *control group;* and

(C) The applicant (or licensee) has a *control group* that complies with the minimum equity requirements of paragraph (b)(1)(vi) of this section and, if the applicant (or licensee) is a corporation, owns at least 50.1 percent of the

applicant's (or licensee's) voting interests, and, if the applicant (or licensee) is a partnership, holds all of its general partnership interests.

(v) *Control group minimum 25 percent equity requirement.* In order to be eligible to exclude gross revenues and total assets of persons or entities identified in paragraph (b)(1)(iii) of this section, and applicant (or licensee) must comply with the following requirements:

(A) Except for an applicant (or licensee) whose sole control group member is a *preexisting entity,* as provided in paragraph (b)(1)(v)(B) of this section, at the time the applicant's short-form application (Form 175) is filed and until at least three years following the date of initial license grant, the applicant's (or licensee's) control group must own at least 25 percent of the applicant's (or licensee's) total equity as follows:

(*1*) At least 15 percent of the applicant's (or licensee's) total equity must be held by *qualifying investors,* either unconditionally or in the form of options exercisable, at the option of the holder, at any time and at any exercise price equal to or less than the market value at the time the applicant files its short-form application (Form 175);

(*2*) Such *qualifying investors* must hold 50.1 percent of the voting stock and all general partnership interests within the control group, and must have de facto control of the control group and of the applicant;

(*3*) The remaining 10 percent of the applicant's (or licensee's) total equity may be owned, either unconditionally or in the form of stock options, by any of the following entities, which may not comply with § 24.720(g)(1):

(*i*) *Institutional Investors;*

(*ii*) Noncontrolling *existing investors* in any *preexisting entity* that is a member of the *control group;*

(*iii*) Individuals that are members of the applicant's (or licensee's) management; or

(*iv*) Qualifying investors, as specified in § 24.720(g)(3).

(*4*) Following termination of the three-year period specified in paragraph (b)(1)(v)(A) of this section, *qualifying investors* must continue to own at least 10 percent of the applicant's (or licensee's) total equity unconditionally or in the form of stock options subject to the restrictions in paragraph (b)(1)(v)(A)(*1*) of this section. The restrictions specified in paragraphs (b)(1)(v)(A)(*3*)(*i*) through (b)(1)(v)(A)(*3*)(*iv*) of this section no longer apply to the remaining equity after termination of such three-year period.

(B) At the election of an applicant (or licensee) whose *control group's* sole member is a preexisting entity, the 25 percent minimum equity requirements set forth in paragraph (b)(1)(v)(A) of this section shall apply, except that only 10 percent of the applicant's (or licensee's) total equity must be held in *qualifying investors,* and that the remaining 15 percent of the applicant's (or licensee's) total equity may be held by *qualifying investors,* or noncontrolling *existing investors* in such *control group* member or individuals that are members of the applicant's (or licensee's) management. These restrictions on the identity of the holder(s) of the remaining 15 percent of the licensee's total equity no longer apply after termination of the three-year period specified in paragraph (b)(1)(v)(A) of this section.

(vi) *Control group minimum 50.1 percent equity requirement.* In order to be eligible to exclude *gross revenues* and *total assets* of persons or entities identified in paragraph (b)(1)(iv) of this section, an applicant (or licensee) must comply with the following requirements:

(A) Except for an applicant (or licenses) whose sole control group member is a *preexisting entity,* as provided in paragraph (b)(1)(vi)(B) of this section, at the time the applicant's short-form application (Form 175) is filed and until at least three years following the date of initial license grant, the applicant's (or licensee's) *control group* must own at least 50.1 percent of the applicant's (or licensee's) total equity as follows:

(*1*) At least 30 percent of the applicant's (or licensee's) total equity must be held by *qualifying investors,* either unconditionally or in the form of options, exercisable at the option of the holder, at any time and at any exercise price equal to or less than the market value at the time the applicant files its short-form application (Form 175);

(*2*) Such *qualifying investors* must hold 50.1 percent of the voting stock and all

general partnership interests within the control group and must have *de facto* control of the control group and of the applicant;

(*3*) The remaining 20.1 percent of the applicant's (or licensee's) total equity may be owned by qualifying investors, either unconditionally or in the form of stock options not subject to the restrictions of paragraph (b)(1)(vi)(A)(*1*) of this section, or by any of the following entities which may not comply with § 24.720(g)(1):

(*i*) *Institutional investors,* either unconditionally or in the form of stock options;

(*ii*) Noncontrolling *existing investors* in any *preexisting entity* that is a member of the *control group,* either unconditionally or in the form of stock options;

(*iii*) Individuals that are members of the applicant's (or licensee's) management, either unconditionally or in the form of stock options; or

(*iv*) Qualifying investors, as specified in § 24.720(g)(3).

(*4*) Following termination of the three-year period specified in paragraph (b)(1)(vi)(A) of this section, *qualifying investors* must continue to own at least 20 percent of the applicant's (or licensee's) total equity unconditionally or in the form of stock options subject to the restrictions in paragraph (b)(1)(vi)(A)(*1*) of this section. The restrictions specified in paragraph (b)(1)(vi)(A)(*3*)(*i*) through (b)(1)(vi)(A)(*3*)(*iv*) of this section no longer apply to the remaining equity after termination of such three-year period.

(B) At the election of an applicant (or licensee) whose *control group's* sole member is a *preexisting entity,* the 50.1 percent minimum equity requirements set forth in paragraph (b)(1)(vi)(A) of this section shall apply, except that only 20 percent of the applicant's (or licensee's) total equity must be held by *qualifying investors,* and that the remaining 30.1 percent of the applicant's (or licensee's) total equity may be held by *qualifying investors,* or noncontrolling existing investors in such *control group* member or individuals that are members of the applicant's (or licensee's) management. These restrictions on the identity of the holder(s) of the remaining 30.1 percent of the licensee's total equity no longer apply after termination of the three-year period specified in paragraph (b)(1)(vi)(A) of this section.

(vii) *Calculation of certain interests.* Except as provided in paragraphs (b)(1)(v) and (b)(1)(vi) of this section, 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 such agreements may not be used to appear to terminate or divest ownership interests before they actually do so, in order to comply with the *nonattributable equity* requirements in paragraphs (b)(1)(iii)(A) and (b)(1)(iv)(A) of this section.

(viii) *Aggregation of affiliate interests.* Persons or entities that hold interest in an applicant (or licensee) that are affiliates of each other or have an identify of interests identified in § 1.2110(c)(5)(iii) will be treated as though they were one person or entity and their ownership interests aggregated for purposes of determining an applicant's (or licensee's) compliance with the nonattributable equity requirements in paragraphs (b)(1)(iii)(A) and (b)(1)(iv)(A) of this section.

Example 1 for paragraph (b)(1)(viii). ABC Corp. is owned by individuals, A, B, and C, each having an equal one-third voting interest in ABC Corp. A and B together, with two-thirds of the stock have the power to control ABC Corp. and have an identity of interest. If A & B invest in DE Corp., a broadband PCS applicant for block C, A and B's separate interests in DE Corp. must be aggregated because A and B are to be treated as one person.

Example 2 for paragraph (b)(1)(viii). ABC Corp. has subsidiary BC Corp., of which it holds a controlling 51 percent of the stock. If ABC Corp. and BC Corp., both invest in DE Corp., their separate interests in DE Corp. must be aggregated because ABC Corp. and BC Corp. are affiliates of each other.

(2) *The following provisions apply to licenses acquired pursuant to § 24.839(a)(2) or (a)(3) on or after October 30, 2000.* In addition to the eligibility requirements set forth at 24.709(a) and (b), applicants and/or licensees seeking to acquire C and/or F block licenses pursuant to 24.839(a)(2) or (a)(3) will be subject to

the controlling interest standard in 1.2110(c)(2) of this chapter for purposes of determining unjust enrichment payment obligations. See §1.2111 of this chapter.

(c) *Short-form and long-form applications: Certifications and disclosure.*

(1) *Short-form application.* In addition to certifications and disclosures required by part 1, subpart Q of this chapter, each applicant to participate in closed bidding for frequency block C or frequency block F shall certify on its short-form application (Form 175) that it is eligible to bid on and obtain such license(s), and (if applicable) that it is eligible for designated entity status pursuant to this section and §24.720, and shall append the following information as an exhibit to its Form 175:

(i) *For all applicants:* The applicant's gross revenues and total assets, computed in accordance with paragraphs (a) of this section and §1.2110(b)(1) through (b)(2) of this chapter.

(ii) For all applicants that participated in Auction Nos. 5, 10, 11, and/or 22:

(A) The identity of each member of the applicant's *control group*, regardless of the size of each member's total interest in the applicant, and the percentage and type of interest held;

(B) The status of each *control group* member that is an *institutional investor*, an *existing investor*, and/or a member of the applicant's management;

(C) The identity of each affiliate of the applicant and each affiliate of individuals or entities identified pursuant to paragraphs (C)(1)(ii)(A) and (c)(1)(ii)(B) of this section;

(D) A certification that the applicant's sole *control group* member is a *preexisting entity*, if the applicant makes the election in either paragraph (b)(1)(v)(B) or (b)(1)(vi)(B)of this section; and

(E) For an applicant that is a *publicly traded corporation with widely disbursed voting power:*

(*1*) A certified statement that such applicant complies with the requirements of the definition of publicly traded corporation with widely disbursed voting power set forth in §24.720(f);

(*2*) The identity of each *affiliate* of the applicant.

(iii) For each applicant claiming status as a *small business consortium*, the information specified in paragraph (c)(1)(ii) of this section, for each member of such consortium.

(2) *Long-form application.* In addition to the requirements in subpart I of this part and other applicable rules (e.g., §§20.6(e) and 20.9(b) of this chapter), each applicant submitting a long-form application for a license(s) for frequency block C or F shall in an exhibit to its long-form application:

(i) Disclose separately and in the aggregate the *gross revenues* and *total assets*, computed in accordance with paragraphs (a) and (b) of this section, for each of the following: The applicant; the applicant's *affiliates*, the applicant's *control group* members; the applicant's attributable investors; and *affiliates* of its attributable investors;

(ii) List and summarize all agreements or other instruments (with appropriate references to specific provisions in the text of such agreements and instruments) that support the applicant's eligibility for a license(s) for frequency block C or frequency block F and its eligibility under §§24.711, 24.712, 24.714 and 24.720, including the establishment of *de facto* and *de jure* control; such agreements and instruments include articles of incorporation and bylaws, shareholder agreements, voting or other trust agreements, partnership agreements, management agreements, joint marketing agreements, franchise agreements, and any other relevant agreements (including letters of intent), oral or written; and

(iii) List and summarize any investor protection agreements and identify specifically any such provisions in those agreements identified pursuant to paragraph (c)(2)(ii) of this section, including rights of first refusal, supermajority clauses, options, veto rights, and rights to hire and fire employees and to appoint members to boards of directors or management committees.

(3) *Records maintenance.* All applicants, including those that are winning bidders, shall maintain at their principal place of business an updated file

of ownership, revenue and asset information, including those documents referenced in paragraphs (c)(2)(ii) and (c)(2)(iii) of this section and any other documents necessary to establish eligibility under this section and any other documents necessary to establish eligibility under this section or under the definition of small business. Licensees (and their successors in interest) shall maintain such files for the term of the license. Applicants that do not obtain the license(s) for which they applied shall maintain such files until the grant of such license(s) is final, or one year from the date of the filing of their short-form application (Form 175), whichever is earlier.

(d) *Definitions.* The terms control group, existing investor, institutional investor, nonattributable equity, preexisting entity, publicly traded corporation with widely dispersed voting power, qualifying investor, and small business used in this section are defined in § 24.720.

[67 FR 45368, July 9, 2002, as amended at 68 FR 42998, July 21, 2003]

§ 24.710 [Reserved]

§ 24.711 Installment payments for licenses for frequency Block C.

Installment payments. Each eligible licensee of frequency Block C may pay the remaining 90 percent of the net auction price for the license in installment payments pursuant to § 1.2110(f) of this chapter and under the following terms:

(a) For an eligible licensee with gross revenues exceeding $75 million (calculated in accordance with § 1.2110(n) of this chapter and § 24.709(b)) in each of the two preceding years (calculated in accordance with § 1.2110(n) of this chapter), interest shall be imposed based on the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted, plus 3.5 percent; payments shall include both principal and interest amortized over the term of the license.

(b) For an eligible licensee with gross revenues not exceeding $75 million (calculated in accordance with § 1.2110(b) of this chapter and § 24.709(b)) in each of the two preceding years, interest shall be imposed based on the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted, plus 2.5 percent; payments shall include interest only for the first year and payments of interest and principal amortized over the remaining nine years of the license term.

(c) For an eligible licensee that qualifies as a small business or as a consortium of small businesses, interest shall be imposed based on the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted; payments shall include interest only for the first six years and payments of interest and principal amortized over the remaining four years of the license term.

[67 FR 45371, July 9, 2002, as amended at 68 FR 42999, July 21, 2003]

§ 24.712 Bidding credits for licenses won for frequency Block C.

(a) Except with respect to licenses won in closed bidding in auctions that begin after March 23, 1999, a winning bidder that qualifies as a small business, as defined in § 24.720(b)(1), or a consortium of small businesses may use a bidding credit of fifteen percent, as specified in § 1.2110(f)(2)(iii) of this chapter, to lower the cost of its winning bid.

(b) Except with respect to licenses won in closed bidding in auctions that begin after March 23, 1999, a winning bidder that qualifies as a very small business, as defined in § 24.720(b)(2), or a consortium of very small businesses may use a bidding credit of twenty-five percent as specified in § 1.2110(f)(2)(ii) of this chapter, to lower the cost of its winning bid.

(c) *Unjust enrichment.* The unjust enrichment provisions of § 1.2111(d) and (e)(2) of this chapter shall not apply with respect to licenses acquired in either the auction for frequency block C that began on December 18, 1995, or the reauction of block C spectrum that began on July 3, 1996.

[67 FR 45371, July 9, 2002, as amended at 68 FR 42999, July 21, 2003]