

will be reallocated to the unit's

Allowance Tracking System account according to the following equation:

$$\text{Unit Allowances} = \left[\frac{\text{Unit's Deduction at Table 2 Column A}}{250,000} \right] \times \text{Allowances Remaining}$$

(4) [Reserved]

(5) Allowances, for use in calendar years 2010 and thereafter, remaining in

the Special Allowance Reserve at the end of each year, following that year's auction and sale (under subpart E of this

part), will be reallocated to the unit's Allowance Tracking System account according to the following equation:

$$\text{Unit Allowances} = \left[\frac{\text{Unit's Deduction at Table 2 Column E}}{250,000} \right] \times \text{Allowances Remaining}$$

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[FR Doc. 98-244 Filed 1-6-98; 8:45 am]

BILLING CODE 6560-50-P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 1, 21, 24, 26, 27, 90, and 95

[WT Docket No. 97-82, ET Docket No. 94-32, FCC 97-413]

Competitive Bidding Proceeding

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In the *Second Further Notice of Proposed Rule Making* ("NPRM"), the Commission seeks comment on a variety of proposed rules relating to its general competitive bidding rules for all auctionable services. The Commission believes that these proposals will assist its efforts to simplify and streamline its regulations in order to increase the overall efficiency of the competitive bidding process. These proposed rules are necessary to further the Commission's goals of simplifying and streamlining its regulations, and developing uniform auction rules and procedures for all future auctions. The intended effect of this action is to seek comment on proposed rules and procedures applicable to the Commission's spectrum auction program.

DATES: Comments are due on or before February 6, 1998. Reply comments are due on or before February 17, 1998.

ADDRESSES: Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C. 20554.

FOR FURTHER INFORMATION CONTACT: Josh Roland or Mark Bollinger, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, at (202) 418-0660.

SUPPLEMENTARY INFORMATION: This is a synopsis of the *Second Further Notice of Proposed Rule Making* in WT Docket No. 97-82, ET Docket No. 94-32, FCC 97-413 which was adopted on December 18, 1997 and released on December 31, 1997. A copy of the complete item is available for inspection and copying during normal business hours in the FCC Reference Center, Room 239, 1919 M Street, N.W., Washington, D.C. 20554. The complete text may be purchased from the Commission's copy contractor, International Transcription Service, Inc., 1231 20th Street, N.W., Washington, D.C. 20036, (202) 857-3800. The complete *Second Further Notice of Proposed Rule Making* also is available on the Commission's Internet home page (<http://www.fcc.gov>).

Summary of Action:

I. Background

On December 18, 1997, the Federal Communications Commission (Commission) adopted a *Second Further Notice of Proposed Rule Making* seeking comment on a variety of proposals relating to its competitive bidding rules for all future auctions. These proposed rules are summarized below.

A. Rules Governing Designated Entities

1. Designated Entities

2. *Background.* Section 309(j)(4)(D) of the Communications Act provides that in prescribing rules for a competitive bidding system, the Commission shall "ensure that small businesses, rural telephone companies, and businesses

owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services." The statute further provides that for this purpose, the Commission shall consider the use of tax certificates, bidding credits and other procedures. In addition, pursuant to section 309(j)(4)(A), the Commission shall "consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, or other schedules or methods," in order to "disseminat[e] licenses among a wide variety of applicants, including small businesses, rural telephone companies, and small businesses owned by members of minority groups and women." Pursuant to these mandates, the Commission has adopted a number of measures, including entrepreneur blocks, bidding credits, reduced upfront payments/down payments and installment payments.

3. In addition, section 257 of the Telecommunications Act requires the Commission to identify and eliminate market entry barriers for small and entrepreneurial telecommunications businesses. The Commission is committed to completing a study to examine barriers encountered by minorities and women in the auctions process and in the secondary market for licenses. The Commission has initiated this process with regard to the study on secondary markets, and will initiate the auctions study expeditiously. The Commission will release the results in 1998.

4. Any measures that the Commission decides to adopt that give special preferences specifically to minority- and women-owned businesses must comply with recent Supreme Court decisions, as

discussed below. To that end, the Commission seeks comment on (1) whether there is a compelling governmental interest that would justify the use of preferences for minority-owned businesses and “exceedingly persuasive justification” for preferences for women-owned businesses; (2) what evidence supports the commenter’s position on the issue; and (3) what measures, if any, could be narrowly tailored to withstand judicial review. The specific issues that commenters should address are discussed in more detail below.

5. Discussion.

a. Minority-based Designated Entity Provisions

6. As the Commission has recognized in the past, in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), the Supreme Court established that governmental policies that take race into account are reviewed under a strict (as opposed to intermediate) scrutiny standard. The Commission tentatively concludes that, to the extent consistent with constitutional standards, the Commission should take steps to further the Commission’s statutory mandate to ensure that minorities have the opportunity to engage in the provision of spectrum services pursuant to section 309(j)(4). The Commission seeks comment on how it can modify its designated entity provisions, consistent with the standards set forth in *Adarand*. In particular, the Commission seeks comment on what tools, such as bidding credits, might be used consistent with *Adarand*. In addition, the Commission seeks comment on whether it should limit any tools designed to ensure that minority-owned businesses have the chance to take part in the Commission’s auction program to those minority-owned businesses that also qualify as small businesses. Commenters advocating the adoption of such measures should address the constitutional issue and present specific empirical evidence supporting their views.

7. Should the Commission determine that provisions for minorities would withstand strict scrutiny as required by *Adarand*, the Commission also seeks comment on appropriate eligibility standards for applicants seeking to qualify for minority-based provisions. For example, the Commission could specify that to qualify for any minority-based provisions, an applicant must be minority-controlled (*i.e.*, minorities must have *de facto* as well as *de jure* control of the applicant and must own more than 50 percent of the equity on a fully diluted basis) and meet the

eligibility requirements set forth in 47 CFR 1.2110(b)(2). Alternatively, to ensure that any minority policies are reserved for businesses in which minorities have a substantial financial stake, as well as *de jure* and *de facto* control, the Commission could strictly define equity to require that minorities have the right to receive at least 50.1 percent of the annual distribution of any dividends paid on the voting stock and the right to receive dividends, profits, and other distributions from the business in proportion to their equity interests. This requirement would be similar to the eligibility standards for minority-owned businesses adopted but never implemented for the broadband PCS auctions, and to the eligibility standards recently proposed for the auction of pending broadcast license applications. In addition, the Commission seeks comment on alternate formulas that might be appropriate for determining eligibility for minority-based provisions.

8. The Commission also observes that the Office of Management and Budget (OMB) recently modified its standards for the classification of federal data on race and ethnicity. Specifically, OMB: (1) separated the category for Asian and Pacific Islander category into two categories—“Asian” and “Native Hawaiian or Other Pacific Islander”; and (2) changed the term “Hispanic” to “Hispanic or Latino”. The Commission previously has used this standard to define the term “minority” for purposes of its designated entity provisions, and seeks comment on whether it should similarly amend the current definition in the Commission’s rules.

b. Gender-based Designated Entity Provisions

9. The Commission seeks comment on whether special policies are warranted for female-owned applicants. The Commission notes that the constitutionality of its former practice of awarding comparative preferences for female ownership was not addressed by the Supreme Court in *Metro Broadcasting Inc. v. FCC*, 497 U.S. 547 (1990) and that the Commission suspended that practice following *Lamprecht v. FCC*, 958 F.2d 382 (D.C. Cir. 1992), which held, under “intermediate” scrutiny, that the Commission’s gender preference was not shown to be substantially related to achieving program diversity and that it was thus unconstitutional. More recently, the Supreme Court has ruled that a state program, which makes distinctions based upon gender, must be supported by an “exceedingly persuasive justification” in order to

withstand constitutional muster. *United States v. Virginia Military Institute*, 116 S.Ct 2264, 2274–76 (1996). The Commission seeks comment on whether there is sufficient evidence to justify special provisions for women-owned businesses under that standard.

10. As with minority-based provisions, the Commission tentatively concludes that to the extent consistent with applicable constitutional standards, it should take steps to further the Commission’s statutory goal of making certain that women have the opportunity to provide spectrum-based services pursuant to section 309(j)(4). The Commission seeks comment on how it can modify its designated entity provisions, consistent with the standards set forth in recent court decisions. In particular, the Commission seeks comment on what tools, such as bidding credits, might be used consistent with judicial precedent. In addition, the Commission seeks comment on whether it should limit any tools designed to encourage participation in the Commission’s auction program by women-owned businesses that also qualify as small businesses. Commenters advocating the adoption of such measures at this time should address the constitutional issue and present specific empirical evidence supporting their views.

c. Rural Telephone Company Provisions

11. In the Commission’s recent report to Congress on the spectrum auctions, the Commission stated its belief that auctions have generally provided rural telephone companies with favorable opportunities. The Commission observed that, to date, rural telephone companies have won about 44 percent of the 123 rural Basic Trading Areas (BTA) licenses in the United States and noted some examples of rural telephone companies’ successes in offering broadband PCS. In keeping with the Commission’s duties under the Act, however, the Commission seeks comment on whether there are mechanisms that might further opportunities for rural telephone companies to provide spectrum based services.

2. Installment Payments

12. *Background.* The Commission is required by statute to provide incentives to ensure participation by small businesses and other “designated entities” when implementing its authority to conduct auctions, as set forth in section 309(j) of the Communications Act. Among other methods, allowing winning bidders to pay for their licenses using installment

plans has been one method the Commission has used to encourage small business involvement in the wireless marketplace. In the *Third Report and Order*, WT Docket No. 97-82, ET Docket No. 94-32, FCC 97-413 (released December 31, 1997) ("*Third Report and Order*"),¹ the Commission suspends the use of installment payments for the foreseeable future. In lieu of installment payments, the Commission has adopted a schedule of bidding credits applicable to small businesses that is higher than that which the Commission originally proposed.

13. *Discussion.* The Commission observed in the *NPRM* in this docket that small businesses have been successful in the auctions in which installment payments plans were offered. The Commission therefore seeks comment on ways in which it can provide an effective installment payment program while at the same time minimizing the concerns (e.g., licensee default or difficulty meeting financial obligations to the Commission) that have led to the decision to suspend the use of installment payments for the present time. The Commission seeks comment, for example, on how the Commission can create an installment payment plan which fulfills the Commission's sometimes incongruent goals of encouraging only serious, financially qualified small business applicants to apply for licenses, ensuring the rapid provision of service to the public, and guaranteeing that the American public is reasonably compensated for the use of the spectrum being auctioned. The Commission also seeks comment on how the Commission might fashion an installment payment program that is consistent with the provision of the Balanced Budget Act that requires that all proceeds from certain future auctions be deposited in the United States Treasury not later than September 30, 2002. In this regard, the Commission notes that under most of the installment payment plans previously offered by the Commission, winning bidders have been permitted to pay for their licenses over the entire 10 year license term. If the Commission were to make installment plans available in the future, the Commission interprets this legislation as requiring that all payments of principal and interest for covered auctions be deposited in the United States Treasury by the statutory deadline for collection, which is approximately five years away.

¹ A summary of the Third Report and Order will be published in the *Federal Register* and a copy is available on the Commission's Internet home page.

Finally, the Commission seeks comment on means other than bidding credits and installment payments by which the Commission might facilitate the participation of small businesses and other designated entities in the Commission's spectrum auction program. Commenters should provide sufficient detail to assist the Commission in fashioning a program based upon their comments.

14. The Commission also notes that under its current rules, winning bidders that are designated entities are not required to pay their second down payment until petitions to deny filed against them are dismissed or denied. In the interim, designated entity winning bidders for the same auction with no petitions filed against them are required to submit their second down payments earlier because their licenses are ready for grant. Because § 1.2110(e)(3)(i) of the Commission's rules provides that interest rates on installment payments will be based on the rate of U.S. Treasury obligations at the time of licensing, in previous auctions this has had the result of establishing different rates of interest on installment payments for winning bidders in the same auction. In the event the Commission reinstates installment payments in the future, the Commission seeks comment on whether it should establish the interest rate based upon the rate of U.S. Treasury obligations on the date of the close of the auction. The Commission also seeks comment on one aspect of its rules relating to the calculation of the total default payment owed where a winning bidder defaults on multiple licenses.

3. Attribution of Gross Revenues of Investors and Affiliates

15. *Background.* In the *NPRM*, the Commission proposed to adopt uniform rules and definitions for the attribution of gross revenues of investors and affiliates for all auctionable services. Some of the Commission's service-specific competitive bidding rules require that, in determining whether an applicant meets certain size-based eligibility requirements, the Commission consider, among other things, the gross revenues of certain investors in the applicant and the affiliates of attributable investors. These service-specific rules have established varying standards of attribution. For example, in both narrowband and broadband PCS, the gross revenues and total assets of an applicant, together with those of its affiliates and persons who hold an interest in the applicant or its affiliates, must be below a certain threshold in order for the applicant to

qualify as a small business or entrepreneur. However, in order to avoid counting the revenue of all of these entities, the rules for each service provide different exceptions whereby the applicants can create control groups. For example, the Commission's broadband PCS rules provide two control group exceptions, while the Commission's narrowband PCS rules provide only one control group exception.

16. In the 900 MHz SMR service, to determine whether an applicant qualifies as a small business, the Commission attributes the revenues of parties holding 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 the applicant in conformance with the Commercial Mobile Radio Service (CMRS) spectrum cap attribution standard. In contrast, under the Commission's MDS rules, the Commission attributes the gross revenues of the applicant and all of the applicant's affiliates (as defined in 47 CFR 1.2110(b)(4)).

17. *Discussion.* In the *NPRM*, the Commission proposed to adopt a "controlling interest" standard, similar to that which the Commission has recently adopted in the Commission's rules for LMDS, as its general attribution rule for all future auctions. Under this standard, determination of eligibility for small business provisions would be made by attributing the gross revenues only of principals of the applicant who exercise both "*de jure*" and "*de facto*" control, and their affiliates. Nevertheless, the Commission seeks further comment on the controlling interest standard, and whether it is sufficient to calculate size so that only those entities truly meriting small business status qualify for bidding credits. The Commission also asks commenters whether alternate standards for attributing the gross revenues of investors and affiliates in an applicant would better meet the Commission's goals. Commenters should specify what alternatives could be applied.

18. The Commission notes that its intent in proposing this standard is to provide flexibility that will enable legitimate small businesses to attract passive financing in a highly competitive and evolving telecommunications marketplace. In the *NPRM*, the Commission preliminarily concluded that structuring the standard in this manner will not invite abuse. In this regard, the Commission seeks comment on whether this proposed standard would be strengthened by

imposing a minimum equity requirement (e.g., 15 percent) that any person or entity identified as controlling must hold. Alternatively, the Commission asks whether it should not adopt a minimum equity requirement, but rather indicate only that an absence of equity would raise a question as to whether *de facto* control exists.

19. The Commission notes that for purposes of calculating equity held in an applicant, the Commission provides for full dilution of certain stock interests, warrants, etc. Finally, the Commission notes that it requires detailed reporting of all ownership interests as part of the general application requirement adopted in this *Third Report and Order*, and under the proposed controlling interest standard would apply the comprehensive affiliation rule to all investors in an applicant. Thus, passive interests that were otherwise non-attributable would be attributed if they are affiliates under this rule. Finally, the Commission notes that it reserves the right to conduct random audits of auction applicants and licensees in order to verify information provided regarding eligibility for small business provisions. The Commission seeks comment on the proposed rule.

B. Payment Issues

1. Default Payments

20. *Background.* Section 1.2104(g) of the Commission's rules provides that where a winning bidder defaults on a license the bidder becomes subject to a default payment equal to the difference between the amount bid and the winning bid the next time the license is offered by the Commission (net or gross, whichever is less) plus an additional payment equal to three percent of the subsequent winning bid or the amount bid (net or gross, whichever is less). In the past, where a bidder has defaulted on multiple licenses, this rule has been interpreted to require that the amount of the default payment be determined on a license-by-license basis, and then added together to determine the total default payment assessed.

21. *Discussion.* The Commission seeks comment on whether it should modify § 1.2104(g) to provide that where a winning bidder defaults on multiple licenses the default payment will be determined based upon the aggregate winning bid and the aggregate winning bid the next time the licenses are offered by the Commission. The Commission recognizes that assessing default payments through this method could significantly alter the amount of the default payment assessed under the Commission's rules. In this regard, the

Commission seeks comment on whether this system could encourage insincere bidding and defaults since it could greatly reduce the effective penalty for a default. To the extent that a bidder is already intending to default on a license whose price at reaction is anticipated to exceed the initial bid price, the effective penalty for defaulting on additional licenses would be limited to three percent of the subsequent winning bid or the amount bid, whichever is lower. Since the potential defaulter would not be facing the full harm caused by the default on the additional license, the incentive for insincere bidding and default could be too great. Indeed, this modification could encourage speculation by encouraging a high bidder on a relatively high valued license who anticipates default to purposely bid and default on a relatively low valued license in order to lessen the default payment assessed under the Commission's rules. Finally, the Commission seeks comment on whether such a modification could function without nullifying the provision in § 1.2104(g) assessing an additional default payment equal to three percent of the subsequent winning bid or the amount bid, whichever is lower.

C. Administrative Filing Periods for Applications and Petitions to Deny

22. *Background.* Previously, the Commission has provided a 30-day period for filing of petitions to deny. A 30-day petition to deny period will be used for the upcoming paging and LMDS auctions. In the *Third Report and Order*, the Commission amends § 1.2108 of its rules to conform to the provisions in the Balanced Budget Act regarding the filing period for petitions to deny applications for initial licenses in auctionable services. Specifically, notwithstanding section 309(b) of the Communications Act, § 1.2108 as amended will provide that the Commission shall not grant a license less than seven days after public notice that long-form applications have been accepted for filing and that in all cases the period for filing petitions to deny shall be no shorter than five days.

23. *Discussion.* Although the Commission believes that in light of Congress' directive in the Balanced Budget Act a shortened petition to deny period is generally appropriate for future auctions, the Commission seeks comment on the appropriate length of a petition to deny period in light of this legislation. For example, the Commission seeks comment on whether there are instances in which the Commission should provide for a longer

period than the minimums set forth in the statute for the filing of petitions to deny or for the grant of initial licenses in auctionable services (5 days and 7 days respectively). In particular, the Commission asks commenters to address whether auctions for specific services (e.g., broadcast licenses) require longer periods for the filing of petitions to deny, and why this may be so.

D. Competitive Bidding Rules and Procedures for the Auction of General Wireless Communications Services (GWCS) Licenses

24. *Background.* On July 31, 1995, the Commission adopted the *Second Report and Order*, 60 FR 40712 (August 9, 1995), establishing auction and service rules for the General Wireless Communications Service (GWCS) in the 4660-4685 MHz band. Subsequently, several parties filed petitions for reconsideration of the *Second Report and Order* that remain pending before the Commission. The 1993 Omnibus Budget Reconciliation Act requires that 5 MHz of this spectrum be auctioned and licensed not later than August 9, 1998, and to comply with that deadline, the Commission has announced an auction for licenses in the GWCS as May 27, 1998.

25. *Discussion.* The Commission tentatively concludes that the part 1 rules it adopted in the *Third Report and Order* should apply to the auction of GWCS spectrum and specifically supersede the previously-adopted GWCS rules setting forth auction rules and procedures. In this regard, consistent with the Commission's decision in the *Third Report and Order*, the Commission notes that it would no longer offer installment payments as a means of financing small business participation in the GWCS auction, but instead would offer somewhat higher bidding credits. Employing part 1 rules for the GWCS auction furthers the Commission's goal of simplifying and streamlining all competitive bidding rules and procedures for future auctions. In addition, by applying the part 1 rules to the GWCS auction, the Commission assures that GWCS auction participants, like participants in other future auctions, benefit from the experience it has gained in the 15 spectrum auctions it has conducted to date. The Commission seeks comment on this tentative conclusion.

26. In light of the statutory deadline for the auction and licensing of GWCS spectrum, the Commission also

tentatively concludes to use its discretion to truncate the petition to deny period for the grant of licenses in the GWCS auction. The Commission believes that a shortened petition to deny period will assure issuance of the GWCS licenses by Congress' deadline. Notwithstanding section 309(d)(1) of the Communications Act, the Balanced Budget Act provides for shortened periods for the filing of petitions to deny and for the grant of licenses. Under this provision, the Commission is permitted to grant any application for authorization assigned under competitive bidding not earlier than 7 days following public notice that an application has been accepted for filing, and may specify a period of not less than 5 days for filing petitions to deny. The Commission seeks comment on this tentative conclusion.

II. Procedural Matters

A. Initial Regulatory Flexibility Analysis

27. As required by the Regulatory Flexibility Act (RFA), 5 U.S.C. 603, the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the rules proposed in the *NPRM*. Written public comments are requested on the IRFA. Comments on the IRFA must have a separate and distinct heading designating them as responses to the IRFA and must be filed by the deadlines for comments on the *NPRM*. The Commission will send a copy of the *NPRM*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration. In addition, the *NPRM* and IRFA (or summaries thereof) will be published in the **Federal Register**.

A. Need for, and objectives of, the proposed rules

28. This *NPRM* is being initiated to secure comment on additional issues relating to the general competitive bidding rules for all auctionable services that are necessary in light of the Balanced Budget Act of 1997. This *NPRM* seeks comment on the use of installment payments for future auctions, the controlling interest standard as a general attribution rule, the appropriate petition to deny period for future auctions, and whether the part 1 rules adopted in the *Third Report and Order* should apply to the auction of General Wireless Communications Services (GWCS) and supersede the previously adopted GWCS auction rules and procedures. The Commission believes that these proposals will further simplify and streamline the rules and regulations and increase the overall

efficiency of the competitive bidding process.

B. Legal Basis

29. This action is taken pursuant to sections 4(i), 5(b), 5(c)(1), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. sections 154(i), 155(b), 155(c)(1), 303(r), and 309(j).

C. Description and estimate of the number of small entities to which the proposed rule will apply

30. The Commission is required to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted. The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." In addition, the term "small business" has the same meaning as the term "small business concern" under section 3 of the Small Business Act. Under the Small Business Act, a "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) meets any additional criteria established by the Small Business Administration ("SBA"). As discussed below, various wireless small entities may be affected by the proposed rules. Also, as noted, with a few exceptions, the Commission has not developed a precise definition of small entities for the various affected wireless services. Therefore, the applicable definition of small entity is the definition under the Small Business Administration (SBA) rules applicable to radiotelephone companies. This definition provides that a small entity is a radiotelephone company employing no more than 1,500 persons. In addition, the Commission incorporates by reference the more refined definitions of small entities pertaining to the broadband PCS, 220 MHz, paging, and SMR services. Generally, a small organization is "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field." Nationwide, there are 275,801 small organizations. "Small governmental jurisdiction" generally means "governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000." As of 1992, there were 85,006 such jurisdictions in the United States.

31. The rules proposed in this *NPRM* would allow all entities, including existing cellular, PCS, paging, and other small communications entities to obtain

licenses in auctionable services through competitive bidding. These rules apply to future auctions, but will not apply to the initial auctions of licenses in the paging, 220 MHz, 800 MHz Specialized Mobile Radio (SMR), and Local Multipoint Distribution (LMDS) services. In estimating the number of small entities who may participate in future auctions of wireless services, the Commission anticipates that the makeup of current wireless services licensees is representative of future auction winning bidders. The following is the Commission's estimate of the number of small entities who are current wireless licensees:

1. Estimates for Cellular Licensees

The Commission has not developed a definition of small entities applicable to cellular licensees. Therefore, the applicable definition of small entity is the definition under the SBA rules applicable to radiotelephone companies. This definition provides that a small entity is a radiotelephone company employing no more than 1,500 persons. The size data provided by the SBA does not enable us to make a meaningful estimate of the number of cellular providers which are small entities because it combines all radiotelephone companies with 500 or more employees. The 1992 Census of Transportation, Communications, and Utilities, conducted by the Bureau of the Census, is the most recent information available. This document shows that only 12 radiotelephone firms out of a total of 1,178 such firms which operated during 1992 had 1,000 or more employees. Therefore, even if all 12 of these firms were cellular telephone companies, nearly all cellular carriers were small businesses under the SBA's definition. The Commission assumes, for purposes of its evaluations and conclusions in this IRFA, that all of the current cellular licensees are small entities, as that term is defined by the SBA. In addition, the Commission notes that there are 1,758 cellular licenses; however, the Commission does not know the number of cellular licensees, since a cellular licensee may own several licenses. The most reliable source of information regarding the number of cellular service providers nationwide appears to be data the Commission publishes annually in its *Telecommunications Industry Revenue* report, regarding the Telecommunications Relay Service (TRS). The report places cellular licensees and Personal Communications Service (PCS) licensees in one group. According to the data released in November, 1997, there are 804 companies reporting that they engage in

cellular or PCS service. Although it seems certain that some of these carriers are not independently owned and operated, or have more than 1,500 employees, the Commission is unable at this time to estimate with greater precision the number of cellular service carriers that would qualify as small business concerns under the SBA's definition. Consequently, the Commission estimates that there are fewer than 804 small cellular service carriers.

2. Estimates for Broadband and Narrowband PCS Licensees

32. *Broadband PCS.* The broadband PCS spectrum is divided into six frequency blocks designated A through F. The Commission has defined "small entity" in the auctions for Blocks C and F as a firm that had average gross revenues of less than \$40 million in the three previous calendar years. This definition of "small entity" in the context of broadband PCS auctions has been approved by the SBA. The Commission has auctioned broadband PCS licenses in Blocks A through F. Of the qualified bidders in the C and F block auctions, all were entrepreneurs—defined for these auctions as entities together with affiliates, having gross revenues of less than \$125 million and total assets of less than \$500 million at the time the FCC Form 175 application was filed. Ninety bidders, including C block reauction winners, won 493 C block licenses and 88 bidders won 491 F block licenses. For purposes of this IRFA, the Commission assumes that all of the 90 C block broadband PCS licensees and 88 F block broadband PCS licensees, a total of 178 licensees, are small entities.

33. *Narrowband PCS.* The Commission has auctioned nationwide and regional licenses for narrowband PCS. There are 11 nationwide and 30 regional licensees for narrowband PCS. The Commission does not have sufficient information to determine whether any of these licensees are small businesses within the SBA-approved definition for radiotelephone companies. At present, there have been no auctions held for the major trading area (MTA) and basic trading area (BTA) narrowband PCS licenses. The Commission anticipates a total of 561 MTA licenses and 2,958 BTA licenses will be awarded in the auctions. Given that nearly all radiotelephone companies have no more than 1,500 employees, and that no reliable estimate of the number of prospective MTA and BTA narrowband licensees can be made, the Commission assumes, for purposes of this IRFA, that all of the licenses will

be awarded to small entities, as that term is defined by the SBA.

3. Estimates for 220 MHz Radio Services

34. Since the Commission has not yet defined a small business with respect to 220 MHz radio services, it will utilize the SBA definition applicable to radiotelephone companies—an entity employing no more than 1,500 persons. With respect to the 220 MHz services, the Commission has proposed a two-tiered definition of small business for purposes of auctions: (1) For Economic Area (EA) licensees, a firm with average annual gross revenues of not more than \$6 million for the preceding three years; and (2) for regional and nationwide licensees, a firm with average annual gross revenues of not more than \$15 million for the preceding three years. Since this definition has not yet been approved by the SBA, the Commission will utilize the SBA definition applicable to radiotelephone companies. Given that nearly all radiotelephone companies employ no more than 1,500 employees, the Commission will consider the approximately 3,800 incumbent licensees as small businesses under the SBA definition.

4. Common Carrier Paging

35. The Commission has proposed a two-tier definition of small businesses in the context of auctioning geographic area paging licenses in the Common Carrier Paging and exclusive Private Carrier Paging services. Under the proposal, a small business will be defined as either: (1) An entity that, together with its affiliates and controlling principals, has average gross revenues for the three preceding years of not more than \$3 million; or (2) an entity that, together with affiliates and controlling principals, has average gross revenues for the three preceding calendar years of not more than \$15 million. Since the SBA has not yet approved this definition for paging services, the Commission will utilize the SBA definition applicable to radiotelephone companies—an entity employing no more than 1,500 persons. At present, there are approximately 24,000 Private Paging licenses and 74,000 Common Carrier Paging licenses. According to *Telecommunications Industry Revenue* data, there were 172 "paging and other mobile" carriers reporting that they engage in these services. Consequently, we estimate that there are fewer than 172 small paging carriers. The Commission estimates that the majority of private and common carrier paging providers would qualify as small businesses under the SBA definition.

5. Air-Ground Radiotelephone Service

36. The Commission has not adopted a definition of small business specific to the Air-Ground radiotelephone service. Accordingly, the Commission will use the SBA definition applicable to radiotelephone companies, *i.e.*, an entity employing no more than 1,500 persons. There are approximately 100 licensees in the Air-Ground radiotelephone service, and the Commission estimates that almost all of them qualify as small under the SBA definition.

6. Specialized Mobile Radio licensees

37. The Commission awards bidding credits in auctions for geographic area 800 MHz and 900 MHz SMR licenses to two tiers of firms: (1) "Small entities," those with revenues of no more than \$15 million in each of the three previous calendar years; and (2) "very small entities," those with revenues of no more than \$3 million in each of the three previous calendar years. The regulations defining "small entity" and "very small entity" in the context of 800 MHz SMR and 900 MHz SMR have been approved by the SBA. The Commission does not know how many firms provide 800 MHz or 900 MHz geographic area SMR service pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than \$15 million. One firm has over \$15 million in revenues. The Commission assumes for purposes of this IRFA that all of the remaining existing extended implementation authorizations are held by small entities, as that term is defined by the SBA. The Commission has held auctions for geographic area licenses in the 900 MHz SMR band, and recently completed an auction for geographic area 800 MHz SMR licenses. There were 60 winning bidders who qualified as small and very small entities in the 900 MHz auction. In the recently concluded 800 MHz SMR auction there were 524 licenses won by winning bidders, of which 38 licenses were won by small and very small entities.

7. Private Land Mobile Radio Licensees (PLMR)

38. The Commission has not developed a definition of small entities specifically applicable to PLMR licensees. For the purpose of determining whether a licensee is a small business as defined by the SBA, each licensee would need to be evaluated within its own business area. The Commission is unable at this time to estimate the number of small businesses which could be impacted by

the rules. However, the Commission's 1994 Annual Report on PLMRs indicates that at the end of fiscal year 1994 there were 1,087,267 licensees operating 12,481,989 transmitters in the PLMR bands below 512 MHz. Any entity engaged in a commercial activity is eligible to hold a PLMR license, therefore, these rules could potentially impact every small business in the United States if PLMR licenses are subject to auction under these new auction rules.

8. Aviation and Marine Radio Service

39. Small entities in the aviation and marine radio services use a marine very high frequency (VHF) radio, any type of emergency position indicating radio beacon (EPIRB) and/or radar, a VHF aircraft radio, and/or any type of emergency locator transmitter (ELT). The Commission has not developed a definition of small entities specifically applicable to these small businesses. Therefore, the applicable definition of small entity is the definition under the SBA rules applicable to a small organization. A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field." Nationwide, there are 275,801 small organizations. "Small governmental jurisdiction" generally means "governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000." As of 1992, there were 85,006 such jurisdictions in the United States. The Commission is unable at this time to make a meaningful estimate of the number of potential small businesses under these size standards. Most applicants for individual recreational licenses are individuals. Approximately 581,000 ship station licensees and 131,000 aircraft station licensees operate domestically and are not subject to the radio carriage requirements of any statute or treaty. Therefore, for purposes of the evaluations and conclusions in this IRFA, the Commission estimates that there may be at least 712,000 potential licensees which are individuals or are small entities, as that term is defined by the SBA.

9. Offshore Radiotelephone Service

40. This service operates on several UHF TV broadcast channels that are not used for TV broadcasting in the coastal area of the states bordering the Gulf of Mexico. At present, there are approximately 55 licensees in this service. The Commission is unable at this time to estimate the number of licensees that would qualify as small

entities under the SBA definition for radiotelephone communications.

10. General Wireless Communication Service (GWCS)

41. This service was created by the Commission on July 31, 1995 by transferring 25 MHz of spectrum in the 4660-4685 MHz band from the federal government to private sector use. The Commission has announced that an auction of 875 GWCS licenses will begin on May 27, 1998. The Commission is unable at this time to estimate the number of licensees that would qualify as small entities under the SBA definition for radiotelephone communications.

D. Description of Reporting, Recordkeeping, and Other Compliance Requirements

42. There are no additional reporting, recordkeeping, or other compliance requirements as a result of the *NPRM*.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

43. The Commission proposes, pursuant to the Balanced Budget Act of 1997, to use competitive bidding for the award of any initial licenses or construction permits, unless excepted under section 309(j)(2), when mutual exclusivity exists among applications that have been accepted for filing. The Commission proposes to employ various mechanisms such as eligibility restrictions, spectrum caps, size limits on service areas, and providing for partitioning of service areas and disaggregation of spectrum in order to provide opportunities for avoiding mutually exclusive license applications. These different mechanisms are intended to help ensure that the marketplace for the various services continue to promote economic opportunity, provide incentives for the development and rapid deployment of new technologies, and to achieve efficient and intensive use of this spectrum.

44. The Commission observes that small businesses have been successful in the auctions in which installment payments plans were offered, and seeks comment on ways to provide an effective installment payment program while at the same time minimizing the concerns that have led to the decision to discontinue the use of installment payments for the present time. The Commission seeks comment on how to create an installment payment plan which fulfills the sometimes incongruent goals of encouraging only serious, financially qualified small

business applicants to apply for licenses, ensuring the rapid provision of service to the public, and guaranteeing that the American public is reasonably compensated for the use of the spectrum being auctioned. The Commission also seeks comment on how to fashion an installment payment program that is consistent with the provision of the Balanced Budget Act of 1997 that requires that all proceeds from future competitive bidding be deposited in the United States Treasury not later than September 30, 2002. In addition, the Commission seeks comment on means other than bidding credits and installment payments to facilitate the participation of small businesses and other designated entities in the spectrum auction program.

45. With respect to general attribution rules, the Commission proposes to adopt a "controlling interest" standard as the general attribution rule for all future auctions. Under this standard, determination of eligibility for small business provisions would be made by attributing the gross revenues only of principals of the applicant who exercise both "*de jure*" and "*de facto*" control, and their affiliates. The Commission seeks comment on whether the standard is sufficient to calculate size so that only those entities truly meriting small business status qualify for bidding credits, or whether alternate standards for attributing the gross revenues of investors and affiliates in an applicant would better meet the Commission's goal to facilitate the participation of small businesses and other designated entities in the spectrum auction program. In addition, the Commission seeks comment on whether the controlling interest standard would be strengthened by imposing a minimum equity requirement.

46. The Commission believes that the provision in the Balanced Budget Act of 1997 requiring that interested parties have adequate time to develop business plans, assess market conditions and evaluate the availability of equipment necessary to make use of the specific spectrum to be auctioned is primarily intended to ensure that interested parties have adequate time to familiarize themselves with the rules and procedures to be employed in an auction prior to the application deadlines and start date of that auction. Nevertheless, it is unclear whether this legislation requires an additional opportunity for notice and comment prior to the issuance of detailed auction-specific information by the Wireless Telecommunications Bureau (Bureau). In order to comply with this provision of the Balanced Budget Act of 1997, and

to ensure that potential bidders have adequate time to familiarize themselves with the specific provisions that will govern the day-to-day conduct of the auction, the Commission proposes to delegate to the Bureau the authority to seek comment on a variety of auction-specific issues prior to the start of each auction.

47. The Commission proposes that the Bureau seek comment on specific mechanisms relating to day-to-day bidding, the round structure, minimum opening bid/reserve prices, minimum acceptable bids, initial maximum eligibility for each bidder, activity requirements for each stage of the auction, activity rule waivers, criteria for determining reductions in eligibility, information regarding bid withdrawal and bid removal, the stopping rules to be employed, and information relating to auction delay, suspension, or cancellation. The Commission also proposes that the Bureau afford interested parties a reasonable time (*e.g.*, seven days), in light of the start date of each auction and relevant pre-auction filing deadlines, to comment on these auction-specific issues. Also, the Commission proposes that the Bureau announce, at any time in the weeks leading up to the start date of each auction, any amendment or clarifications to the information contained in the auction-related public notices or the Bidder Information Package.

48. The Commission tentatively concludes that the Balanced Budget Act of 1997 establishes a presumption that a reserve price or minimum opening bid will be required for each auction, unless it is determined that such mechanisms are not in the public interest. Comment is sought on this conclusion. The Commission tentatively concludes that the new provision establishing reserve prices or a minimum opening bid does not call for traditional reserve prices; rather, it calls for an added protection that licenses will not be assigned at unacceptably low prices. The Commission also seeks comment on suggested methods by which a reserve price or minimum bid can be established in future auctions, in light of the tentative conclusion above.

49. The Commission believes that in light of Congress' directive in the Balanced Budget Act, a shortened time

period for the grant of initial licenses in auctionable services, as well as a shortened petition to deny period, is generally appropriate for future auctions. The Commission seeks comment on the appropriate length of a petition to deny period in light of this legislation, and in particular, whether auctions for specific services require longer periods for the grant of initial licenses or for the filing of petitions to deny.

50. Section 309(j) of the Communications Act directs the Commission to disseminate licenses among a wide variety of applicants, including small businesses and other designated entities. Section 309(j) also requires that the Commission ensure the development and rapid deployment of new technologies, products, and services for the benefit of the public, and recover for the public a portion of the value of the public spectrum resource made available for commercial use. The Commission believes these provisions in the *NPRM* help meet those goals and promote efficient competition while maintaining fairness and efficiencies of process in the Commission's rules.

F. Federal Rules Which Overlap, Duplicate, or Conflict With These Rules

51. None.

B. *Ex Parte* Presentations

52. The *NPRM* is a permit but disclose notice and comment rule making proceeding. *Ex parte* presentations are permitted, provided they are disclosed as provided in Commission rules. See generally 47 CFR 1.1202, 1.1203, and 1.1206(a).

C. Comments

53. Pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's rules, interested parties may file comments on or before February 6, 1998 and reply comments on or before February 17, 1998. In addition, a courtesy copy should be delivered to Josh Roland and Ken Burnley, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, 2025 M Street, Room 5202, Washington, DC 20554. All relevant and timely comments will be considered by the Commission before final action is taken

in this proceeding. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus ten copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, DC 20554.

List of Subjects

47 CFR Part 1

Communications common carriers, Reporting and recordkeeping requirements.

47 CFR Part 21

Communications common carriers, Reporting and recordkeeping requirements.

47 CFR Part 24

Communications common carriers, Reporting and recordkeeping requirements.

47 CFR Part 26

Communications common carriers, Reporting and recordkeeping requirements.

47 CFR Part 27

Communications common carriers, Reporting and recordkeeping requirements.

47 CFR Part 90

Communications common carriers, Reporting and recordkeeping requirements.

47 CFR Part 95

Communications common carriers, Reporting and recordkeeping requirements.

Federal Communications Commission.

Magalie Roman Salas,

Secretary.

[FR Doc. 98-297 Filed 1-6-98; 8:45 am]

BILLING CODE 6712-01-P