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Acting Associate Director for Mitigation.

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 20 and 24

[WT Docket No. 96–59; GN Docket No. 90–314; FCC 96–278]

Broadband Personal Communications Services

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This Report and Order amends the Commission's broadband Personal Communications Services (''PCS'') rules. The Commission concludes that the present record is insufficient to support the race-based F block rules under the strict scrutiny standard of judicial review required by the Supreme Court's decision in *Adarand Constructors, Inc.* v. *Peña,* or to support the gender-based rules under the intermediate scrutiny standard that currently applies to those rules. Taking account of the need to award the remaining broadband PCS licenses expeditiously and to promote the rapid deployment of new services to the public, as well as the statutory objective of disseminating licenses among a wide variety of applicants, the Commission makes the F block rules race- and gender-neutral to avoid the delay that would likely result from legal challenges to the special provisions for minority- and women-owned businesses. The Commission also amends its D, E, and F block rules and broadband PCS rules generally to streamline procedures, reduce administrative burdens, and minimize the possibility of insincere bidding and bidder default. Finally, the Commission, in response to *Cincinnati Bell Telephone Co.* v. *FCC,* eliminates the cellular/PCS cross-ownership rule and the PCS spectrum cap in favor of the 45 MHz cap on Commercial Mobile Radio Services spectrum.

EFFECTIVE DATE: July 31, 1996.

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SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order in WT Docket No. 96–59; GN Docket No. 90–314; FCC 96–278, adopted June 21, 1996, and released June 24, 1996. The complete text is available for inspection and copying during normal business hours in the FCC Reference Center (Room 239), 1919 M Street, N.W., Washington, DC. The complete text may also be purchased from the Commission's copy contractor, International Transcription Service, Inc., (202) 857–3800, 2100 M Street, N.W., Washington, DC 20037.

Synopsis of the Report and Order

I. Introduction

1. In this Report and Order, the Commission modifies the competitive bidding and ownership rules for broadband Personal Communications Services (''PCS''). Many of the rule modifications concern the treatment of ''designated entities,'' *i.e.*, small businesses, rural telephone companies, and businesses owned by members of minority groups and women, under the broadband PCS F block rules. The Commission also amends the D, E, and F block rules and other broadband PCS rules in order to encourage sincere bidding, streamline the auction process, and lessen administrative burdens. In addition, in response to the remand from the U.S. Court of Appeals for the Sixth Circuit in *Cincinnati Bell Telephone Co.* v. *FCC,* 69 F.3d 752 (6th Cir. 1995), the Commission modifies the rules governing cellular licensees' ownership of broadband PCS licenses in all frequency blocks.

II. Rules Affecting Designated Entities

A. Meeting the Adarand Standard

2. In *Adarand Constructors, Inc.* v. *Peña,* 115 S. Ct. 2097 (1995), the Supreme Court held that all racial classifications, whether imposed at the federal, state or local government level, must be analyzed by a reviewing court under strict scrutiny, which requires such classifications to be narrowly tailored to further a compelling governmental interest. An intermediate scrutiny standard of review (under which a provision is constitutional if it serves an important governmental objective and is substantially related to achievement of that objective) applies to gender-based measures. Having evaluated the record before it, the Commission concludes that this record is insufficient to support the race- and gender-based F block provisions and revises the F block rules in this Report and Order to make them race- and gender-neutral. Overall, the commenters agree that this approach will best serve the goal of rapidly conducting the F block auction with the least risk of judicial delay. Moreover, this type of approach was upheld by the D.C. Circuit Court of Appeals, which held in *Omnipoint* v. *FCC,* 78 F.3d 620 (D.C. Cir. 1996), that the Commission acted reasonably in concluding that, in light of the additional time it would take to develop a record to support the race- and gender-based provisions of the C block rules, it should revise these rules by providing the most favorable terms to all small businesses. The Commission concludes that making the F block rules race- and gender-neutral will serve the public interest by enabling it to auction the remaining broadband PCS licenses as expeditiously as possible. Because many minority- and women-owned entities are small businesses and will therefore qualify for the same special provisions that would have applied to them under the previous rules, the Commission also believes that the amended rules will continue to fulfill the mandate under Section 309(j) of the Communications Act, as amended, 47 U.S.C. 309(j)(3), to provide opportunities for minority- and women-owned businesses to become providers of spectrum-based services.

1. Control Group Equity Structures

3. The F block auction is limited to applicants that, together with their affiliates and persons or entities that hold interests in them, have gross revenues of less than $125 million in each of the last two years and total assets of less than $500 million. As part of its decision to make the F block rules race- and gender-neutral, the Commission concludes that the 50.1/49.9 percent equity option, previously available to minority- and women-owned applicants only, should be available to all small businesses and entrepreneurs. Applicants may use this control group equity structure to establish eligibility to participate in the F block auction. It requires the control group to own at least 50.1 percent of the applicant's total equity; of that 50.1 percent equity, at least 30 percent must be held by qualifying investors. If these and certain other requirements are met, the remaining 49.9 percent of the applicant's equity may be held by non-controlling investors, and the gross revenues and total assets of any such investor will not be attributed.

4. The Commission adopts this rule modification because it reduces the likelihood of legal challenges to the F block rules and enhances the opportunities for a wide variety of applicants to obtain licenses and rapidly deploy broadband PCS; and because it believes that making the same equity structures available to both C and F block applicants is necessary so that C

block participants will not be required to structure themselves differently in order to participate in the F block auction. Moreover, this rule amendment will benefit other entities that did not participate in the C block auction because it continues equity structures that are familiar to the industry and the financial community.

5. The Commission declines to make adjustments to the financial eligibility thresholds in the F block rules. The Commission believes that retaining the same thresholds as those used for the C block auction will allow for participation by entities that used the C block rules as guidelines for determining their structure in preparation for the F block auction. Moreover, these thresholds were used by C block bidders, many of whom will be interested in participating in the F block auction. The Commission declines to further restrict participation in the F block (or any of the other 10 MHz blocks) to small businesses and rural telephone companies. It believes that setting aside the F block for both entrepreneurs and small businesses will be sufficient to achieve the objectives of providing opportunities for small businesses to obtain 10 MHz licenses and ensuring broad dissemination of 10 MHz licenses.

6. In addition, the Commission declines to treat C block licenses as assets that could potentially preclude C block winners from F block eligibility. It believes it would be unfair to disqualify C block winners on the basis of their success in acquiring capital to participate in that auction, primarily because the Commission has indicated previously that the C and F blocks are linked. The Commission believes that treating C block winners' licenses as an asset for purposes of eligibility for the F block auction could frustrate business plans and auction strategies made in reliance on its previous statements. Applicants should be aware that other licenses (such as Specialized Mobile Radio (''SMR''), cellular, narrowband PCS, and broadband PCS A and B block licenses) should be included in their total asset calculations for F block eligibility.

2. Affiliation Rules

7. The affiliation rules applicable to the F block identify all individuals and entities whose gross revenues and assets must be aggregated with those of the applicant to determine whether the applicant exceeds the financial caps for the entrepreneurs' blocks or for small business size status. There are two exceptions to these rules. Under the first exception, Indian tribes and Alaska Regional or Village Corporations organized pursuant to the Alaska Native Claims Settlement Act, 43 U.S.C. 1601 *et seq.*, are not considered affiliates of an applicant owned and controlled by such tribes and corporations. Under the second exception, the gross revenues and assets of affiliates controlled by minority investors who are members of the applicant's control group are not attributed to the applicant.

8. The Commission will eliminate the exception to the affiliation rules pertaining to minority investors for purposes of the F block auction. To retain this exception in its present state poses legal risks that, as discussed above, could delay the award of F block licenses. Furthermore, the Commission declines to adopt the modification of this rule that it utilized for the C block, which allowed all small business applicants to exclude any affiliates who would otherwise qualify as entrepreneurs by having gross revenues of $125 million or less and total assets of $500 million or less and whose total assets and gross revenues, when considered on a cumulative basis and aggregated with each other, do not exceed these amounts. The Commission adopted the modified exception for the C block at a time when a number of minority-owned applicants had relied on the rule and had structured their business arrangements accordingly. However, the Commission is not convinced that the C block exception is needed under current circumstances, and it acknowledges the argument made by certain commenters that the exception may qualify too many larger entities as small businesses. For applicants that participated in the C block auction and relied on the affiliation exception in structuring themselves, the Commission will consider requests to waive the rules to allow them to be eligible to participate in the F block auction. Finally, the Commission will retain the exception to the affiliation rules for Indian tribes and Alaska Regional or Village Corporations. The Commission notes that certain comments support its tentative conclusion in the Notice of Proposed Rule Making that the Indian Commerce Clause of the U.S. Constitution provides a basis for this exception which is not implicated by *Adarand*.

3. Installment Payments

9. The Commission amends its F block rules concerning installment payments to provide for three rather than five installment payment plans and to make all small businesses, rather than only those owned by minorities and women, eligible for the most favorable installment plan. The Commission concludes that extending the most favorable payment plan to all small businesses will give minority- and women-owned businesses an opportunity to participate in the provision of spectrum-based services. The Commission also concludes, however, that it should shorten the period during which F block auction winners eligible for this plan may make interest-only payments. Thus, the most favorable plan will have a two-year interest-only payment period, rather than a six-year interest-only period. The plan will provide for installments at a rate equal to ten-year U.S. Treasury obligations applicable on the date the license is granted, with payments of principal and interest amortized over the remaining eight years of the license term. Principal will be repaid as part of equal quarterly payments of interest and principal (as with a standard mortgage amortization schedule).

10. The Commission believes that these terms will provide small businesses with the appropriate level of U.S. government assisted financing to overcome the difficulties they face in accessing capital to compete in the PCS marketplace. It further believes that reducing the interest-only period to two years will deter speculation; encourage bidding, business, and financial strategies based upon market forces rather than the financial terms of installment payment plans; and still provide small businesses with the ability to obtain the necessary funds for construction and initial operation of their systems. Finally, shortening the interest-only period to two years will not foreclose opportunities for small businesses to compete in PCS. The terms that the Commission is offering are extremely attractive compared to other terms small businesses may be able to obtain.

11. Entrepreneurs that are not small businesses will be eligible for installment payments as provided in Sections 24.716(b)(1) and 24.716(b)(2) of the rules. These rules provide for installments at a rate equal to ten-year U.S. Treasury obligations applicable on the date the license is granted plus 3.5 percent, with payments of principal and interest amortized over the license term for eligible licensees with gross revenues exceeding $75 million in each of the two preceding years. Eligible licensees with gross revenues not exceeding $75 million in each of the two preceding years may make installment payments at a rate equal to ten-year U.S. Treasury obligations applicable on the date the license is granted plus 2.5 percent, with interest-

only payments for the first year and payments of interest and principal amortized over the remaining nine years of the license term.

12. The Commission also concludes that it should amend the terms of the installment payment plans to provide for late payment fees. Therefore, when licensees are more than fifteen days late in their scheduled installment payments, the Commission will charge a late payment fee equal to 5 percent of the amount of the past due payment. Without this late payment fee, licensees may not have adequate financial incentives to make installment payments on time. The 5 percent payment adopted here is an approximation of late payment fees applied in typical commercial lending transactions. Payments will be applied in the following order: late charges, interest charges, principal payments.

4. Bidding Credits

13. Consistent with its concerns about avoiding litigation based on *Adarand,* the Commission will eliminate the race- and gender-based aspects of the F block bidding credits. In place of these provisions, the Commission adopts a two-tiered bidding credit for small businesses. It believes that this approach will promote dissemination of licenses to a broader variety of applicants than a 25 percent bidding credit for all small businesses and will encourage smaller businesses, possibly businesses that are very well suited to provide 10 MHz niche services, to participate in the F block auction.

14. The Commission modifies its rules to provide that entities with average gross revenues greater than $15 million but not more than $40 million for the past three years are eligible for a 15 percent bidding credit; entities with average gross revenues of not more than $15 million for the past three years are eligible for a 25 percent bidding credit. The Commission believes that the timing of the modification here allows it to take a different approach than it took for the C block. Entities interested in bidding on F block licenses have not had expectations similar to those of entities that were interested in bidding on the C block licenses and that formulated business strategies in reliance on the tiered bidding credits originally adopted.

5. Information Collection

15. The Commission will request information regarding minority- and women-owned status in the F block short-form applications. The Commission believes that continuing to collect such information will assist it in analyzing applicant pools and auction results to determine whether it has promoted substantial participation in auctions by minorities and women, as directed by Congress, through the special provisions it makes available to small businesses.

B. Definitions

1. Small Business

16. Under the current F block rules, a ''small business'' is defined as an entity that, together with its affiliates and persons or entities that hold interests in such entity and their affiliates, has average gross revenues of not more than $40 million for the preceding three years. The Commission will continue to define small businesses in this way. Maintaining the $40 million definition of small businesses avoids disruption to the business plans of potential bidders, particularly participants in the C block auction. Additionally, however, the Commission defines a second tier of small businesses, which it will refer to as ''very small businesses,'' as entities that, together with their affiliates and persons or entities that hold interests in such entities and their affiliates, have average gross revenues of not more than $15 million for the preceding three years. Creation of this subcategory of small businesses enables the Commission to tailor its benefits to better meet the needs of bidders likely to participate in the F block auction. Smaller license size may mean that smaller businesses are likely to participate in the F block auction. Thus, as discussed above, the Commission's goals can best be served by offering varying bidding credits depending on the applicant's size.

17. The Commission declines to make special provisions for small business winners of C block licenses as requested by some commenters. As a practical matter, C block small business winners will likely not have accrued substantial gross revenues by the time the Commission auctions the D, E, and F blocks. Therefore, most of these winners should continue to qualify as small businesses. On the other hand, if they have grown in size beyond the established financial cap, or if they can no longer avail themselves of the exception to the affiliation rules, they may no longer qualify as a small business.

2. Rural Telephone Company

18. The Telecommunications Act of 1996 (''1996 Act'') defines 'rural telephone company' to include a larger number of local exchange carriers than the Commission's F block rules, which define a rural telephone company as ''a local exchange carrier having 100,000 or fewer access lines, including all affiliates.'' The Commission adopts the definition of rural telephone company contained in the 1996 Act. It finds compelling the argument that this definition will increase the number of entities eligible for partitioning and expedite the delivery of advanced services to rural areas. Although this decision may result in larger rural telephone companies being eligible to partition licenses, the Commission recognizes that the number of accesslines—including those provided by rural telephone companies—continues to grow rapidly as the uses of telecommunications services expand. Thus, most rural telephone companies will benefit from a definition that accounts for their growth. Adopting the 1996 Act definition for purposes of Section 309(j) will also promote uniformity of regulations and is therefore consistent with the mandate of this legislation of easing regulatory burdens and eliminating unnecessary regulation.

19. The Commission agrees with commenters who assert that the definition is one of general applicability and it therefore elects not to adopt the definition of rural telephone company contained in Section 251(f)(2) of the 1996 Act, as proposed by one commenter. This definition applies to rural telephone companies only in the context of suspensions or modifications of the application of certain statutory requirements to rural carriers. Absent a specific definition of rural telephone company for purposes of Section 309(j), and reading the statute as a whole, the Commission is constrained to adopt the more generalized definition.

C. Extending Small Business Provisions to the D and E Blocks

20. The Commission declines to extend installment payment plans or any other special provisions to small businesses bidding on the D and E blocks, believing that the special provisions for small businesses in the F block rules sufficiently further the objective of encouraging wide dissemination of broadband PCS licenses. Since the F block is an entrepreneurs' block, it guarantees that one third of the 10 MHz broadband PCS licenses will be assigned to entrepreneurs and small businesses. The Commission believes that it would undermine the justification for the F block as an entrepreneurs' block if it were to open the D and E blocks to special provisions for small businesses, and that departing from the original

plan to establish two contiguous blocks of broadband PCS spectrum for the exclusive use of entrepreneurs and small businesses is not warranted.

D. Adjusting Payment Provisions for 10 MHz Licenses

21. The Commission modifies the upfront payment requirement for the F block to raise it to the same level as the D and E block requirement and eliminate the discount previously provided to entrepreneurs. The Commission originally discounted upfront payments for entrepreneurs because their down payment requirement was low (5 percent) and it was concerned that if it required them to pay upfront payments larger than the required down payment it might discourage their participation. The Commission's experience to date, however, indicates that it has underestimated the value of spectrum and that upfront payments have not created a barrier to entrepreneur participation in auctions. The Commission is also concerned, based on defaults in the C block auction, that there is a need to obtain a higher payment up front to guard against default. The Commission also agrees that requiring a uniform upfront payment (per bidding unit) of all bidders for D, E, and F block licenses will greatly simplify the auction process for bidders interested in bidding on two or more of the blocks. The Commission also believes that if it conducts a single simultaneous multiple round auction of the D, E, and F block licenses, it is necessary for operational reasons to have the same upfront payment and activity requirements across all three blocks.

22. Further, because the Commission wants the payment terms to more accurately reflect the value of the licenses, it will raise the upfront payment requirement for all three blocks. It believes that this action is consistent with the policy reason for requiring upfront payments—to deter insincere and speculative bidding and to ensure that bidders have the financial capability to build out their systems. The formula for calculating upfront payments was intended to approximate 5 percent of the estimated license value. Based on the license values established in the completed PCS auctions, however, the formula of $0.02 per MHz-pop underestimates actual value. The Commission adopts an upfront payment of $.06 per MHz-pop for the D, E, and F blocks. Based on its analysis of the prices paid in the C block auction, the Commission believes that such an upfront payment is sufficient to ensure sincere bidding and guard against defaults. The Commission also delegates authority to the Wireless Telecommunications Bureau to modify the upfront payment requirement for any C block licenses that are reauctioned in the future. The Commission notes that it also favors the suggested approach that would require applicants to supplement their upfront payments during the auction to ensure that their payment is a certain percentage of their bids. Operationally the Commission cannot implement this proposal at this time, but it will look for ways to implement it in future auctions.

23. For similar reasons, the Commission also modifies the rule governing down payments for the F block. It finds that a 20 percent down payment, the same down payment that is required of D and E block auction winners, should be required of F block winners. Under this approach, F block entrepreneurs and small businesses will be required to supplement their upfront payments to bring their total payment to 10 percent of their winning bid within 5 business days of the close of the auction. Prior to licensing, they will be required to pay an additional 10 percent. The government will then finance the remaining 80 percent of the purchase price. The Commission believes an increased down payment will provide it with strong assurance against default and sufficient funds to cover default payments in the unlikely event of default. Increasing the amount of the bidder's funds at risk in the event of default discourages insincere bidding and therefore increases the likelihood that licenses are awarded to parties who are best able to serve the public.

E. Rules Regarding the Holding of Licenses

24. The Commission amends the holding requirement for F block licensees and extends this change to the C block rules. The Commission amends 47 CFR § 24.839 to permit the transfer of entrepreneurs' block licenses in the first five years to any entity that either holds other entrepreneurs' block licenses (and thus at the time of auction satisfied the entrepreneurs' block criteria) or that satisfies the criteria at the time of transfer. There will be no restrictions on transfers after the fifth year. The Commission notes, however, that the unjust enrichment provisions will continue to apply as before. The Commission further amends the holding rule to exempt *pro forma* transfers and assignments because trafficking concerns do not exist under such circumstances. The Commission concludes that allowing transfers and assignments in the first five years—but only to entrepreneurs—provides a sufficient safeguard. It also has the experience of the C block auction behind it, and understands that strict holding requirements may actually be hampering the ability of entrepreneurs to attract the capital necessary to construct and operate their systems. In particular, lenders and investors have expressed concern about the need for more flexibility in the event of financial distress and default. Because the Commission does not want investors to shy away from financing C and F block winners due to such concerns, it modifies the holding rule in a manner that continues to promote small and entrepreneurial ownership in broadband PCS licenses. The Commission believes that by not eliminating the transfer restriction entirely, it continues to have a useful safeguard to ensure that small businesses and entrepreneurs retain the opportunity to build out and operate broadband PCS licenses. At the same time, by allowing entrepreneurs to transfer their licenses to other entrepreneurs, the Commission believes that it allows market transactions to occur that balance the objectives of ensuring that entrepreneurs have an opportunity to participate in PCS and putting spectrum in the hands of those who value it most in the event the auction fails to accomplish this objective. In addition, the Commission believes that its amendment to the holding requirement serves the public interest by helping to ensure rapid and uninterrupted service to the public. Market-oriented solutions in the event of financial distress will help avoid PCS license defaults to the Commission and the accompanying investor and/or service disruption that such defaults engender.

III. The Cincinnati Bell Remand

A. The Cellular/PCS Cross-ownership Rule

25. In light of the Sixth Circuit's ruling in *Cincinnati Bell Telephone Co.* v. *FCC*, remanding the Commission's rule limiting cellular operators' eligibility for PCS licenses, the Commission will maintain the 45 MHz Commercial Mobile Radio Services (''CMRS'') spectrum cap set forth in 47 CFR 20.6 and eliminate the PCS and cellular/PCS spectrum cap contained in Sections 24.229 and 24.204, respectively. The Commission finds that a spectrum cap is necessary to avoid excessive concentration of licenses and promote and preserve competition in the CMRS marketplace and therefore declines to eliminate all limitations on

the amount of CMRS spectrum a single entity (or affiliated entities) may acquire.

26. The Commission adopted the 45 MHz CMRS spectrum cap to discourage anticompetitive behavior while at the same time maintaining incentives for innovation and efficiency. The Commission was concerned that excessive aggregation of spectrum by any one of several CMRS licensees could reduce competition by precluding entry by other service providers and might thus confer excessive market power on incumbents. The continuation of the 45 MHz spectrum cap will promote competition and prevent anticompetitive horizontal concentration in the CMRS business.

27. For determining when concentration reduces competition to an undesirable level, one accepted tool is the Herfindahl-Hirschman Index (''HHI''), which is used in the Department of Justice and Federal Trade Commission Horizontal Merger Guidelines (''DOJ/ FTC Guidelines'') to measure market concentration. In addition to considering the arguments presented by commenters in this proceeding and in response to the Sixth Circuit's concern about the lack of economic support for the cellular/PCS spectrum cap, the Commission's competitive analysis staff performed an HHI analysis for various possible structures of a hypothetical market for mobile two-way voice communications service in the same geographic area. The Commission staff's HHI analysis indicates that the 45 MHz CMRS spectrum cap is needed to prevent undue market concentration and the noncompetitive conditions in local markets that result from such concentration.

28. The 45 MHz spectrum cap is also needed specifically to prevent cellular licensees from gaining too great a competitive advantage over new entrants to the wireless telephony market. Cellular companies already hold licenses for 25 MHz of clear spectrum, and they already have technical expertise, customer bases, marketing operations, and antenna and transmitter sites. In short, cellular operators have a competitive position that is superior to that of any new market entrant. By limiting current cellular licensees to an additional 20 MHz of spectrum (*i.e.*, two of the three 10 MHz broadband PCS licenses), the 45 MHz cap will help to level the playing field for all new entrants, while ensuring that incumbent providers are not placed at any disadvantage.

29. The 45 MHz spectrum cap also furthers the goal of diversity of ownership that the Commission is mandated to promote under Section 309(j). Section 309(j) directs the Commission, in specifying eligibility for licenses and permits, to avoid excessive concentration of licenses and disseminate licenses among a wide variety of applicants. The statute further states that in prescribing regulations, the Commission must, *inter alia,* prescribe area designations and bandwidth assignments that promote economic opportunity for a wide variety of applicants. A spectrum cap is one of the most effective mechanisms the Commission could employ to achieve these goals.

30. The court in the *Cincinnati Bell* decision was concerned that the cellular/PCS spectrum cap would ''have a profound impact on businesses in an industry enmeshed in this country's telecommunications culture.'' It stated that ''[t]he continued existence of some wireless communications businesses rests on their ability to bid on Personal Communications Service licenses'' and that ''Cellular providers foreclosed from obtaining Personal Communications Service licenses may ultimately be left holding the remnants of an obsolete technology.'' *Cincinnati Bell*, 69 F.3d at 764. The Commission's amendment of its rules provides cellular licensees additional flexibility to expand into or migrate to PCS technology. Under the old rule, they were limited to one 10 MHz channel until the year 2000. The shift to a single 45 MHz spectrum cap will allow incumbent cellular operators to acquire up to two of the 10 MHz broadband PCS licenses (20 MHz) in the upcoming auction for the D, E, and F blocks. As many commenters point out, an additional 20 MHz of spectrum will be sufficient to develop and provide new digital services. The Commission also notes that cellular carriers have been rapidly implementing digital and other new technologies with their current 25 MHz of spectrum.

31. While the Commission's analysis of the CMRS market under the DOJ/FTC Guidelines indicates that the 45 MHz spectrum cap is needed to ensure competition, it also shows that this cap adequately addresses the Commission's concerns about anticompetitive behavior. Indeed, the Commission's HHI analysis indicates that the concentration levels under the single 45 MHz spectrum cap would not be higher than the level that would be possible under all three of the existing caps. Thus, the Commission concludes that the PCS and cellular/PCS spectrum caps are unnecessary.

32. The Commission also believes that elimination of the cellular/PCS cross-ownership rule and the PCS spectrum cap in favor of the single 45 MHz CMRS spectrum cap has important advantages. Applying the single 45 MHz CMRS cap will give both cellular and PCS providers more flexibility to participate in a more competitive marketplace. The elimination of the cellular/PCS and PCS limits will give PCS providers greater flexibility to own interests in other providers and provide additional services and, hence, enhanced opportunities to compete. In addition, PCS providers will no longer be restricted to less than a 5 percent ownership interest in cellular and other PCS licensees in order to avoid attribution. Instead, they will be subject to the more liberal 20 percent attribution level for all CMRS.

33. The Commission also notes that the 1996 Act requires it to determine in every even-numbered year (beginning with 1998) ''whether any regulation is no longer necessary in the public interest as the result of meaningful economic competition between providers of such service'' and to modify or repeal such regulation. 47 CFR 161(a)(2). In an effort to streamline regulations consistent with the spirit of the 1996 Act, and in light of the findings set forth above, the Commission believes that simplifying the rules to include a single 45 MHz CMRS cap in place of the three separate spectrum caps is warranted. In addition, at the next biennial review of the Commission's regulations under the 1996 Act and in annual reports on the state of competition in the CMRS market, the Commission will continue to evaluate the need for the 45 MHz spectrum cap in its present form.

34. The Commission declines to alter the 10 percent overlap restriction for the CMRS cap as some commenters suggest. It continues to believe that an overlap of less than 10 percent of the population is sufficiently small that the potential for exercise of undue market power by the cellular operator is slight. Given its decision to eliminate the cellular/PCS and PCS ownership limitations, the Commission is concerned that greater overlap might lead to anticompetitive practices. It will, however, expand the post-auction divestiture provisions of 47 CFR § 20.6 to conform with the divestiture provisions that previously applied in the cellular/PCS cross-ownership rule, including the relaxed rule applicable to situations where the overlap exceeds 10 percent, but is less than 20 percent. Thus, any party holding an attributable ownership interest in a CMRS licensee may be a party to a broadband PCS application if it certifies that, if necessary, it will come

into compliance with the CMRS spectrum cap through post-auction divestiture procedures.

B. The 20 Percent Attribution Standard

35. The Commission's decision to eliminate the 35 MHz cellular/PCS spectrum cap renders the issue of whether to modify the attribution standard of 47 CFR 24.204(d) moot. The Commission reaffirms, however, the 20 percent attribution standard for the purpose of determining whether an entity is subject to the 45 MHz CMRS spectrum aggregation limit. The Commission also concludes that the attribution standard for the 45 MHz spectrum cap should be made race- and gender-neutral such that a 40 percent attribution standard applies to all small businesses and rural telephone companies. The Commission believes that extending the 40 percent threshold to noncontrolling investors in small businesses as it did for the C block licenses will promote additional investment in small business applicants and ensure broad participation in PCS by designated entities.

36. The Commission believes that a 20 percent interest held by a single entity would create a possibility of *de facto* control. Such an interest (whether 20 percent or less) that conveys to its holder actual working control (including investor control) is already attributable under the rules. The Commission believes generally, however, that even an entity that does not have *de facto* or *de jure* control but owns a 20 percent or more interest in a licensee would have sufficient influence to reduce competition and should be subject to the CMRS spectrum aggregation limit. The Commission notes that attribution rules for other services typically apply much lower ownership benchmarks of 5 to 10 percent. Both cable and broadcast use a 5 to 10 percent attribution level. The Commission further notes, as do some commenters, that the 1996 Act defines ''affiliate'' as a ''person that * * * owns or controls, is owned or controlled by, or is under common ownership or control with, another person * * *. [The] term 'own' means to own an equity interest (or the equivalent thereof) of more than 10 percent.'' 47 U.S.C. 153 (1).

37. The Commission continues to believe that a higher benchmark of 20 percent should apply for purposes of the CMRS spectrum cap to encourage capital investment and business opportunities in CMRS. Given the changing technology and the variety of competing services that will be subject to this limitation, it believes that increased flexibility in the rules will enable CMRS providers to adapt their services to meet customer demand. Furthermore, the Commission originally adopted a 20 percent attribution level in the cellular/PCS cross-ownership rules to allow partial owners of cellular licensees to participate in PCS, in light of several partial and often passive ownership interests that may have resulted from early settlements during the initial phase of cellular licensing. The Commission believes that maintaining a 20 percent attribution level for the CMRS cap will allow a wide variety of players (*i.e.*, PCS, cellular and SMR providers) to enter the marketplace while still preventing anticompetitive practices that would have harmful effects on consumers.

38. The Commission disagrees with suggestions that only controlling interests should be attributable. Establishing a control test would require the Commission to conduct frequent case-by-case determinations of control, which are time-consuming, fact specific, and subjective. The bright line 20 percent attribution rule avoids these problems. Also, for the reasons discussed below, a single majority shareholder exception to the rule is not appropriate for all situations involving CMRS licensees and their owners, and so adoption of such an exception is not a suitable bright line substitute for 20 percent attribution. However, the Commission adopts a less restrictive alternative and allows licensees with non-controlling minority investors with potentially conflicting CMRS ownership interests to seek waivers of the spectrum cap rule where the licensee is controlled by a single majority shareholder or controlling general partner.

39. The Commission rejects a control-based attribution test because significant, but non-controlling, investments have sufficient potential to affect the level of competition in the CMRS market. The CMRS spectrum cap ownership attribution rule, just as all other ownership attribution rules and similar statutory provisions, must take such interests into account. Economic theory predicts that where a CMRS licensee owns a substantial portion of one of its competitors, neither company has as strong an incentive to compete vigorously against its partner as it does with respect to an unrelated competitor. Theoretical analysis has demonstrated that partial ownership interests can create the very non-competitive markets that the Commission wants to avoid. Indeed, as noted above, Congress was also apparently concerned about competitive incentives when it defined ownership in the 1996 Act to mean an interest of ten percent. The Communications Act also limits foreign ownership interests in CMRS licenses to 20 percent. Although these statutory ownership attribution criteria do not directly apply to the CMRS ownership attribution rules, they indicate that Congress believed that even non-controlling, minority ownership interests can convey significant influence to their holders.

40. The Commission recognizes that small businesses and rural telephone companies, as well as non-controlling investors in small businesses, may have non-attributable ownership of up to 40 percent under the rules. But these relaxed attribution rules present a situation entirely different from the 20 percent attribution rule. The Commission has been charged expressly by Congress to ensure that small businesses, including businesses owned by women and minorities, and rural telephone companies are given meaningful opportunities to participate in the provision of wireless services. The rules must also promote the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas. One of the most formidable barriers to such participation is the difficulty such businesses face in raising sufficient capital to compete in the highly capital-intensive wireless communications businesses. By increasing the attribution threshold for such designated entities and their investors, the Commission's goal was to make capital more readily available by reducing the number of investors such businesses must seek out. The Commission also concluded that smaller entities that have some interests in cellular operations may be especially effective PCS competitors because of their cellular experience. This will help ensure that service is brought quickly to underserved areas and that designated entities become viable competitors. In particular, rural telephone companies and some small cellular companies, due to their existing infrastructure, are uniquely positioned rapidly to introduce PCS services into their service areas or adjacent areas.

41. However, the Commission did not exempt small businesses and rural telephone companies entirely from the cellular eligibility rules because such an exemption could foreclose competition from a new PCS entrant. In maintaining the 45 MHz spectrum cap, the Commission remains concerned that there is potential for some of these parties to compete less vigorously in the nascent PCS industry. While it recognizes that its relaxation of the rules

for the CMRS spectrum cap presents a risk of lower than optimal competition, the Commission must balance competing public policies and believes that this is the proper balance to fulfill the various statutory mandates under Section 309(j) of the Communications Act.

42. Further, the Commission declines to adopt a single majority shareholder exception for the CMRS spectrum cap rule. As discussed above, economic theory indicates that an entity holding less than a majority interest may influence the CMRS market in an anticompetitive manner. In those circumstances, it makes no difference whether there is another shareholder that exercises control since significant minority ownership that does not convey control still poses a serious danger of hindering competition in a concentrated market such as CMRS. In addition, the Commission notes that, although the single majority shareholder exception currently applies in the broadcast context, it believes that the broadcast and CMRS markets are sufficiently different to warrant different treatment (and even in the broadcast arena the Commission has recently sought comment on whether to restrict the single majority shareholder rule). Mass media entities subject to the broadcast ownership rules with the single majority shareholder exception—including AM and FM radio licensees, UHF and VHF television licensees, cable television operators and newspaper publishers—offer the audience with numerous competing ''voices'' from which to choose. There are as many as 30 or more broadcast stations in some areas. In contrast, as the Commission envisions CMRS (particularly in the short term), consumers will be able to choose from only about 5 or 6 competing service providers at most—as noted above, a fairly concentrated market. The concerns the Commission has expressed above about the potential of common ownership to influence the entire market may be far less serious in a less concentrated market such as that for mass media services. That is because the participants in a non-oligopoly market are less likely to act jointly in order to preserve high prices. In addition, the type of ''product'' on which competition in broadcasting is based is different from the product offered by CMRS providers. Broadcasters compete for advertising dollars (by attracting audience share) on the basis of non-quantifiable programming choices, while CMRS providers are expected to offer commodity-type services that compete in terms of prices charged directly to consumers. The Commission believes that it is more important to preserve vigorous competition in a commodity-based market than in a market like broadcasting. CMRS prices will be lowered only where competitors must vie to survive, whereas it is not so clear that programming will improve or become more diverse as the result of competition in free over-the-air television and radio. Indeed, some economists suggest that less competitive markets may actually offer more diverse programming. Thus, even if the single majority shareholder rule is appropriate for the mass media industry, that sector is sufficiently different from the CMRS market to justify somewhat different regulation.

43. Hence, the Commission believes that, as a general matter, minority stock interests and limited partnership interests should be deemed attributable CMRS ownership interests even if a single holder (or group of affiliated holders) that owns more than 50 percent of the outstanding stock or partnership equity or has voting control of the CMRS licensee. Nevertheless, the Commission believes that there may be limited circumstances where the existence of a single majority shareholder (or a single, controlling general partner) may mitigate the competitive impact of common ownership and the ability of the non-controlling interest holder to influence the licensee. Accordingly, the Commission will implement two less restrictive measures as an alternative to attributing ownership in such cases.

44. First, as was previously done with the cellular/PCS cross-ownership rule, the Commission will allow parties with non-controlling, attributable interests in CMRS licensees to have an attributable (or controlling) interest in another CMRS application that would exceed the 45 MHz cap so long as certain post-licensing divestiture procedures are followed. A ''non-controlling attributable interest'' is one where the holder has less than a 50 percent voting interest and there is an unaffiliated single holder of a 50 percent or greater voting interest. This will allow interest holders in licensees with a single majority shareholder to obtain another CMRS license (or attributable interest therein) through an auction or other means, subject to the interest holder coming into compliance with the divestiture provisions within 90 days of grant of the conflicting license.

45. Second, the Commission will consider requests for waivers of the CMRS spectrum cap that make an affirmative showing that an otherwise attributable ownership interest should not be attributed to its holder because: the interest holder has less than a 50 percent voting interest and there is an unaffiliated single holder of a 50 percent or greater voting interest; the interest holder is not likely to affect the local market in an anticompetitive manner because the market is highly competitive; the interest holder is not involved in operations of the licensee and does not have the ability to influence the licensee on a regular basis; and grant of a waiver is in the public interest because the benefits of such common ownership to the public outweigh any potential for anticompetitive harm to the market.

46. Finally, the Commission believes that retroactive application of any cross-ownership or spectrum cap rule changes would be contrary to the public interest. PCS licensees that participated in the A, B, and C block auctions have already incurred enormous expenses to, *inter alia*, design their systems, relocate incumbent users of the spectrum, acquire cell sites, and establish marketing plans. Retroactive application of the rules would disrupt this burgeoning industry and delay service to the public. Furthermore, entities that may have been precluded from participating in past auctions for CMRS spectrum based on the prior rules may now acquire additional spectrum through future auctions, assignments of licenses, transfers of control or investments. Thus, the Commission concludes that any changes to the spectrum cap and cross-ownership rules will apply prospectively.

IV. Ownership Disclosure Provisions

47. The Commission amends Section 24.813(a)(1) and Section 24.813(a)(2) of the rules, 47 CFR §§ 24.813 (a)(1) and (a)(2), to limit the information disclosure requirement with respect to outside ownership interests of applicants' attributable stockholders, and will require only the disclosure of attributable stockholders' direct, attributable ownership in other businesses holding or applying for CMRS or PMRS licenses. The Commission believes that the more extensive ownership disclosure requirements are burdensome and difficult to administer, and that the more limited requirements will continue to ensure participation of only eligible bidders. The Commission also amends 47 CFR 24.813(a)(4) to delete the requirement that partnerships file a signed and dated copy of their partnership agreement with their short-form and long-form applications. The Commission has found this requirement

to be overly burdensome and is concerned that confidential or strategic bidding information could be unnecessarily disclosed through submissions of such agreements.

48. The Commission also amends Sections 24.720(f) and 24.720(g) of the rules, to allow each applicant that does not otherwise use audited financial statements to provide a certification from its chief financial officer that the gross revenue and total asset figures indicated in its short-form and long-form applications are true, full, and accurate and, that it does not have the audited financial statements that are otherwise required under the rules. The Commission believes the requirement of using audited financial statements to be unnecessarily burdensome, especially for small businesses that do not normally rely on such statements.

49. Finally, the Commission amends its rules to require that an applicant's determination of average gross revenues be based on the three most recently completed fiscal or calendar years. With regard to concerns about inadvertent release of confidential data, the Commission will require that confidential data be filed separately on paper. Similarly, any requests that information be treated as confidential will not be accepted electronically and must otherwise comply with the rules governing confidential treatment of documents.

V. Auction Schedule

50. The Commission concludes that it should auction the D, E, and F blocks at the same time. It also intends to auction the D, E, and F blocks in a single auction. The Commission believes that auctioning the three blocks in one simultaneous multiple round auction will benefit bidders by reducing administrative inefficiencies and by providing maximum flexibility for bidders to choose between similar licenses. The Commission believes that if it uses uniform upfront payments, which it adopts for the three blocks in this *Report and Order*, it will reduce the complexity of a single auction. The Commission also believes that this method will expedite service to the public. Although the Commission believes that a single auction is the best option, it delegates authority to the Wireless Telecommunications Bureau to conduct one auction for the D and E blocks and one for the F block concurrently if such an approach is operationally necessary or otherwise furthers the public interest.

VI. Other Issues

A. Limit on Licenses Acquired at Auction

51. Several commenters suggested modifying the limitation on the number of licenses that a single entity may acquire at auction to ensure wide distribution of entrepreneurs' block licenses. Commission rules provide that a single entity may win no more than 10 percent of the licenses available in the entrepreneurs' blocks; these licenses may be all C block licenses or F block licenses or some combination of the two. Several commenters proposed that the Commission change this limitation to one based on population rather than on the number of licenses. The Commission declines to modify the rule as requested. First, C block licenses were disseminated to a large number of auction winners. Second, bidding strategies in the C block auction and the business plans of many firms may have been formulated in reliance on this rule. The Commission finds no basis for modifying it here.

B. Partitioning and Disaggregation

52. Numerous commenters argue that the Commission's geographic partitioning provisions, which currently apply only to rural telephone companies, should be expanded to include broadband PCS licensees and spectrum disaggregation should be permitted in the near term. Under the current rules, broadband PCS licensees may disaggregate licensed broadband PCS spectrum after January 1, 2000, if they have met the five-year construction requirement. Because the issues of partitioning and disaggregation exceed the scope of this proceeding, the Commission will consider these issues in a separate proceeding.

C. Bid Withdrawal

53. One commenter suggested that the bid submission software should be enhanced to warn bidders whenever a bid is entered that exceeds the minimum bid by more than 10 bid increments. For the D, E, and F block auction, the Wireless Telecommunications Bureau will employ a procedure in addition to those in place that will warn bidders of the possibility of a mistaken bid.

54. The same commenter also states that since the Commission cannot distinguish honest mistakes from strategic mistakes, it should impose a penalty for mistaken bids. The rules provide for a bid withdrawal payment that is equal to the difference between the withdrawn bid amount and the subsequent winning bid, if the subsequent winning bid is lower. No withdrawal payment is assessed if the subsequent winning bid exceeds the withdrawn bid.

55. For the D, E, and F block auction, the Commission adopts the approach of *Atlanta Trunking*, where it held that in cases of erroneous bids, some relief from the bid withdrawal payment requirement appears necessary. (Atlanta Trunking Associates, Inc. and MAP Wireless L.L.C. Requests to Waive Bid Withdrawal Payment Provisions, Order, FCC 96–203, 61 FR 25807 (May 23, 1996)). In *Atlanta Trunking*, the Commission fashioned the following guidelines to be followed when addressing individual requests for waiver of withdrawal payments: If a mistaken bid is withdrawn in the round immediately following the round in which it was submitted, and the auction is in Stage I or Stage II, the withdrawal payment should be the greater of (a) two times the minimum bid increment during the round in which the mistaken bid was submitted or (b) the standard withdrawal payment calculated as if the bidder had made a bid at one bid increment above the minimum accepted bid. If the mistaken bid is withdrawn two or more rounds following the round in which it was submitted, the bidder should not be eligible for any reduction in the bid withdrawal payment. Similarly, during Stage III of an auction, if a mistaken bid is not withdrawn during the round in which it was submitted, the bidder should not be eligible for any reduction in the bid withdrawal payment. The Commission believes that under this approach, the required bid withdrawal payment would be substantial enough to discourage strategic placement of erroneous bids without being so severe as to impose an untenable burden on bidders.

VII. Conclusion

In this *Order*, the Commission concludes that making the F block rules race- and gender-neutral will avoid the uncertainty and delay that could result from legal challenges to the special provisions for minority- and women-owned businesses in the broadband PCS F block rules. The Commission also takes steps to streamline procedures and minimize the possibility of insincere bidding and bidder default. The Commission also responds to the *Cincinnati Bell* remand issues. Finally, to expedite the delivery of broadband PCS services to the public, the Commission plans to offer the D, E, and F block licenses together in one simultaneous multiple round auction and delegates authority to the Wireless

Telecommunications Bureau to conduct two concurrent auctions if circumstances warrant.

VIII. Procedural Matters and Ordering Clauses

57. The Final Regulatory Flexibility Analysis, as required by Section 604 of the Regulatory Flexibility Act, is set forth in Appendix C of the Report and Order. Public Law No. 96–354, 94 Stat. 1164, 5 U.S.C. 601 *et seq.* (1981).

58. *It is ordered,* That the rule changes specified below *are adopted* and are *effective* July 31, 1996.

59. This action is taken pursuant to Sections 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303(r) and 309(j).

List of Subjects in 47 CFR Parts 20 and 24

Commercial Mobile Radio Service, Personal Communications Services.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

Rule Changes

Parts 20 and 24 of Chapter I of Title 47 of the Code of Federal Regulations are amended as follows:

PART 20—COMMERCIAL MOBILE RADIO SERVICES

1. The authority citation for Part 20 continues to read as follows:

Authority: Secs. 4, 303, and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, and 332, unless otherwise noted.

2. Section 20.6 is amended by revising paragraphs (d)(2), (e), and Note 1 to § 20.6 to read as follows:

§ 20.6 CMRS spectrum aggregation limit.

* * * * *

(d) * * *

(2) Partnership and other ownership interests and any stock interest amounting to 20 percent or more of the equity, or outstanding stock, or outstanding voting stock of a broadband PCS, cellular or SMR licensee shall be attributed, except that ownership will not be attributed unless the partnership and other ownership interests and any stock interest amount to at least 40 percent of the equity, or outstanding stock, or outstanding voting stock of a broadband PCS, cellular or SMR licensee if the ownership interest is held by a small business or a rural telephone company, as these terms are defined in § 1.2110 of this chapter or other related provisions of the Commission's rules, or if the ownership interest is held by an entity with a non-controlling equity interest in a broadband PCS licensee or applicant that is a small business.

* * * * *

(e) Divestiture. (1) Any party holding controlling or attributable ownership interests in broadband PCS, cellular, and/or SMR licensees regulated as CMRS providers that would exceed the spectrum aggregation limitation defined in paragraph (a) of this section, if granted additional licenses, may be a party to a broadband PCS, cellular, or SMR application (i.e., have a controlling or attributable interest in the applicant), and such applicant will be eligible for licenses amounting to more than 45 MHz of broadband PCS, cellular, and/or SMR spectrum regulated as CMRS in a geographical area, pursuant to the divestiture procedures set forth in paragraphs (e)(2) through (e)(4) of this section; provided, however, that in the case of parties holding controlling or attributable ownership interests in broadband PCS, cellular, and/or SMR licensees, these divestiture procedures shall be available only to:

(i) Parties with controlling or attributable ownership interests in broadband PCS, cellular, and/or SMR licenses where the geographic license areas cover 20 percent or less of the applicant's service area population;

(ii) Parties with attributable interests in broadband PCS, cellular, and/or SMR licenses solely due to management agreements or joint marketing agreements; and

(iii) Parties with non-controlling attributable interests in broadband PCS, cellular, and/or SMR licenses, regardless of the degree to which the geographic license areas cover the applicant's service area population. For purposes of this paragraph, a ''non-controlling attributable interest'' is one in which the holder has less than a fifty (50) percent voting interest and there is an unaffiliated single holder of a fifty (50) percent or greater voting interest.

(2) The applicant for a license that, if granted, would exceed the 45 MHz limitation shall certify on its application that it and all parties to the application will come into compliance with this limitation.

(3) If such an applicant is a successful bidder in an auction, it must submit with its long-form application a signed statement describing its efforts to date and future plans to come into compliance with the 45 MHz spectrum limitation. A similar statement must also be included with any application for assignment of licenses or transfer of control that, if granted, would exceed the spectrum aggregation limit.

(4) If such an applicant is otherwise qualified, its application will be granted subject to a condition that the licensee shall come into compliance with the 45 MHz spectrum limitation within ninety (90) days of final grant.

(i) Parties holding controlling interests in broadband PCS, cellular, and/or SMR licensees that conflict with the attribution threshold or geographic overlap limitations set forth in this section will be considered to have come into compliance if they have submitted to the Commission an application for assignment of license or transfer of control of the conflicting licensee (see §§ 24.839 of this chapter (PCS), 22.39 of this chapter (cellular), 90.158 of this chapter (SMR)) by which, if granted, such parties no longer would have an attributable interest in the conflicting license. If no such assignment or transfer application is tendered to the Commission within ninety (90) days of final grant of the initial license, the Commission may consider the certification and the divestiture statement to be material, bad faith misrepresentations and shall invoke the condition on the initial license or the assignment or transfer, cancelling or rescinding it automatically, shall retain all monies paid to the Commission, and, based on the facts presented, shall take any other action it may deem appropriate. Divestiture may be to an interim trustee if a buyer has not been secured in the required period of time, as long as the applicant has no interest in or control of the trustee, and the trustee may dispose of the license as it sees fit.

(ii) Where parties to broadband PCS, cellular, or SMR applications hold less than controlling (but still attributable) interests in broadband PCS, cellular, or SMR licensee(s), they shall submit, within ninety (90) days of final grant, a certification that the applicant and all parties to the application have come into compliance with the limitations on spectrum aggregation set forth in this section.

Note 1 to § 20.6: Waivers of § 20.6(d) may be granted upon an affirmative showing:

(1) That the interest holder has less than a 50 percent voting interest in the licensee and there is an unaffiliated single holder of a 50 percent or greater voting interest;

(2) That the interest holder is not likely to affect the local market in an anticompetitive manner;

(3) That the interest holder is not involved in the operations of the licensee and does not have the ability to influence the licensee on a regular basis; and

(4) That grant of a waiver is in the public interest because the benefits to the public of common ownership outweigh any potential anticompetitive harm to the market.

* * * * *

PART 24—PERSONAL COMMUNICATIONS SERVICES

3. 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.

§ 24.204 [Removed]

4. Section 24.204 is removed.

5. Section 24.229 is amended by removing paragraph (c) and redesignating paragraph (d) as paragraph (c) and revising it to read as follows.

§ 24.229 Frequencies.

* * * * *

(c) After January 1, 2000, licensees that have met the 5-year construction requirement may assign portions of licensed PCS spectrum.

6. Section 24.704 is amended by adding paragraph (a)(3) to read as follows:

§ 24.704 Withdrawal, default and disqualification penalties.

(a) * * *

(3) *Erroneous Bids.* If at any point during an auction an erroneous bid is withdrawn in the same round in which it was submitted, the bid withdrawal payment will be the greater of

(i) The minimum bid increment for that license and round; and

(ii) The standard bid withdrawal payment, as defined in paragraph (a)(1) of this section, calculated as if the bidder had made the minimum accepted bid. If an erroneous bid is withdrawn in the round immediately following the round in which it was submitted, and the auction is in Stage I or Stage II, the withdrawal payment will be the greater of

(A) Two times the minimum bid increment during the round in which the erroneous bid was submitted, and

(B) The standard withdrawal payment, as defined in paragraph (a)(1) of this section, calculated as if the bidder had made a bid one bid increment above the minimum accepted bid. If an erroneous bid is withdrawn two or more rounds following the round in which it was submitted, the bidder will not be eligible for any reduction in the bid withdrawal payment as defined in paragraph (a)(1) of this section. During Stage III of an auction, if an erroneous bid is not withdrawn during the round in which it was submitted, the bidder will not be eligible for any reduction in the bid withdrawal payment as defined in paragraph (a)(1) of this section.

* * * * *

7. Section 24.706 is revised to read as follows:

§ 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 this chapter, paragraph (c) of this section, and §§ 24.711(a)(1) and 24.716(a)(1).

(b) Winning bidders in an auction must submit a down payment to the Commission in accordance with § 1.2107(b) of this chapter and §§ 24.711(a)(2) and 24.716(a)(2).

(c) Each eligible bidder for licenses on frequency Blocks D and E subject to auction shall pay an upfront payment of $0.06 per MHz per pop for the maximum number of licenses (in terms of MHz-pops) on which it intends to bid pursuant to § 1.2106 of this chapter and procedures specified by Public Notice.

8. Section 24.709 is amended by revising the section heading, paragraphs (a)(1), (a)(2), (c)(1) introductory text, (c)(2) introductory text, and (c)(2)(ii) to read as follows:

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

(a) * * *

(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 or entities that hold interests in the applicant and their *affiliates,* have *gross revenues* of less than $125 million in each of the last two years and *total assets* of less than $500 million at the time the applicant's short-form application (Form 175) is filed.

(2) The *gross revenues* and *total assets* of the applicant (or licensee), and its *affiliates,* and (except as provided in paragraph (b) of this section) of persons or entities that hold interests in the applicant (or licensee), and their *affiliates,* shall be attributed to the applicant and 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.

* * * * *

(c) * * *

(1) *Short-form Application.* In addition to certifications and disclosures required by Part 1, subpart Q of this chapter and § 24.813, each applicant for a license 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:

* * * * *

(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 frequency block F shall, in an exhibit to its long-form application:

* * * * *

(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

* * * * *

§ 24.715 [Removed]

9. Section 24.715 is removed.

10. Section 24.716 is amended by revising paragraphs (a)(1), (a)(2), (b), redesignating paragraph (c) as paragraph (d); revising newly-redesignated paragraph (d)(2); and adding a new paragraph (c) to read as follows:

§ 24.716 Upfront payments, down payments, and installment payments for licenses for frequency Block F.

(a) * * *

(1) Each eligible bidder for licenses on frequency Block F subject to auction shall pay an upfront payment of $0.06 per MHz per pop for the maximum number of licenses (in terms of MHz-pops) on which it intends to bid pursuant to § 1.2106 of this chapter and procedures specified by Public Notice;

(2) Each winning bidder shall make a down payment equal to 20 percent of its winning bid (less applicable bidding credits); a winning bidder shall bring its total amount on deposit with the Commission (including upfront payment) to 10 percent of its net winning bid within five business days after the auction closes, and the remainder of the down payment (10

percent) shall be paid within five business days after the application required by § 24.809(b) is granted; and

(b) *Installment Payments.* Each eligible licensee of frequency Block F may pay the remaining 80 percent of the net auction price for the license in installment payments pursuant to § 1.2110(e) of this chapter and under the following terms:

(1) For an eligible licensee with *gross revenues* exceeding $75 million (calculated in accordance with § 24.709 (a)(2) and (b)) in each of the two preceding years (calculated in accordance with § 24.720(f)), 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;

(2) For an eligible licensee with *gross revenues* not exceeding $75 million (calculated in accordance with § 24.709 (a)(2) and (b)) in each of the two preceding years (calculated in accordance with § 24.720(f)), 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; or

(3) 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 two years and payments of interest and principal amortized over the remaining eight years of the license term.

(c) *Late Installment Payments.* Any licensee that submits a scheduled installment payment more than 15 days late will be charged a late payment fee equal to 5 percent of the amount of the past due payment. Payments will be applied in the following order: late charges, interest charges, principal payments.

(d) * * *

(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 such change as a condition of approval. 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 § 24.709(b)), debt financing, revenue from operations or other investments, business development or expanded service shall not be considered to result in the licensee losing eligibility for installment payments.

* * * * *

11. Section 24.717 is amended by revising paragraphs (a) and (b), removing paragraph (c), and redesignating paragraph (d) as paragraph (c) to read as follows:

§ 24.717 Bidding credits for licenses for frequency Block F.

(a) A winning bidder that qualifies as a *small business* or a *consortium of small businesses* may use a bidding credit of 15 percent to lower the cost of its winning bid.

(b) A winning bidder that qualifies as a *very small business* or a *consortium of very small businesses* may use a bidding credit of 25 percent to lower the cost of its winning bid.

* * * * *

12. Section 24.720 is amended by revising the heading of paragraph (b) redesignating paragraphs (b)(2) and (b)(3) as paragraphs (b)(3) and (b)(4) and revising them; adding new paragraphs (b)(2) and (b)(5); and revising paragraphs (c)(2), (e), (f), (g), (j)(2), (l)(11)(i), (n)(1), (n)(3) and (n)(4) to read as follows:

§ 24.720 Definitions.

* * * * *

(b) *Small business; very small business; consortia.* * * *

(2) A *very small business* is an entity that, together with its *affiliates* and persons or entities that hold interests in such entity and their *affiliates*, has average annual *gross revenues* that are not more than $15 million for the preceding three years.

(3) For purposes of determining whether an entity meets the $40 million average annual *gross revenues* size standard set forth in paragraph (b)(1) of this section or the $15 million average annual *gross revenues* size standard set forth in paragraph (b)(2) of this section, the *gross revenues* of the entity, its *affiliates*, persons or entities holding interests in the entity and their *affiliates* shall be considered on a cumulative basis and aggregated subject to the exceptions set forth in § 24.709(b).

(4) A *small business consortium* is a conglomerate organization formed as a joint venture between or among mutually independent business firms, each of which individually satisfies the definition of a *small business* in paragraphs (b)(1) and (b)(3) of this section.

(5) A *very small business consortium* is a conglomerate organization formed as a joint venture between or among mutually independent business firms, each of which individually satisfies the definition of a *very small business* in paragraphs (b)(2) and (b)(3) of this section.

(c) * * *

(2) That complies with the requirements of § 24.709(b)(3) and (b)(5) or § 24.709(b)(4) and (b)(6).

* * * * *

(e) *Rural Telephone Company.* A *rural telephone company* is a local exchange carrier operating entity to the extent that such entity:

(1) Provides common carrier service to any local exchange carrier study area that does not include either;

(i) Any incorporated place of 10,000 inhabitants or more, or any part thereof, based on the most recently available population statistics of the Bureau of the Census; or

(ii) Any territory, incorporated or unincorporated, included in an urbanized area, as defined by the Bureau of the Census as of August 10, 1993;

(2) Provides telephone exchange service, including exchange access, to fewer than 50,000 access lines;

(3) Provides telephone exchange service to any local exchange carrier study area with fewer than 100,000 access lines; or

(4) Has less than 15 percent of its access lines in communities of more than 50,000 on the date of enactment of the Telecommunications Act of 1996.

(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 financial statements for the relevant number of most recently completed calendar years, or, if audited financial statements were not prepared on a calendar-year basis, for the most recently completed fiscal years preceding the filing of the applicant's short-form application (Form 175). If an entity was not in existence for all or part of the relevant period, gross revenues shall be evidenced by the audited financial statements of the entity's predecessor-in-interest or, if there is no identifiable predecessor-in-interest, unaudited financial statements certified by the applicant as accurate. When an applicant does not otherwise use

audited financial statements, its gross revenues may be certified by its chief financial officer or its equivalent.

(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 financial statements or certified by the applicant's chief financial officer or its equivalent if the applicant does not otherwise use audited financial statements.

* * * * *

(j) * * *

(2) For purposes of assessing compliance with the equity limits in § 24.709 (b)(3)(i) and (b)(4)(i), where such interests are not held directly in the applicant, the total equity held by a person or entity shall be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain.

* * * * *

(l) * * *

(11) * * *

(i) For purposes of §§ 24.709(a)(2) and paragraphs (b)(2) and (d) of this section, Indian tribes or Alaska Regional or Village Corporations organized pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.), or entities owned and controlled by such tribes or corporations, are not considered affiliates of an applicant (or licensee) that is owned and controlled by such tribes, corporations or entities, and that otherwise complies with the requirements of § 24.709 (b)(3) and (b)(5) or § 24.709 (b)(4) and (b)(6), except that gross revenues derived from gaming activities conducted by affiliated entities pursuant to the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.) will be counted in determining such applicant's (or licensee's) compliance with the financial requirements of § 24.709(a) and paragraphs (b) and (d) of this section, unless such applicant establishes that it will not receive a substantial unfair competitive advantage because significant legal constraints restrict the applicant's ability to access such gross revenues.

* * * * *

(n) * * *

(1) A qualifying investor is a person who is (or holds an interest in) a member of the applicant's (or licensee's) control group and whose gross revenues and total assets, when aggregated with those of all other attributable investors and affiliates, do not exceed the gross revenues and total assets limits specified in § 24.709(a), or, in the case of an applicant (or licensee) that is a small business, do not exceed the gross revenues limit specified in paragraph (b) of this section.

* * * * *

(3) For purposes of assessing compliance with the minimum equity requirements of § 24.709(b) (5) and (6), where such equity interests are not held directly in the applicant, interests held by qualifying investors or qualifying minority and/or woman investors shall be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain.

(4) For purposes of § 24.709 (b)(5)(i)(C) and (b)(6)(i)(C), a qualifying investor is a person who is (or holds an interest in) a member of the applicant's (or licensee's) control group and whose gross revenues and total assets do not exceed the gross revenues and total assets limits specified in § 24.709(a).

* * * * *

13. Section 24.813 is amended by revising paragraphs (a)(1), (a)(2) and (a)(4) to read as follows:

§ 24.813 General application requirements.

(a) * * *

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

(2) A list of any party which holds a five percent or more interest (or a ten percent or more interest for institutional investors as defined in § 24.720(h)) in the applicant, or any entity holding or applying for CMRS or PMRS licenses in which a five percent or more interest (or a ten percent or more interest for institutional investors as defined in § 24.720(h)) is held by another party which holds a five percent or more interest (or a ten percent or more interest for institutional investors as defined in § 24.720(h)) in the applicant (*e.g.* If Company A owns 5% of Company B (the applicant) and 5% of Company C, a company holding or applying for CMRS or PMRS licenses, then Companies A and C must be listed on Company B's applications.)

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(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 interest in the partnership.

* * * * *

14. Section 24.839 is amended by revising paragraphs (a), (d)(1), and (d)(2) and adding paragraphs (d)(3), (d)(4), and (d)(5) to read as follows:

§ 24.839 Transfer of control or assignment of license.

(a) Approval required. Authorization 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), 24.717(c) (unjust enrichment) and 1.2111(a) (reporting requirement).

* * * * *

(d) * * *

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

(2) The proposed assignee or transferee meets the eligibility criteria set forth in § 24.709 at the time the application for assignment or transfer of control is filed, or the proposed assignee or transferee holds other license(s) for frequency blocks C and F and, at the time of receipt of such license(s), met 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 proposed assignee meets the eligibility criteria set forth in § 24.709;

(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; or

(5) The assignment or transfer of control is *pro forma*.

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