

(iii) The grantee may be required to submit quarterly progress and financial reports under part 92 of this title.

(b) *Grantees letter of acceptance.* Grantees must submit a letter of acceptance to CMS' Acquisition and Grants Group within 30 days of the date of the award agreeing to the terms and conditions of the award letter.

(Catalog of Federal Domestic Assistance Program No. 93779, Centers for Medicare and Medicaid Services Research, Demonstration, and Evaluations)

Dated: March 16, 2003.

**Thomas A. Scully,**  
Administrator, Centers for Medicare & Medicaid Services.

Approved: April 18, 2003.

**Tommy G. Thompson,**  
Secretary.  
[FR Doc. 03-10713 Filed 4-28-03; 8:45 am]  
BILLING CODE 4120-01-P

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 1

[WT Docket No. 99-266; FCC 03-51]

#### Practice and Procedure

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** In this document, the Commission clarifies rules relating to tribal lands bidding credits that were established to provide incentives for wireless telecommunications carriers to serve individuals living on tribal lands. In the *Second Report and Order*, the Commission extends the time period during which winning bidders can negotiate with the relevant tribes to obtain the certification needed to obtain the credit. The Commission also clarifies various administrative matters involved in implementing the credit.

**DATES:** Effective July 1, 2003.

**FOR FURTHER INFORMATION CONTACT:** Roger Noel or Linda Chang, Wireless Telecommunications Bureau, at (202) 418-0620.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Federal Communications Commission's *Second Report and Order (2nd R&O)*, FCC 03-51, adopted March 7, 2003, and released March 14, 2003. The full text of the *2nd R&O* is available for public inspection during regular business hours at the FCC Reference Information Center, 445 12th St., SW., Room CY-A257, Washington, DC 20554. The complete text may be purchased from the

Commission's duplicating contractor: Qualex International, 445 12th Street, SW., Room CY-B402, Washington, DC 20554, telephone 202-863-2893, facsimile 202-863-2898, or via e-mail at [qualexint@aol.com](mailto:qualexint@aol.com).

### Synopsis of Second Report and Order

#### I. Background

1. In June 2000, the Commission adopted bidding credits for use by winning bidders who pledge to deploy facilities and provide service to federally recognized tribal areas that have a telephone service penetration rate at or below 70 percent. In setting out the bidding credit, the Commission noted that communities on tribal lands have had less access to telecommunications services than any other segment of the U.S. population. See *Extending Wireless Telecommunications Services to Tribal Lands*, WT Docket No. 99-266, *Report and Order*, 65 FR 47349 (August 2, 2000) (*R&O*), and *Further Notice of Proposed Rulemaking*, 65 FR 47366 (August 2, 2000) (*FNPRM*).

2. The *R&O* provided that, in order to obtain a bidding credit in a particular market, a winning bidder must indicate on its long-form application (FCC Form 601) that it intends to serve tribal lands in that market. Following the long-form application filing deadline, the applicant has 90 calendar days to amend its application to identify the tribal lands to be served, and provide certification from the tribal government(s) that: (1) It will allow the bidder to site facilities and provide service on its tribal land(s), in accordance with the Commission's rules; (2) it has not and will not enter into an exclusive contract with the applicant precluding entry by other carriers, and will not unreasonably discriminate against any carrier; and (3) its tribal land is a qualifying tribal land as defined in the Commission's rules, *i.e.*, an area that has a telephone penetration rate at or below 70 percent. In addition, at the conclusion of the 90-day period, the applicant must amend its long-form application to file a certification that it will comply with the bidding credit build-out requirement, and that it will consult with the tribal government regarding the siting of facilities and deployment of service on the tribal land. Upon receipt by the Commission of the certifications, the bidding credit is awarded and the applicant makes payment of the final net adjusted bid amount. If the required certifications are not provided at the conclusion of the 90-day period, the bidding credit is not awarded and the

applicant is required to pay the balance on the original gross bid amount in order to be awarded the licenses.

3. In order to ensure that applicants awarded bidding credits actually deploy facilities and provide service to tribal lands, the Commission imposed performance requirements as a condition of obtaining the bidding credit. The Commission required that a licensee construct and operate its system to cover 75 percent of the population of the qualifying tribal land within three years of the grant of the license. While this 75 percent benchmark is higher than the construction benchmarks applicable to auctioned wireless licenses generally, the Commission determined that it would ensure that only carriers that are committed to serving tribal lands will receive bidding credits, and that wireless telecommunications services will be deployed rapidly to underserved tribal areas. In the *R&O*, the Commission required that, at the conclusion of the three-year period, licensees file a notification of construction indicating that they have met the 75 percent construction requirement on the tribal lands for which the credit was awarded. If the licensee fails to comply with any condition, it is required to repay the bidding credit plus interest thirty days after the conclusion of the construction period. In the event the licensee fails to repay the amount, the license automatically cancels.

4. In limiting the scope of the bidding credit to federally recognized tribal areas with telephone penetration rates equal to or less than 70 percent, the Commission concluded that the credits would target the tribal communities with the greatest need for access to telecommunications service. Although the Commission acknowledged that there are some non-tribal areas with penetration rates lower than the national average, it was determined that almost all non-tribal areas have penetration rates greater than 70 percent and that non-tribal areas have penetration rates significantly greater than most tribal areas. Accordingly, the Commission found it appropriate to limit the program to tribal lands with a 70 percent or less penetration rate. The Commission did not, however, foreclose the possibility of extending the credit both to non-tribal areas and to areas with higher penetration rates.

5. In the *FNPRM*, the Commission solicited comment on ways the bidding credit could be extended to encourage further deployment of wireless telecommunications services. The Commission specifically sought

comment on whether it should award bidding credits to carriers who commit to serve non-tribal areas with a 70 percent or less penetration rate, or tribal and/or non-tribal areas with penetration levels above 70 percent but significantly below the national average. Further, comment was requested regarding whether the Commission should expand the program to give transferable bidding credits to be used in future auctions to existing licensees in already-established wireless services who deploy and provide service to unserved tribal communities. The Commission also asked whether it should make credits available to licensees that enter into partitioning agreements with tribal authorities that allow the tribal government to provide service, either directly or through negotiation with a third-party carrier.

## II. Discussion

### A. Modification and Clarification of Bidding Credit Procedures

6. *Certification Procedure.* When the Commission adopted the tribal lands bidding credit in the R&O, it established the method by which a bidding credit would be calculated, as well as the application process involved in obtaining a bidding credit. Since the inception of the tribal lands bidding credit, there have been 10 auctions, with 375 winning bidders purchasing 10,479 licenses. However, only 27 winning bidders to date have initially indicated on their long-form applications that they would be seeking the tribal lands bidding credit, and of those applicants, only five submitted the required 90-day certifications. Upon review of this proceeding, the Commission finds that the small number of applications seeking the credit is due, at least in part, to the administrative process established by the Commission. Specifically, the Commission finds that the 90-day deadline for obtaining the certifications from the applicable tribal government(s) makes it extremely difficult to qualify for the credit. The 90-day deadline and certifications were established: (1) To ensure prompt issuance of licenses to winning bidders; (2) to provide a time frame for making contact with tribal governments and obtaining requisite certifications; and (3) to ensure that the wireless carrier intends to provide service to the tribal land. Because ninety days may not be a sufficient amount of time for licensees and tribal authorities to complete the certification process, the Commission extends the tribal lands certification period to 180 days. Accordingly, a winning bidder claiming a tribal lands

bidding credit will now have 180 days to amend its long-form application to identify the tribal lands to be served, and provide the required certification from the tribal government. Further, the winning bidder will have 180 days to file a certification that it will comply with the tribal lands build-out requirements, and consult with the tribal government regarding the siting of facilities and deployment of service on the tribal land. If the winning bidder fails to submit the required certifications within the 180-day period, the bidding credit will not be awarded, and the winning bidder will be required to pay the balance on the original gross bid amount in order to obtain the license.

7. Full or partial assignments of licenses involving tribal lands bidding credits. An issue that was inadvertently omitted in the R&O is the impact of license assignments on licenses with tribal lands bidding credit construction/repayment obligations. The Commission therefore clarifies that if the license is assigned to another entity, the construction/repayment obligations associated with the credit are transferred as well. Because all obligations of the license automatically transfer to the assignee, the Commission will not require the assignee to seek re-certification where the original licensee received certifications from the appropriate tribal authorities. It is important to note that an assignee contracting with a licensee to transfer a license for which a tribal lands bidding credit was received bears the risk that the tribal government may not allow the assignee to deploy facilities on its land. The Commission expects that parties interested in obtaining wireless licenses will exercise due diligence in identifying whether or not a tribal lands bidding credit construction obligation is associated with the license, and, therefore, take into account the heightened construction obligation, the dependence of the credit on obtaining the consent of the tribal government, and the potential for a repayment penalty in case the construction requirement is not met within the original three-year time frame. It is up to the assignee to verify that the tribe will consent to allowing the assignee access to its lands.

8. Also, the Commission clarifies that in partial license transfers involving geographic partitioning, the tribal land must be wholly contained within either the assignor's or assignee's proposed license area after the partition. The Commission will not permit, for example, a tribal area for which a credit was awarded to be "split" between

partitioned areas because this would be inconsistent with the original purpose of issuing the credit, *i.e.*, to ensure that at least 75 percent of the tribal land is served. Where a partition occurs, the construction/repayment obligation will attach to the license for the partitioned area that encompasses the tribal land for which the credit was awarded.

However, in partial license transfers involving spectrum disaggregation (but not partitioning), the construction/repayment obligation will be presumed to remain with the original licensee whose stated intention was to serve the tribal land unless the parties to the transaction inform us otherwise. As is the case with partitioning, spectrum covering the tribal land must be disaggregated in its entirety (*i.e.* a disaggregation involving only a portion of a tribal area subject to a bidding credit will not be permitted).

9. *Notification of Construction.* In the R&O, the Commission did not clearly set out the notification of construction procedures applicable to licensees that are granted tribal lands bidding credits. Pursuant to the goals of section 309(j)(4)(B) of the Act, the Commission has set out performance requirements for the various services, with alternative construction obligations for those licensees using tribal land bidding credits. As noted, the Commission imposed more stringent construction requirements for those licensees that choose to utilize the tribal lands bidding credit in order to ensure that only those most committed to building out their facilities will receive bidding credits and that service is deployed as quickly as possible. In order to verify compliance with the tribal lands construction requirement, any licensee employing a bidding credit must file a notification of construction (FCC Form 601, Schedule K) electronically at the conclusion of the three-year construction period along with an attachment stating affirmatively that it is providing coverage to 75 percent of the population of the tribal area for which the credit was awarded. In its notification of construction, the licensee must provide the total population of the tribal area covered by its license as well as the number of persons it is serving in the tribal area. If the licensee fails to make an adequate showing that it has met the 75 percent benchmark, it will be required to repay the bidding credit, plus interest, thirty days after the conclusion of the construction period. 47 CFR 1.2110(f)(3)(vii). Failure to repay this amount will result in automatic termination of the license. 47 CFR 1.946(c).

10. Penalty for failure to construct and failure to timely repay bidding credit. The Commission also takes this opportunity to correct an omission in the rules implemented in connection with the *R&O*, in which the Commission stated that a licensee's failure to comply with build-out requirements, and subsequent failure to repay the bidding credit, plus interest, thirty days after the conclusion of the construction period, would result in automatic termination of the licensee's license, *i.e.*, termination without any further notification being sent to the licensee, opportunity for a hearing, or other Commission action. This penalty will now be expressly codified in Part 1 of the Commission's rules.

#### B. Use of Bidding Credits in Non-Tribal Areas or Areas With Telephone Penetration Rates of More Than 70 Percent

11. In the *FNPRM*, the Commission sought comment on whether it should apply the bidding credit to non-tribal areas on the same terms and conditions as for tribal areas, or alternatively, whether it should extend the bidding credit to areas (tribal and non-tribal) with penetration levels greater than 70 percent, but below the national average of 94 percent. As noted, very few commenters submitted responses to the *FNPRM*. Those who filed comments generally support extending bidding credits to entities seeking to provide service to non-tribal areas with telephone penetration rates below the national average.

12. The Commission concludes that it is premature to expand the program to non-tribal areas or to areas with penetration rates of greater than 70 percent at this time. Because this program is still in its early stages and few entities have taken advantage of the bidding credit thus far, the Commission cannot yet determine whether it would be constructive to expand the use of the bidding credit to non-tribal areas generally. Moreover, the Commission is concerned about the paucity of comment regarding this issue. It is necessary to have a more substantial record as to whether the use of bidding credits is appropriate to encourage deployment of services into non-tribal areas, particularly from those most familiar with dealing with rural and high-cost service issues. Similarly, the Commission believes the record is insufficient at this time to support expanding the use of the bidding credit to areas having telephone penetration rates of greater than 70 percent. However, in an effort to develop a more complete and up-to-date record on

possible adjustment of the penetration rate threshold, the Commission seeks comment in its *Second Further Notice of Proposed Rulemaking* on information from the 2000 Census regarding increases in tribal penetration rates that has recently been released by the Census Bureau. See *Extending Wireless Telecommunications Services to Tribal Lands*, WT Docket No. 99-266, *Second Further Notice of Proposed Rulemaking*, FCC 03-51, adopted March 7, 2003, and released March 14, 2003.

#### C. Applying Bidding Credits to Existing Licenses

13. The Commission noted in the *R&O* that the current tribal lands bidding credit can be applied only in the auction in which it is obtained. Accordingly, the bidding credit is not available to carriers with existing licenses that were acquired in prior auctions or through transfer or assignment. The Commission therefore asked in the *FNPRM* whether a more flexible form of credit should be made available to existing licensees who have constructed facilities, using currently-licensed spectrum to provide service to qualifying tribal lands. Under this approach, carriers who use their existing spectrum to provide service to such areas could receive bidding credits that could be used in future auctions. Further, the Commission sought comment on whether such a credit should be transferable to third parties for use in future auctions. The Commission also sought comment on its legal authority under section 309(j) of the Communications Act to adopt the flexible bidding credit.

14. Although the Commission continues to believe that the tribal lands bidding credit is a valuable means to encourage greater deployment of telecommunications services into underserved tribal areas, the Commission concludes that in light of its still-limited experience with the bidding credit program, it should not extend the program to already-licensed carriers or make the credit transferable at this juncture. The Commission believes that before taking such a step, additional time is needed to determine the effectiveness of the program as currently structured in meeting its intended goals. The Commission also finds that the limited comment it has received in this proceeding does not provide sufficient support or guidance for such an expansion of the program. Accordingly, the Commission declines to extend the program to already-licensed carriers or make the credit transferable at this time.

#### D. Transferable Bidding Credits for Licensees That Partition Tribal Areas

15. In the *FNPRM*, the Commission solicited comment on whether bidding credits should be made available to carriers that enter into partitioning agreements with tribal governments to facilitate deployment of service to tribal lands. The Commission proposed that a credit would be awarded to a geographic area licensee that partitioned portions of its license area covering tribal lands to the appropriate tribal government. Again, the Commission received limited comment regarding this issue, and therefore it concludes that the record does not at this time support expanding the bidding credit program as proposed.

### III. Procedural Matters

#### A. Paperwork Reduction Act Analysis

16. The actions taken in the *2nd R&O* have been analyzed with respect to the Paperwork Reduction Act of 1995 (PRA), Pub. L. No. 104-13, and found to impose new or modified reporting and recordkeeping requirements or burdens on the public. Implementation of these new or modified reporting and recordkeeping requirements will be subject to approval by the Office of Management and Budget (OMB) as prescribed by the PRA, and will go into effect upon announcement in the **Federal Register** of OMB approval.

#### B. Final Regulatory Flexibility Act Analysis.

17. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *FNPRM*. The Commission sought written public comment on the proposals in the *FNPRM*, including comment on the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

#### Need for, and Objectives of, the 2nd R&O.

18. In the *2nd R&O*, the Commission clarifies rules previously adopted in the *R&O* and *FNPRM* in WT Docket 99-266 to provide incentives for wireless telecommunications carriers to serve individuals living on tribal lands. In that *R&O*, the Commission authorized the grant of bidding credits to winning bidders who deploy facilities and provide service to federally-recognized tribal areas that have a telephone service penetration rate below 70 percent. In the present item, the Commission clarifies, on its own motion, administrative matters involved in implementing the bidding credit, such as the process by which carriers obtain certifications

permitting them to deploy facilities on tribal lands. This 2nd *R&O* also addresses issues raised in the *FNPRM*. In the *FNPRM*, the Commission requested comment on whether it should expand the use of bidding credits. Specifically, the Commission sought comment as to whether to: (1) Apply bidding credits to entities who undertake to serve non-tribal areas and/or tribal areas with telephone penetration levels above 70 percent, but significantly below the national penetration average; (2) award bidding credits for use in future auctions to existing geographic area licensees who deploy facilities in unserved tribal communities; and, (3) grant bidding credits to licensees who enter into partitioning agreements with tribal governments that enable tribal entities to provide service, either directly or by way of a third-party carrier. It is the Commission's goal to ensure that all Americans have access to telecommunications service.

19. While the Commission continues to believe that the tribal lands bidding credit is a useful device in improving telephone penetration rates on tribal lands, it concludes that the specific measures proposed in the Commission's *FNPRM* to encourage greater deployment should not be adopted at this time. Given the nascent state of the tribal lands bidding credit program, as well as the lack of a comprehensive record supporting the proposed extensions of the bidding credit, the Commission believes that it is premature to expand the use of bidding credits as proposed.

#### Summary of Significant Issues Raised by Public Comments in Response to the IRFA

20. No comments were filed that specifically addressed the rules and policies proposed in the IRFA.

#### Description and Estimate of the Number of Small Entities To Which the Rules Will Apply.

21. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the rules adopted herein. 5 U.S.C. 604(a)(3). The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." 5 U.S.C. 601(6). In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act. 5 U.S.C. 601(3) (incorporating by reference the definition of "small business concern"

in the Small Business Act, 15 U.S.C. 632). A "small business concern" is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA). 15 U.S.C. 632.

22. Cellular Licensees. The SBA has developed a small business size standard for small businesses in the category "Cellular and Other Wireless Telecommunications." 13 CFR 121.201, North American Industry Classification System (NAICS) code 513322. Under that SBA category, a business is small if it has 1,500 or fewer employees. According to the Bureau of the Census, only twelve firms from a total of 1238 cellular and other wireless telecommunications firms operating during 1997 had 1,000 or more employees. Therefore, even if all twelve of these firms were cellular telephone companies, nearly all cellular carriers were small businesses under the SBA's definition. In addition, the Commission notes that there are 1807 cellular licenses; however, a cellular licensee may own several licenses. According to the most recent *Trends in Telephone Service* data, 858 carriers reported that they were engaged in the provision of either cellular service, Personal Communications Service (PCS), or Specialized Mobile Radio telephony services, which are placed together in that data. See *Trends in Telephone Service*, Industry Analysis Division, Wireline Competition Bureau, Table 5.3—Number of Telecommunications Service Providers that are Small Businesses (May 2002). The Commission has estimated that 291 of these are small under the SBA small business size standard. Accordingly, based on this data, the Commission estimates that not more than 291 cellular service providers will be affected by these revised rules.

23. 220 MHz Radio Service—Phase I Licensees. The 220 MHz service has both Phase I and Phase II licenses. Phase I licensing was conducted by lotteries in 1992 and 1993. There are approximately 1,515 such non nationwide licensees and four nationwide licensees currently authorized to operate in the 220 MHz band. The Commission has not developed a definition of small entities specifically applicable to such incumbent 220 MHz Phase I licensees. To estimate the number of such licensees that are small businesses, the Commission applies the definition under the SBA rules applicable to "Cellular and Other Wireless Telecommunication" companies. This category provides that a small business

is a wireless company employing no more than 1,500 persons. According to the Bureau of the Census, only twelve firms from a total of 1238 cellular and other wireless telecommunications firms operating during 1997 had 1,000 or more employees. If this general ratio continues in 2002 in the context of Phase I 220 MHz licensees, the Commission estimates that nearly all such licensees are small businesses under the SBA's small business standard.

24. 220 MHz Radio Service—Phase II Licensees. The Phase II 220 MHz service is a new service, and is subject to spectrum auctions. In the *220 MHz Third Report and Order*, the Commission adopted a small business size standard for defining "small" and "very small" businesses for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. See Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220–222 MHz Band by the Private Land Mobile Radio Service, PR Docket No. 89–552, *Third Report and Order*, 62 FR 16004 (April 3, 1997). This small business standard indicates that a "small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years. A "very small business" is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that do not exceed \$3 million for the preceding three years. The SBA has approved these small size standards. Auctions of Phase II licenses commenced on September 15, 1998, and closed on October 22, 1998. In the first auction, 908 licenses were auctioned in three different sized geographic areas: three nationwide licenses, 30 Regional Economic Area Group (EAG) Licenses, and 875 Economic Area (EA) Licenses. Of the 908 licenses auctioned, 683 were sold. Thirty-nine small businesses won licenses in the first 220 MHz auction. The second auction included 225 licenses: 216 EA licenses and 9 EAG licenses. Fourteen companies claiming small business status won 158 licenses.

25. 700 MHz Guard Band Licenses. In the *700 MHz Guard Band Order*, the Commission adopted a small business size standard for "small businesses" and "very small businesses" for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. See Service Rules for the 746–764 MHz Bands, and Revisions to Part 27 of the Commission's Rules, WT Docket No. 99–168, *Second Report and Order*, 65 FR 17594 (April 4, 2000). A small

business is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$40 million for the preceding three years. Additionally, a "very small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$15 million for the preceding three years. An auction of 52 Major Economic Area (MEA) licenses commenced on September 6, 2000, and closed on September 21, 2000. Of the 104 licenses auctioned, 96 licenses were sold to 9 bidders. Five of these bidders were small businesses that won a total of 26 licenses. A second auction of 700 MHz Guard Band licenses commenced on February 13, 2001 and closed on February 21, 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business that won a total of two licenses.

26. Lower 700 MHz Band Licenses. The Commission adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits. See Reallocation and Service Rules for the 698–746 MHz Spectrum Band (Television Channels 52–59), GN Docket No. 01–74, *Report and Order*, 67 FR 5491 (February 6, 2002). The Commission defined a small business as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$40 million for the preceding three years. A very small business is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$15 million for the preceding three years. Additionally, the lower 700 MHz Service has a third category of small business status that may be claimed for Metropolitan/Rural Service Area (MSA/RSA) licenses. The third category is entrepreneur, which is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$3 million for the preceding three years. An auction of 704 licenses (one license in each of the 734 MSAs/RSAs and one license in each of the six Economic Area Groupings [EAGs]) commenced on August 27, 2002, and closed on September 18, 2002. Of the 740 licenses available for auction, 484 licenses were sold to 102 winning bidders. Seventy-two of the winning bidders claimed small business, very small business or entrepreneur status and won a total of 329 licenses.

27. Private and Common Carrier Paging. In the *Paging Second Report*

and *Order*, the Commission adopted a small size standard for "small businesses" for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, WT Docket No. 96–18, *Second Report and Order*, 62 FR 11616 (March 12, 1997). A small business is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years. The SBA has approved this definition. An auction of Metropolitan Economic Area (MEA) licenses commenced on February 24, 2000, and closed on March 2, 2000. Of the 985 licenses auctioned, 440 were sold. Fifty-seven companies claiming small business status won. At present, there are approximately 24,000 Private Paging site-specific licenses and 74,000 Common Carrier Paging licenses. According to the most recent *Trends in Telephone Service*, 608 carriers reported that they were engaged in the provision of either paging or "other mobile" services. Of these, the Commission estimates that 589 are small, under the SBA-approved small business size standard. The Commission estimates that the majority of private and common carrier paging providers would qualify as small entities under the SBA definition.

28. Broadband Personal Communications Service (PCS). The broadband PCS spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission has created a small business size standard for Blocks C and F as an entity that has average gross revenues of less than \$40 million in the three previous calendar years. See Amendment of Parts 20 and 24 of the Commission's Rules—Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, WT Docket No. 96–59, *Report and Order*, 61 FR 33859 (1996); see also 47 CFR 24.720(b). For Block F, an additional small business size standard for "very small business" was added and is defined as an entity that, together with their affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years. These small business size standards, in the context of broadband PCS auctions, have been approved by the SBA. No small businesses within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90

winning bidders that qualified as small entities in the Block C auctions. A total of 93 "small" and "very small" business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F. On March 23, 1999, the Commission reaucted 347 C, D, E, and F Block licenses; there were 48 small business winning bidders. Based on this information, the Commission concludes that the number of small broadband PCS licensees will include the 90 winning C Block bidders and the 93 qualifying bidders in the D, E, and F blocks plus the 48 winning bidders in the re-auction, for a total of 231 small entity PCS providers as defined by the SBA small business standards and the Commission's auction rules. On January 26, 2001, the Commission completed the auction of 422 C and F Broadband PCS licenses in Auction No. 35. Of the 35 winning bidders in this auction, 29 qualified as "small" or "very small" businesses.

29. 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. In March 2002, 106 MTA and BTA narrowband PCS licenses were granted to 4 licensees. Each of the licensees are small or very small businesses.

30. Specialized Mobile Radio (SMR). Pursuant to 47 CFR 90.814(b)(1), the Commission has established a small business size standard for purposes of auctioning 900 MHz SMR licenses, 800 MHz SMR licenses for the upper 200 channels, and 800 MHz SMR licenses for the lower 230 channels on the 800 MHz band as a firm that has had average annual gross revenues of \$15 million or less in the three preceding calendar years. 47 CFR 90.814(b)(1). The SBA has approved this small business size standard for the 800 MHz and 900 MHz auctions. Sixty winning bidders for geographic area licenses in the 900 MHz SMR band qualified as small businesses under the \$15 million size standard. The auction of the 525 800 MHz SMR geographic area licenses for the upper 200 channels began on October 28, 1997, and was completed on December 8, 1997. Ten (10) winning bidders for geographic area licenses for the upper 200 channels in the 800 MHz SMR band qualified as small businesses under the \$15 million size standard.

31. The auction of the 1,050 800 MHz SMR geographic area licenses for the

General Category channels began on August 16, 2000, and was completed on September 1, 2000. Eleven (11) winning bidders for geographic area licenses for the General Category channels in the 800 MHz SMR band qualified as small businesses under the \$15 million size standard. In an auction completed on December 5, 2000, a total of 2,800 Economic Area licenses in the lower 80 channels of the 800 MHz SMR service were sold. Of the 22 winning bidders, 19 claimed "small business" status. Thus, 40 winning bidders for geographic licenses in the 800 MHz SMR band qualified as small business. In addition, there are numerous incumbent site-by-site SMR licensees on the 800 and 900 MHz band. The Commission awards bidding credits in auctions for geographic area 800 MHz and 900 MHz SMR licenses to firms that had revenues of no more than \$15 million in each of the three previous calendar years. This analysis applies to SMR providers in the 800 MHz and 900 MHz bands that either hold geographic area licenses or have obtained extended implementation authorizations. The Commission does not know how many firms provide 800 MHz or 900 MHz geographic area SMR 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 analysis, that all of the remaining existing extended implementation authorizations are held by small entities, as that small business size standard is established by SBA.

#### Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

32. The 2nd R&O modifies the certification process that wireless carriers must follow in order to obtain a tribal lands bidding credit. The Commission extends the time period during which winning bidders can negotiate to obtain the certification needed to obtain the credit, however, the Commission declines to expand the credit beyond its current scope.

#### Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

33. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in developing its approach, which may include the following four alternatives (among others): (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources

available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small Entities. 5 U.S.C. 603(c).

34. A certification period of 90 days was previously identified in the final regulatory flexibility analysis in the R&O. In the 2nd R&O, the Commission extends the time period in which an applicant must obtain a certification from tribal governments regarding the siting of facilities and deployment of service on tribal lands. The 2nd R&O extends the certification period from 90 days to 180 days in order to allow applicants more time to conduct necessary research and negotiate with tribal governments. The change the Commission is adopting in the certification process is minor, and will not have additional significant economic impact on tribal governments or carriers seeking to serve tribal lands. The extension of the certification period from 90 to 180 days benefits all carriers, particularly small entities.

35. Further, the 2nd R&O clarifies partitioning and disaggregation rules specific to licensees electing to use the tribal lands bidding credit. In clarifying these rules, the Commission considered whether or not to apply its existing partitioning and disaggregation rules to situations in which a tribal lands bidding credit is utilized. While the partitioning and disaggregation rules are slightly more restrictive in situations in which tribal lands bidding credits are involved, the Commission believes these rules further its original goal of promoting service to tribal lands by helping to ensure that those using bidding credits fulfill their construction obligations.

36. Report to Congress: The Commission will send a copy of the 2nd R&O, including the FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act. See 5 U.S.C. 801(a)(1)(A). In addition, the Commission will send a copy of the 2nd R&O, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the 2nd R&O and FRFA (or summaries thereof) will also be published in the **Federal Register**.

#### IV. Ordering Clauses

37. Pursuant to the authority of sections 1, 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 303(r),

and 309(j), the rule changes specified below are adopted.

38. The rule changes set forth below will become effective July 1, 2003.

#### List of Subjects in 47 CFR Part 1

Practice and procedure.

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary.*

#### Rule Changes

■ For the reasons discussed in the Preamble, the Federal Communications Commission amends 47 CFR part 1 as follows:

#### PART 1—PRACTICE AND PROCEDURE

■ 1. The authority citation for part 1 continues to read as follows:

**Authority:** 47 U.S.C. 151, 154(i), 154(j), 155, 225, 303(r), 309 and 325(e).

■ 2. Section 1.2110 is amended by revising paragraphs (f)(3)(i), (ii) (vi), (vii), and (viii) to read as follows:

#### § 1.2110 Designated entities.

\* \* \* \* \*

(f) \* \* \*

(3) \* \* \*

(i) Qualifying tribal land means any federally recognized Indian tribe's reservation, Pueblo, or Colony, including former reservations in Oklahoma, Alaska Native regions established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688), and Indian allotments, that has a wireline telephone subscription rate equal to or less than seventy (70) percent based on the most recently available U.S. Census Data.

(ii) *Certification.* (A) Within 180 days after the filing deadline for long-form applications, the winning bidder must amend its long-form application and attach a certification from the tribal government stating the following:

(1) The tribal government authorizes the winning bidder to site facilities and provide service on its tribal land;

(2) The tribal area to be served by the winning bidder constitutes qualifying tribal land; and

(3) The tribal government has not and will not enter into an exclusive contract with the applicant precluding entry by other carriers, and will not unreasonably discriminate among wireless carriers seeking to provide service on the qualifying tribal land.

(B) In addition, within 180 days after the filing deadline for long-form applications, the winning bidder must amend its long-form application and file a certification that it will comply with

the construction requirements set forth in paragraph (f)(3)(vi) of this section and consult with the tribal government regarding the siting of facilities and deployment of service on the tribal land.

(C) If the winning bidder fails to submit the required certifications within the 180-day period, the bidding credit will not be awarded, and the winning bidder must pay the balance on the original gross bid amount.

\* \* \* \* \*

(vi) *Post-construction certification.* Within fifteen (15) days of the third anniversary of the initial grant of its license, a recipient of a bidding credit under this section shall file a certification that the recipient has constructed and is operating a system capable of serving seventy-five (75) percent of the population of the qualifying tribal land for which the credit was awarded. The recipient must provide the total population of the tribal area covered by its license as well as the number of persons that it is serving in the tribal area.

(vii) *Performance penalties.* If a recipient of a bidding credit under this section fails to provide the post-construction certification required by paragraph (f)(3)(vi) of this section, then it shall repay the bidding credit amount in its entirety, plus interest. The interest will be based on the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted. Such payment shall be made within thirty (30) days of the third anniversary of the initial grant of its license. Failure to repay the bidding credit amount and interest within the required time period will result in automatic termination of the license without specific Commission action.

(viii) *Partitioning and disaggregation.* Parties seeking approval for partitioning or disaggregation of tribal areas obtained pursuant to the tribal lands bidding credit shall request an authorization for partial assignment of a license pursuant to § 1.948.

(A) *Partitioning.* A licensee of a market obtained using a tribal lands bidding credit may partition the tribal lands within its market. The partitioned area must include all tribal areas within the market subject to the tribal lands bidding credit. The partitionee must certify that it will satisfy the construction requirements set forth in paragraph (f)(3)(vi) of this section.

(B) *Disaggregation.* Spectrum covering tribal lands may be disaggregated in any amount. The disaggregated spectrum must include all tribal areas within the market subject to the tribal lands bidding credit. The original licensee

must certify that it will satisfy the construction requirements set forth in paragraph (f)(3)(vi) of this section, unless the parties to the transaction inform the Commission otherwise.

\* \* \* \* \*

[FR Doc. 03-10736 Filed 5-1-03; 8:45 am]

BILLING CODE 6712-01-P

## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

### 48 CFR Parts 1802, 1806, 1815, 1816, and 1843

RIN 2700-AC33

#### Definitions

**AGENCY:** National Aeronautics and Space Administration.

**ACTION:** Final rule.

**SUMMARY:** This final rule revises the NASA FAR Supplement (NFS) by amending the definitions of “contracting activity” and “head of contracting activity” consistent with realignment of program management responsibilities between NASA Headquarters and the field centers.

**EFFECTIVE DATE:** May 2, 2003.

**FOR FURTHER INFORMATION CONTACT:** Harold Nelson, NASA, Office of Procurement, Program Operations (Code HS); (202) 358-0436; e-mail: [harold.a.nelson@nasa.gov](mailto:harold.a.nelson@nasa.gov).

#### SUPPLEMENTARY INFORMATION:

##### A. Background

On November 14, 2002, the Assistant Administrator for Procurement approved a deviation to NFS section 1802.101 to designate the Deputy Associate Administrator for the International Space Station (ISS) and Space Shuttle Programs in the Office of Space Flight as the head of the contracting activity (HCA) in lieu of the Center Director(s) for all contracts that directly support the ISS or Space Shuttle Program. This deviation was approved in support of the realignment of program management responsibilities between NASA Headquarters and the field centers. This final rule implements this deviation.

##### B. Regulatory Flexibility Act

This final rule does not constitute a significant revision within the meaning of FAR 1.501 and Public Law 98-577, and publication for public comment is not required. However, NASA will consider comments from small entities concerning the affected NFS Parts 1802, 1806, 1815, 1816, and 1843 in accordance with 5 U.S.C. 610.

## C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes do not impose recordkeeping or information collection requirements which require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

### List of Subjects in 48 CFR Parts 1802, 1806, 1815, 1816, and 1843

Government Procurement.

Tom Luedtke,

Assistant Administrator for Procurement.

■ Accordingly, 48 CFR Parts 1802, 1806, 1815, 1816, and 1843 are amended as follows:

■ 1. The authority citation for 48 CFR Parts 1802, 1806, 1815, 1816, and 1843 continues to read as follows:

Authority: 42 U.S.C. 2473(c)(1).

### PART 1802—DEFINITIONS OF WORDS AND TERMS

■ 2. Amend section 1802.101 by revising the definitions of “contracting activity” and “head of the contracting activity” to read as follows:

#### 1802.101 Definitions.

\* \* \* \* \*

“Contracting activity” in NASA includes the NASA Headquarters installation and the following field installations: Ames Research Center, Dryden Flight Research Center, Glenn Research Center at Lewis Field, Goddard Space Flight Center, Johnson Space Center, Kennedy Space Center, Langley Research Center, Marshall Space Flight Center and Stennis Space Center. A major program that may have contracts at multiple field centers may also be considered a “contracting activity.”

\* \* \* \* \*

“Head of the contracting activity” (HCA) means, for field installations, the Director or other head and, for NASA Headquarters, the Director for Headquarters Operations. For International Space Station (ISS) and Space Shuttle Program contracts, the HCA is the Headquarters Deputy Associate Administrator for ISS and Shuttle Programs in lieu of the field Center Director(s).

\* \* \* \* \*

### PART 1806—COMPETITION REQUIREMENTS

■ 3. Amend section 1806.304-70 by revising paragraphs (b)(2) and (c)(1)(iii) to read as follows: