**Before the**
**FEDERAL COMMUNICATIONS COMMISSION** FCC 94-285
**Washington, D.C. 20554**

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| In the Matter of | ) | |
| | ) | |
| Implementation of Section 309(j) | ) | |
| of the Communications Act - | ) | PP Docket No. 93-253 |
| Competitive Bidding | ) | |
| | ) | |

# FIFTH MEMORANDUM OPINION AND ORDER

**Adopted:** November 10, 1994 **Released:** November 23, 1994

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

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## I. INTRODUCTION

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

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

3. Although we wish to "fine-tune" some aspects of our rules, we generally conclude that

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

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

[3] *See* 47 U.S.C. § 309(j).

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

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

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

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

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

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

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

- Modify the rules to allow certain noncontrolling investors who do not qualify for the entrepreneurs' block or as small businesses to be investors in an applicant's control group. Allow entities that are controlled by minorities and/or women, but that have investors that are neither minorities nor women, to be part of the control group.

- Retain the requirement that a designated entity's control group own at least 25 percent of the applicant's total equity, but require that only 15 percent be held by controlling members of the control group that are minorities, women or small/entrepreneurial business principals. The composition of the principals of the control group determines whether the applicant qualifies for bidding credits, installment payments and reduced upfront payments. The minimum 15 percent may be held unconditionally, or in the form of options, provided these options are exercisable at any time, solely at the holder's discretion, and at an exercise price less than or equal to the current market valuation of the underlying shares at the time of filing FCC Form 175 (short-form). The remaining 10 percent of the applicant's equity may be held in the form of either stock options or shares, and we will allow certain investors that are not women, minorities or small business/entrepreneurial principals to hold interests in such shares or options that are part of the control group's equity. Thus, the 10 percent portion may be any combination of the following: (1) stock options or shares held by investors in the control group that are women, minorities, small businesses, or entrepreneurs; (2) management stock options or shares held by individuals who are members of an applicant's management team (which could include individuals who are not minorities or women or who have affiliates that exceed the entrepreneurs' blocks or small business size standards); (3) shares or stock options held by existing investors of businesses in the control group that have been operating and earning revenues for two years prior to December 31, 1994; or (4) shares or stock options held by noncontrolling institutional investors. Three years after the date of license grant, the 25 percent minimum equity requirement would be reduced so that the principals in the control group would be required to retain voting control and at least a 10 percent equity interest in the licensee.

- Modify the alternative equity option available to applicants controlled by women and/or minorities (*viz.*, a 50.1 percent equity investment in the applicant with other non-attributable investor(s) holding no more than a 49.9 percent interest) to provide that 30 percent of the applicant's equity must be held by principals of the control group that are

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

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

- Amend our rules to provide that when the sole member of the control group is a firm or corporation that was operating and earning revenues for at least two years prior to December 31, 1994, qualifying principals will only be required to own a 10 percent equity interest in the applicant from the outset (or 20 percent if the 49.9 percent investor option available to women and/or minorities is used).

- Exempt applicants that are small, publicly-traded corporations with widely dispersed voting stock ownership from the control group requirement if the company is not controlled by any entity or group of shareholders holding a controlling interest in the company's voting stock. As the applicant, such a company therefore must own all the equity and voting stock to qualify for the exemption. Amend our rule to define a small, publicly-traded corporation with widely dispersed voting power as a business entity in which no person (as defined by the Federal securities laws) (1) owns more than 15 percent of the equity; or (2) has the power to control the election of more than 15 percent of the members of the board of directors.

- Simplify our rules by eliminating (a) the $100 million personal net worth cap for all attributable investors investing in applicants for entrepreneurs' block licenses, and (b) the $40 million dollar personal net worth cap for all attributable investors in an applicant seeking to qualify as a small business.

- Create a limited exception to our affiliation rules that would exclude the gross revenues and assets of affiliates controlled by minority investors or enterprises that are members of the applicant's control group from our financial caps that are the entry criteria for the entrepreneurs' block and are utilized to qualify as a small business. Exempt applicants affiliated with Alaska Native Corporations and Indian tribes from the same financial caps, except create a rebuttable presumption that revenues derived from gaming, pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.*, will be included in determining whether such an applicant qualifies as an "entrepreneur" and as a "small business."

- Clarify that persons or entities that are affiliates of one another or that have an "identity of interests" will be treated as though they were one person or entity and their ownership interests aggregated for purposes of determining compliance with our equity requirements. Thus, for example, if two entities have formed a joint venture or a consortium to apply for PCS licenses in the A and B frequency blocks, they will be treated as a single entity and their separate interests will be aggregated when investing in the same entrepreneurs' block applicant.

- Define control of the applicant for purposes of entrepreneurs' block licenses by looking at traditional standards for determining *de facto* and *de jure* control and, in addition, provide guidelines for establishing and maintaining *de facto* control.

- Clarify the scope of permissible management agreements between noncontrolling investors (or others) and entrepreneurs' block applicants.

- Clarify that rights of first refusal, supermajority voting rights and other such "standard terms" used to protect investments of noncontrolling shareholders do not individually trigger transfers of control. The Commission will review such provisions in the aggregate, in light of the totality of the circumstances, to determine whether they will be deemed to confer and/or relinquish control. A critical factor in such analysis will be whether the provisions involved vary from the recognized standard under our case law. Under no circumstances may such provisions operate to force the designated entity to transfer its equity or control.

- Amend the attribution rules by raising the amount of voting interest that qualifies as nonattributable from 15 percent to 25 percent. This change allows existing companies with established financial structures the opportunity to compete in the entrepreneurs' blocks, and does not sacrifice the objective of retaining control in the control group (which must still retain at least a 50.1 percent voting interest). Clarify that under our amended rule, the maximum permissible nonattributable ownership interest that a noncontrolling investor may hold is equal to, but no greater than, 25 percent of the total equity of the applicant (which may include no more than 25 percent of the applicant's voting stock).

- Clarify that rights of first refusal will not be considered on a fully-diluted basis for purposes of calculating the ownership levels held by investors in an applicant. Also, stock "puts" exercisable after the expiration of the license holding period are generally not attributable to shareholders holding such options until their exercise date. Stock "calls" held by investors, on the other hand, are immediately attributable holdings.

- Maintain bidding credits at current levels.

- Offer installment payments for all entrepreneurs' blocks licensees, regardless of applicant or BTA size. For companies that are not minority or women-owned and have revenues between $75 million and $125 million, create a new class of installment payments, with slightly less generous terms.

- Extend the period in which small businesses owned by minorities and/or women are allowed to make interest-only payments from five to six years.

- Clarify that we will permit entrepreneurs' block licensees to transfer entrepreneurs' block

licenses after their third year of ownership, to other entrepreneurs' block licensees even if the licensee has grown beyond our size limitations to qualify as an entrepreneur or small business. In years four and five, and subject to applicable unjust enrichment provisions, entrepreneurs' block licensees may transfer licenses to any entity that either holds other entrepreneurs' block licenses or that satisfies the eligibility criteria at the time of transfer.

- Retain the rule that limits the number of entrepreneurs' block licenses any single entity may purchase at 10 percent of the total entrepreneurs' block licenses.

- Clarify the definition of "members of minority groups" to be consistent with the definition of minority used in other contexts.

- Provide guidance on issues associated with an entrepreneurs' block licensee's financial insolvency or in the event of default on installment payments to the Commission.

## II. BACKGROUND

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

8. In the *Fifth Report and Order*, we established specific competitive bidding rules for broadband PCS.[10] We also decided in the *Fifth Report and Order* to conduct three separate

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

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

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

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

auctions for broadband PCS licenses: the first for the 99 available broadband PCS licenses in MTA blocks A and B; the second for the 986 broadband PCS licenses in BTA blocks C and F (the "entrepreneurs' blocks"); and, the third for the remaining 986 broadband PCS licenses in BTA blocks D and E.[11] The rules adopted in the *Fifth Report and Order* address auction methodology, application and payment procedures, and other regulatory safeguards.[12] In addition, we established the entrepreneurs' block licenses to insulate smaller applicants from bidding against very large, well-financed entities.[13] We also supplemented our entrepreneurs' block regulations with other special provisions designed to offer meaningful opportunities for designated entity participation in broadband PCS. In particular, we made bidding credits and installment payment options available to those entrepreneurs and designated entities that, according to the record of this proceeding, have demonstrated historic difficulties accessing capital.[14] Additionally, we extended the benefits of our tax certificate policies to broadband PCS minority and women applicants to promote participation by these designated entities in the service.[15] We also adopted attribution rules that accommodate passive equity investment in designated entities, but ensure that control of the applicant resides in the intended beneficiaries of the special provisions.[16] Furthermore, we reduced the upfront payment required of bidders in the entrepreneurs' block.[17] Finally, we established partitioning rules to allow rural telephone companies to expedite the

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*Reconsideration*). The *Fourth Report and Order* in this docket established competitive bidding rules for the Interactive Video and Data Service (IVDS). *See Fourth Report and Order*, 9 FCC Rcd 2330 (1994).

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

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

[13] *Id.* at ¶¶ 113-118.

[14] *Id.* at ¶¶ 130-141.

[15] *Id.* at ¶¶ 142-145.

[16] *Id.* at ¶¶ 158-168.

[17] *Id.* at ¶¶ 154-155.

availability of offerings in rural areas.[18]

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

## III. DISCUSSION

### A. Concept of Entrepreneurs' Blocks

#### 1. Authority and Amount of Spectrum

10. Background. In the *Fifth Report and Order*, the Commission designated a portion of the broadband PCS spectrum available at auction for qualified entrepreneurs.[21] Eligible entrepreneurs can bid on BTA licenses in the C (30 MHz) and F (10 MHz) blocks.[22] In addition, entrepreneurs who fall within one of the four statutory "designated entity" categories (*i.e.*, small

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[18] *Id.* at ¶¶ 158-153.

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

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

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

[22] *Id.* at ¶¶ 121, 127.

businesses, rural telephone companies, and businesses owned by members of minority groups and/or women) are eligible for additional benefits to enable them to acquire broadband PCS licenses.[23]

11. Petitions. The Association of Independent Designated Entities (AIDE) contends that the Commission exceeded its statutory authority in establishing the entrepreneurs' blocks because they potentially benefit entities that fall outside of the four designated entity groups enumerated by Congress.[24] AIDE maintains that the entrepreneurs' blocks reduce meaningful opportunities for smaller designated entities to participate in PCS by forcing them to bid against "entrepreneurs" that may not qualify as designated entities. AIDE further argues that the Commission impermissibly restricted the availability of financial incentives to designated entities for use only in Blocks C and F.[25] Instead, AIDE requests that the Commission make its financial incentives for designated entities available for every auctionable broadband PCS license.[26] The United States Interactive & Microwave Television Association and the United States Independent Personal Communication Association (USIMTA/USIPCA) (filing jointly) support the entrepreneurs' block concept, but encourage the Commission to provide additional broadband PCS spectrum exclusively for designated entities.[27] Citing Congress' concern about the historical impediments that small, minority and women-owned businesses have encountered, USIMTA/USIPCA maintain that "it would not be unreasonable" to set aside up to one-half of the available PCS spectrum.[28] Finally, GTE Service Corporation (GTE) requests the Commission eliminate the entrepreneurs' blocks and instead allow designated entities to "partner" with major investors and be eligible for more generous bidding credits.[29] Additionally, GTE contends that our entrepreneurs' block

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

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

[25] *Id.* at 16-17.

[26] *Id.* at 17.

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

[28] *Id.* at 3-4.

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

scheme unduly restricts the ability of cellular carriers to participate in the provision of PCS.[30] Specifically, GTE contends that this scheme, combined with the PCS-cellular crossownership restrictions, will effectively limit eligibility for many cellular operators to 20 MHz of spectrum on the D and E blocks.[31]

12. Decision. Contrary to AIDE's contention, it is within our statutory authority to establish the entrepreneurs' blocks, for which parties other than designated entities are eligible to apply for or invest in, and we believe that this scheme will provide meaningful opportunities for designated entities to participate in the provision of broadband PCS. Accordingly, we will retain the entrepreneurs' block structure set forth in the *Fifth Report and Order*. In establishing a competitive bidding process for the provision of spectrum-based services, Congress gave the Commission broad authority to adopt bidding procedures and policies, so long as certain objectives are fulfilled. Specifically, Congress mandated that the Commission "promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women."[32] Thus, the language of the statute allows us to consider other entities in order to ensure that licenses are widely dispersed among a variety of licensees,[33] so long as we also, among other statutory objectives, ensure that designated entities are given the opportunity to participate in the provision of broadband PCS.[34]

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

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[30] GTE Petition at 2.

[31] GTE Petition at 4.

[32] *See* 47 U.S.C. § 309(j)(3)(B).

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

[34] 47 U.S.C. § 309(j)(4)(D).

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

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

16. Similarly, we do not accept GTE's argument that we should do away with the entrepreneurs' blocks and instead offer bidding credits as well as other special provisions across all broadband PCS frequency blocks. As we already explained in the *Fifth Report and Order*, in our judgment we do not anticipate designated entities to realize meaningful opportunities for participation in broadband PCS unless we supplement bidding credits and other special provisions with a limitation on the size of the entities designated entities will bid against. Without the insulation of the entrepreneurs' block, the record strongly supports the conclusion that measures such as bidding credits will prove ineffective for broadband PCS. We also disagree with GTE's contention that our entrepreneurs' block plan unduly restricts the ability of cellular carriers to provide PCS. We believe that the public interest benefits of establishing an entrepreneurs' block outweigh the need to provide additional opportunities for cellular operators as GTE describes. Moreover, our rules do allow cellular operators such as GTE to take noncontrolling interests in designated entities and gain opportunities in the entrepreneurs' block. We have recently relaxed the cellular-PCS crossownership rules to facilitate such opportunities.[37]

### 2. Gross Revenues and Other Financial Caps

#### a. Gross Revenues and Total Assets

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[35] USIMTA/USIPCA petition at 3-4.

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

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

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

18. Petitions. MasTec, Inc. (MasTec) argues that the Commission's gross revenues test is misleading when applied across the board to all applicants because the gross revenues of investors operating in different industries will not convey the same information about size or the ability to attract capital.[40] The Telephone Electronics Corporation (TEC) notes that the discontinuity between gross revenues and the ability to attract capital is particularly acute where the entity in question is involved in a volume-intensive business with high operating costs and small profit margins (such as TEC's interexchange resale carriers).[41] Accordingly, TEC argues that the Commission's gross revenue criteria are not rationally related to their stated purpose and should be eliminated.[42]

19. Several petitioners request that the Commission modify its gross revenues test, but disagree whether the limits should be liberalized or made more restrictive. For example, MasTec encourages the Commission to modify its designated entity criteria to include those minority businesses which are too small to compete outside of the entrepreneur blocks, but too large to qualify for the entrepreneurs' blocks.[43] The National Paging and Personal Communications Association (NPPCA) and USIMTA/USIPCA urge the Commission to reduce the gross revenues

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

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

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

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

[42] *Id.*

[43] MasTec Petition at ¶ 6.

cap.[44] Specifically, NPPCA requests that the Commission reduce the gross revenues limit to $75 million and the total assets limit to $250 million.[45] NPPCA maintains that these modifications are needed because the present size standards encourage mid-sized companies to refrain from bidding in competitively unrestricted auctions and to compete, instead, against designated entities in the entrepreneurs' block auctions.[46]

20. As an alternative to increasing the gross revenues cap, Omnipoint Communications, Inc. (Omnipoint) and the National Association of Black Owned Broadcasters, Inc. (NABOB) argue that the "aggregation rule," under which the Commission will aggregate the gross revenues and total assets of the applicant, attributable investors and all affiliates in order to determine whether the applicant complies with the financial caps,[47] should be eliminated.[48] Omnipoint contends that a "multiplier approach," employed in other areas of Commission practice, should be used to determine compliance with the financial caps.[49] Under this approach, the revenues and assets attributed to an applicant would be based on the revenues and assets of each attributable investor, multiplied by the percentage ownership interest in the applicant held by that investor.

21. Cellular Telecommunications Industry Association (CTIA) requests that the Commission prescribe specific dates for measuring the financial thresholds to determine entrepreneurs' block eligibility.[50] Specifically, CTIA requests clarification that gross revenues will be measured from the two years preceding September 23, 1993.[51] CTIA maintains that our current rules, referring only to the "last two calendar years," are ambiguous.[52]

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

[45] NPPCA Petition at 7.

[46] *Id.*

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

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

[49] Omnipoint Petition at 7-8.

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

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

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

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

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

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

[54] *See* 47 C.F.R. § 24.709(a)(3).

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

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

whole.

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

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

26. We agree with CTIA that clarification is required concerning the two-year period in order to provide applicants with a uniform way to measure gross revenues for purposes of qualifying for the entrepreneurs' blocks.[60] For the initial entrepreneurs' block auctions involving broadband PCS, companies should use audited financial statements for each of the two calendar years ending December 31, 1993 or, if audited financial statements are not prepared on a calendar-year basis, data from audited financial statements for their two most recently completed

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

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

[59] *See, e.g.*, ¶ 71 *infra*.

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

fiscal years. Therefore, if applicants and their investors do not have audited statements ending on December 31, 1993, they will have to use one annual statement ending at a later date (sometime in 1994). This approach will enable the Commission to obtain timely financial data while providing applicants with some degree of flexibility in their financial reporting practices. For subsequent entrepreneurs' block auctions (*i.e.*, license re-auctioning), we will require applicants to use their last two annual audited financial statements to determine compliance with the financial caps. Newly-formed companies should use the audited financial statements of their predecessors in interests, or financial statements current as of the time their short-form application is filed that are certified by the applicant as accurate.

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

**b. Personal Net Worth**

28. Background. In addition to the gross revenues and assets caps, the *Fifth Report and Order* also established a personal net worth limit to determine eligibility for bidding in the

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

entrepreneurs' blocks.[62] The current rules require that persons that are applicants, attributable investors in the applicant and all of their respective affiliates who are themselves individuals each have less than $100 million in personal net worth. Additionally, the rules require that if the applicant seeks to qualify as a small business each individual in the control group, attributable investors and all affiliates who are individuals, must have less than $40 million in personal net worth.[63]

29. Petitions. BET requests the Commission relax the personal net worth limits applicable to attributable investors in minority-owned firms.[64] BET argues that eliminating the personal net worth standard would help ensure participation by minority and women-owned businesses by allowing successful individuals to bring their experience to bear in the PCS marketplace.[65] At the same time, BET argues that this measure would ensure that relatively small, minority and women-owned enterprises have a meaningful opportunity to participate in the provision of PCS.[66] TEC also requests the Commission liberalize its personal net worth standard to permit an attributable individual investor to hold up to $125 million in personal net worth.[67] MasTec claims that net worth/net revenue definitions are overly restrictive and will exclude those minority businesses that can best survive and succeed in the competitive PCS market.[68]

30. Decision. We will eliminate the personal net worth limits (both for the entrepreneurs' blocks and for small business size status) for all applicants, attributable investors, and affiliates. The obstacles faced by minorities and minority-controlled businesses in raising capital are well-documented in this proceeding and are not necessarily confined to minorities with limited personal net worth.[69] Therefore, we agree with the view that the personal net worth requirements should be eliminated in the case of minority-controlled applicants seeking to qualify for entrepreneurs' block licenses. However, rather than eliminate the personal net worth limits for minorities only, we will eliminate the requirement for all applicants because personal net worth limits are difficult to apply and enforce and may be easily manipulated. We do not believe that eliminating the

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

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

[64] BET Petition at 16-17.

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

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

[67] TEC Petition at 23-25.

[68] MasTec Petition at 2.

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

personal net worth limits will facilitate significant encroachment by "deep pockets" that can be accessed by wealthy individuals through affiliated entities because, in those instances where access to such resources would create an unfair advantage, the affiliation rules, discussed *infra*, will continue to apply and require that such an entity's assets and revenues be included in determining an applicant's size. Thus, we emphasize that we believe the affiliation rules make the personal net worth rules largely unnecessary since most wealthy individuals are likely to have their wealth closely tied to ownership of another business.

**c. Treatment of Affiliates**

31. Background. The *Fifth Report and Order* sets forth specific affiliation rules for identifying all individuals and entities whose gross revenues and assets must be aggregated with those of the applicant in determining whether the applicant exceeds the financial caps for the entrepreneurs' blocks (or for small business size status).[70] The affiliation rules were adapted from those used by the SBA for purposes of assessing size status and consequent eligibility to participate in SBA's loan, procurement and minority enterprise programs.

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

33. Petitions. BET and others argue that we did not provide adequate notice or opportunity to comment on the possibility of the Commission adopting affiliation rules for all entrepreneurs' block participants (specifically, minorities and women).[72] BET argues that we have thus violated the notice and comment requirements of the Administrative Procedure Act (APA), and that the Commission is required to issue a *Further Notice* prior to adopting the affiliation

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

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

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

rules.[73] BET also contends that the affiliation rules add unnecessary complexity to the broadband auction rules and that they make it very difficult, if not impossible, for potential bidders to tailor their pre-existing business relationships and ownership structures to our eligibility requirements.

34. Several parties have filed petitions for reconsideration of our *Order on Reconsideration.*[74] On reconsideration of the *Fifth Report and Order,* several petitioners also challenge the limited exemption granted to Indian tribes or request that generic exemptions be granted for other applicants.[75] BET and MasTec oppose any special treatment for a particular minority group, arguing that the exemption accorded Indian tribes creates an imbalance of bidding power in favor of tribally-owned entities and will skew the broadband PCS auction results. Cook Inlet Region, Inc. (Cook Inlet) argues that the exemption for Indian tribes should be expanded to encompass eligibility for treatment as a small business for purposes of bidding credits and installment payments because: (1) Indian tribes are congressionally recognized as particularly disadvantaged; (2) such an exemption applies when determining size status for SBA's programs; and, (3) substantial legal constraints with respect to tribal property and businesses preclude their use to raise capital or to cross-subsidize other tribally-owned entities.[76]

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

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[73] BET Petition at 20.

[74] *See* BET Petition for Reconsideration of *Order* (filed Sept. 21, 1994); Cook Inlet Region, Inc., Petition for Clarification (Cook Inlet Petition)(filed Aug. 22, 1994). *See also* AIDE Petition for Reconsideration (filed Sept. 21, 1994) (seeking reconsideration of voting equity change in *Order on Reconsideration*); AMP Opposition to Petition for Reconsideration (filed Oct. 17, 1994) (same).

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

[76] *See* Cook Inlet Petition at 1-2.

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

[78] *Id.*

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

significantly greater access to capital than other minority-owned entities participating in the bidding for the entrepreneurs' block licenses despite any restrictions they might have on their assets.[80]

36. TEC seeks an exemption from the affiliation rules for rural telephone companies, arguing that regulatory and corporate barriers prohibit small telephone companies like TEC from shifting broadband PCS costs to their affiliated resellers and that courts have found questions of affiliation to be irrelevant where such barriers to cross-subsidization exist.[81] MEANS/SDN suggests a more narrowly tailored exception that would exempt centralized equal access providers (*i.e.*, a consortia of rural telephone companies that provide centralized equal access and other sophisticated information services) from the Commission's affiliation rules.[82] MEANS/SDN argues that this modification would allow the consortia to bring their considerable expertise and efficiencies to bear in the deployment of broadband PCS.[83]

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

38. As an initial matter, we do not believe that promulgation of the affiliation rules violated the notice and comment requirements of the Administrative Procedures Act. Our *Notice of Proposed Rule Making* in this docket[84] alerted petitioners to the fact that the Commission was considering SBA's size standards which, by their terms (as set forth in the *Notice*), incorporate the concept of affiliation in determining a firm's small business size status.[85] The question of affiliation is integral to the concept of size status, by whatever means size status is assessed. Without affiliation rules, large firms may unfairly avail themselves of the preferences intended for small businesses and other designated entities since they have an incentive to create subsidiaries

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[80] *Id*.

[81] TEC Petition at 14-15.

[82] MEANS/SDN Opposition at 5-11.

[83] *Id*.

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

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

(that would have access to the parent's substantial resources) to compete against *bona fide* applicants in the entrepreneurs' blocks. Adoption of affiliation rules similar to those used by the SBA is a logical outgrowth of the Commission's decision to impose a gross revenues test for small businesses and to consider SBA's size standards in establishing that test.[86] It was reasonable for petitioners to conclude that such rules would be applied in assessing eligibility for the entrepreneurs' blocks and for small business size status. Thus, sufficient opportunity to comment was provided on the affiliation rules since they play an integral role in any determination of size status. Moreover, we see no advantage in seeking additional comment on the affiliation rules since petitioners, such as BET, had a full and fair opportunity to suggest modifications to our affiliation rules, some of which we adopt on reconsideration. A *Further Notice* could also substantially delay the auction of entrepreneurs' block licenses.

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

40. We are persuaded, however, that a limited exception to our affiliation rules is appropriate for minority-owned applicants and applicants owned by a combination of minorities and women.[88] The exception will apply to affiliates controlled by investors who are members of minority groups who are attributable members of an applicant's control group. Under the

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[86] Rules adopted as a "logical outgrowth" of a *Notice of Proposed Rule Making* satisfy our APA notice requirements. *See Public Service Commission of the District of Columbia v. FCC*, 906 F.2d 713, 717 (D.C. Cir. 1990); *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983). An agency must be free to adopt a final rule not described exactly in the *Notice*, where the difference involved is "sufficiently minor," otherwise, agencies could not change a rule in response to valid comments without beginning the rulemaking anew. *See National Cable Television Assoc., Inc. v. FCC*, 747 F.2d 1503, 1507 (D.C. Cir. 1984).

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

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

exception, the gross revenues and assets of affiliates that the minority investor controls will not be counted in determining the applicant's compliance with the financial caps, both for purposes of the entry into the entrepreneurs' block and for purposes of the applicant qualifying as a small business.

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

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

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

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

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

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

43. In response to MasTec's and BET's concerns about special treatment for a particular minority group, we clarify that we exempt Indian tribes generally from our affiliation rules because Congress has imposed unique legal constraints on the way they can utilize their revenues and assets.[96] Cook Inlet contends that, while other minority-owned businesses can issue debt and equity securities and pledge their assets and securities to raise capital, the real and personal property interests held by Alaska Native Corporations are subject to a number of constraints -- both legal and cultural -- that affect their ability to manage and dispose of property.[97] For example, under the Alaska Native Claims Settlement Act, 43 U.C.S § 1601 *et seq.*, the stock held by Native corporations is subject to strict alienability restrictions - it cannot be sold, pledged,

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

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

[94] *Id.*

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

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

[97] Cook Inlet Opposition at 1-2.

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

44. After considering the record, however, we have determined that gaming revenues generally are not subject to the same types of legal restrictions as other revenues received by Indian tribes.[103] Therefore, we establish a rebuttable presumption that revenues derived from gaming pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.*, will be included in our calculations when determining whether an applicant that is affiliated with an Indian tribe qualifies for the entrepreneurs' block or as a small business. Cook Inlet has set forth several reasons why we should treat gaming revenues differently from other types of Indian tribe revenues. First, these revenues were not part of the tribal economic picture when Congress enacted the SBA tribal exception to the affiliation rule in 1970.[104] Second, the Indian Gaming Regulatory Act provides certain Indian tribes with a non-traditional source of revenue that could be very substantial.[105] Cook Inlet also asserts that gaming revenues are not subject to the same types of legal and governmental controls as other revenues received by Indian tribes, and

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

[99] *Id.* 4-5.

[100] *Id.*

[101] *Id.*

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

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

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

[105] *Id.*

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

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

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[106] *Id.*

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

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

[109] BET Opposition, at 16-17.

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

## B. Designated Entity Definitions

### 1. Minority and Women-Owned Businesses

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

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

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

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

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

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

[114] *Id.*

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

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

50. We wish to emphasize also, that it is highly likely that most firms owned by individuals with disabilities will be eligible to bid in the entrepreneurs' block and for an installment payment option if they meet the required gross revenues and total assets test. Such firms may also be eligible for "enhanced" installment payments and bidding credits if they qualify as small businesses under our rules. Indeed, absent a substantial record that demonstrates firms owned by

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

[116] *See* Karl Brothers Petition at 2-5.

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

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

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

persons with disabilities have any more difficulty accessing capital than any other small business, we find that we cannot accommodate the Karl Brothers request.

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

52. In response to numerous inquiries,[121] however, we revise the definition of "members of minority groups" slightly to conform with the definition of minority used in other contexts. [122] Thus, Section 24.720(i) of the Commission's rules shall read as follows: "Members of minority groups include Blacks, Hispanics, American Indians, Alaskan Natives, Asians, and Pacific Islanders."[123] We have also been asked to clarify the meaning of particular categories in the definition of minority. Again, for consistency, we shall use the same category descriptions the Commission has relied on in other contexts.[124] These categories are as follows :

a. Black. A person having origins in any of the black racial groups of Africa.

b. Hispanic. A person of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish Culture or origin, regardless of race.

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

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

[122] *See, e.g., Broadcast Equal Employment Opportunity Rules and FCC Form 395*, 70 FCC 2d 1466, 1473 (1979); 47 C.F.R. §§ 73.3555(d)(3)(iv), l.1621(b); *see also* 47 U.S.C. § 309(i)(3)(c)(ii); Race and Ethnic Standards for Federal Statistics and Administration Reporting, OMB Statistical Policy Directive No. 15 (1977).

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

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

c. American Indian or Alaskan Native. A person having origins in any of the original peoples of North America, and who maintains cultural identification through tribal affiliations or community recognition.

d. Asian or Pacific Islander. A person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands. This area includes, for example, China, India, Japan, Korea, the Philippine Islands, and Samoa.

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

**2. Small Business Consortia**

53. Background. In the *Fifth Report and Order* the Commission allowed a consortium of small businesses to qualify collectively for the preferences available to a small business if each business within the consortium individually satisfies the definition of a small business designated entity.[126] The Commission defined a small business designated entity as any company that, together with attributable investors and affiliates, has average gross revenues for the three preceding years of not in excess of $40 million.[127] We defined "consortium of small businesses" as a conglomerate organization formed as a joint venture among mutually-independent business firms, each of which individually satisfies the definition of a small business.[128] In the *Second Report and Order,* we concluded that consortia should not always be entitled to qualify for measures designed specifically for designated entities.[129] In the *Fifth Report and Order*, however, we stated that for the auctioning of broadband PCS, it is especially necessary to allow small businesses to pool their resources in this manner to help them overcome capital formation problems.[130] Thus, our rules provide that if a consortium's members are all small businesses (*i.e.*, defined as companies that do not have average yearly gross revenues for the preceding three years in excess of $40 million), the consortium as a whole will qualify for designated entity provisions for small businesses.

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

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

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

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

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

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

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

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

56. We also deny Omnipoint's request that small businesses be allowed to form a single corporate applicant that would be afforded the same treatment as consortia. The concept of a consortium is that each small business participant remains a distinct corporate entity independent of other consortium members and that each member has rights and obligations similar, or equal to, those held by participants in other types of joint ventures. Allowing a group of small businesses to apply as one corporate applicant and receive the benefits of our consortia rule would disadvantage small, independent businesses wishing to bid as a group under our rule, but who cannot restructure as a corporate applicant and could tend to dilute each member's influence and insulate their responsibilities in the venture. We believe that such a change would also eviscerate our small business eligibility size requirement. We wish to clarify, however, that we intend to examine the qualifications of each consortium member to ensure that each is a *bona fide* small business. In this regard, it is assumed that each concern should be an entity "organized for profit" and not for the sole purpose of qualifying as part of a small business consortia. This is consistent with SBA's long-standing definition of "business concern." *See* 43 C.F.R. § 121.403(a), *Small Business Size Standards*, 54 Fed. Reg. 52634 (Dec. 21, 1989).

57. On another issue, BET contends that the $40 million gross revenues standard fails to comply with an SBA requirement that any size standard proposed by a federal agency that varies from SBA's standard be "proposed after an opportunity for public notice and comment" and be "approved by the Administrator [of the SBA]."[133] We believe we have fully met our notice and comment obligations, both under the Administrative Procedures Act and the Small Business Act,

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[131] Omnipoint Petition at 9.

[132] BET Petition at 7.

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

in this proceeding. We solicited comment on a range of size options, and received comment that included SBA's recommendation for a $40 million gross revenues cap (which we ultimately adopted). Indeed, we recently obtained SBA's approval of the $40 million size standard.[134]

## C. Eligibility Requirements

### 1. Minimum Equity Limit for the Control Group

58. Background. In the *Fifth Report and Order*, the Commission adopted a methodology for assessing an applicant's compliance with the financial caps for the entrepreneurs' blocks and for small business size status based on the distinction between: (a) noncontrolling investors (whose financial status would not be attributed to the applicant); and (b) investors holding interests in the control group of the applicant.[135] The gross revenues, assets and personal net worth limits of attributable investors (*i.e.*, those with more than 25 percent equity) and *all* control group members, regardless of the size of their individual interests, are included in assessing an applicant's compliance with the financial caps.[136] To qualify as a women or minority-owned business, the Commission further required that the control group be composed entirely of women and minorities.[137] The control group requirement ensures that designated entity and entrepreneur principals retain control of the applicant and own a substantial financial interest in the venture. At the same time, it enables noncontrolling investors outside the control group to provide essential capital to an applicant without their revenues, assets or net worth being attributed to the applicant or their non-minority or male status disqualifying the applicant.

59. The Commission adopted two control group options in the *Fifth Report and Order*.[138] Under the first option, passive investors are permitted to own up to 75 percent of the applicant's total equity, so long as: (1) no investor holds more than 25 percent of the applicant's passive equity (which was subsequently defined to include up to 15 percent of a corporation's voting stock); and (2) in the case of a corporate applicant, at least 50.1 percent of the voting stock is held by the control group.[139] In the case of partnership applicants, the control group must

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

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

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

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

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

[139] *Id.* at ¶ 158.

own all the general partnership interests.[140] The Commission determined that this minimum equity level strikes an appropriate balance between the competing considerations of permitting qualified bidders to raise capital and ensuring that designated entities receive a significant economic benefit from the venture.[141] The Commission extended an alternate option to qualified women or minority-owned businesses. Under this option, the Commission would permit a single investor in a women or minority-owned applicant to own up to 49.9 percent of the passive equity (which we subsequently defined to include up to 15 percent of a corporation's voting stock), so long as the control group holds the remaining 50.1 percent of the equity. As with the first option, the control group is required to retain control and, in the case of a corporate applicant, hold at least 50.1 percent of the voting stock.[142] Also, ownership interests are to be calculated on a fully diluted basis .

60. Petitions. Petitions filed by BET, Columbia PCS, CTIA, EATEL, Lehman Brothers and Omnipoint variously address the Commission's restrictions on the composition of an applicant's control group.[143] Specifically, petitioners request clarification that our attribution rules and definitions of minority and women-owned business be interpreted to permit "nonqualifying" noncontrolling investors *within* the control group.[144] "Nonqualifying" investors, as petitioners describe, are investors that are neither women nor minorities, or investors that if attributed would cause the applicant to exceed the financial caps. EATEL argues that to do otherwise may preclude participation by existing companies whose existing corporate structures would disqualify an applicant absent significant expenditures for corporate restructuring. EATEL maintains that existing entities have the greatest amount to offer applicants in terms of financial and technical resources.[145] Petitioners also request that the Commission allow a limited amount of equity investment in the control group to help the applicant comply with the 25 percent minimum equity requirement. Columbia PCS, for example, advocates adoption of a bright-line test that would require at least a 75 percent equity and a 100 percent voting interest in the control group to be held by "qualifying" entities.[146] Columbia PCS maintains that designated entities will be unable to

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[140] *Id.*

[141] *Id.* at ¶ 159.

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

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

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

[145] EATEL Petition at 5-6.

[146] Columbia PCS Petition at 2-4.

raise sufficient capital unless this clarification is made.[147] EATEL and CTIA maintain that the 100 percent equity requirement for minority and women-owned control groups is too restrictive for entities already in existence. Instead, they argue that businesses which are in fact *controlled* by women and/or minorities, but which have numerous non-controlling shareholders (including some that are neither women nor minorities), should be eligible for the preferences we adopted for minority and women-owned businesses.[148] BET also requests clarification that a control group may be comprised of a single individual.[149]

61. Omnipoint, Columbia PCS, CTIA and Lehman Brothers contend that the 25 percent minimum equity ownership restriction is too high and that designated entities will face insurmountable difficulties arranging financing if it is not reduced.[150] To remedy this problem, Lehman Brothers proposes two alternative solutions. First, for publicly-traded companies, Lehman proposes that public shareholders with less than 5 percent equity should be counted towards the control group's 25 percent equity threshold. Lehman maintains that this proposal would permit control group equity to be diluted by new shareholders, but not below a minimum equity level (Lehman recommends 10 percent).[151] Second, Lehman suggests that all designated entities should be permitted to dilute their 25 percent equity interests in the following circumstances: (a) not earlier than one year after license grant, to dilute control group equity to a total of not less than 20 percent; (b) not earlier than two years, to dilute control group equity to a total of not less than 15 percent; and (c) not earlier than three years to dilute control group equity to a total of not less than 10 percent. Lehman argues that this proposal would provide designated entities efficient access to capital, thereby improving their competitive position.[152] CTIA recommends that an applicant should be eligible to bid on the C and F blocks with at least 10 percent equity.[153] Lehman Brothers also requests that the Commission modify its control group definition to provide that members of the control group receive dividends, profits and regular and liquidating distributions in proportion to the actual possession of equity held, rather than in proportion to their interest in the total equity of the applicant. Lehman Brothers contends that our rules could be interpreted to mean that such distributions must be paid on options held but not

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[147] *Id.* at 2.

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

[149] BET Petition at 16.

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

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

[152] *Id.* at 5.

[153] CTIA Petition at 9.

exercised by control group members, rather than on the basis of actual shares held.[154]

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

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

64. Specifically, we will retain the 25 percent minimum equity requirement for the control group, but we will require only 15 percent (*i.e.*, 60 percent of the control group's 25 percent equity holdings) to be held by qualifying, controlling principals in the control group (*i.e.*,

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

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

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

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

minorities, women or small/entrepreneurial business principals).[158] For example, if the applicant seeks minority or women-owned status, the 15 percent equity, as well as 50.1 percent of the voting stock of the control group and all of its general partnership interests, must be owned by control group members who are minorities and/or women. If the applicant seeks small business status, 15 percent of the equity, as well as 50.1 percent of the control group's voting stock and all of its general partnership interests, must be held by control group members who, in the aggregate, qualify as a small business.[159] With regard to establishing control of the applicant by qualified investors, where the control group is composed of both qualifying and nonqualifying members, the qualifying members in the control group must have 50.1 percent of the voting stock and all general partnership interests within the control group, and maintain *de facto* control of the control group. The control group, in turn, must hold 50.1 percent of the voting stock and all general partnership interests of the PCS applicant. Thus, qualifying members of the control group will have *de jure* and *de facto* control of both the control group and, indirectly, the applicant. The composition of the principals of the control group and their legal and active control of the applicant determines whether the applicant qualifies for bidding credits, installment payments and reduced upfront payments. The 15 percent minimum equity amount may be held in the form of options, provided these options are exercisable at any time, solely at the holder's discretion, and at an exercise price equal to or less than the current market valuation of the underlying shares at the time of short-form filing. The remaining 10 percent (*i.e.*, 40 percent of the control group's minimum equity holdings) may be held in the form of either stock options or shares, and we will allow certain investors that are not minorities, women, small businesses or entrepreneurs to hold interests in such shares or options. Specifically, we will allow the 10 percent portion to be held in the form of shares or stock options by qualifying investors or by any of the following entities which may not comply with the entrepreneurs' block requirements (*e*.g. investors who are not minorities or women or investors, and/or their affiliates, that exceed the entrepreneurs' block or small business size thresholds): (1) individuals who are members of an applicant's management team; (2) existing investors of businesses in the control group that were operating and earning revenues for two years prior to December 31, 1994; or (3) noncontrolling institutional investors.[160]

65. As discussed *supra* at paragraph 59, the Commission also adopted an alternative to the 25 percent minimum equity requirement for minority and women-owned businesses, which permits a single investor to hold as much as 49.9 percent of its equity, provided the control group holds at least 50.1 percent. Several petitioners have expressed similar concerns with respect to

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

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

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

the need to revise the 50.1 percent requirement.[161] Therefore, in tandem with, and for the same reasons as, the modifications to the 25 percent equity requirement, we make similar modifications to the rules governing the 50.1 percent minimum equity requirement. Accordingly, where a minority or women-owned business uses the 50.1 percent minimum equity option, we will require only 30 percent of the total equity to be held by the principals of the control group that are minorities or women. The 30 percent may be held in the form of options, provided these options are exercisable at any time, solely at the holder's discretion, and at an exercise price equal to or less than the current market valuation of the underlying shares at the time of short-form filing. The remaining 20.1 percent may be made up of shares and/or options held by investors that are not women or minorities under similar criteria described in paragraph 64 above. That is, the 20.1 percent portion of the control group's equity may be held in the form of shares or stock options by qualifying investors or by any of the following entities which may not comply with the entrepreneurs' block requirements (*e*.g. investors who are not minorities or women or investors, and/or their affiliates, that exceed the entrepreneurs' block or small business size thresholds): (1) individuals who are members of an applicant's management team; (2) existing investors of businesses in the control group that were operating and earning revenues for two years prior to December 31, 1994; or (3) noncontrolling institutional investors.[162]

66. In addition, the control group minimum equity requirement will be reduced three years from the date of license grant as suggested by Lehman Brothers, but the control group must still retain voting control (*i.e.*, 50.1 percent of the vote).[163] According the control group the option to reduce the equity requirement accommodates the needs of designated entity licensees to raise capital as they build out their systems.[164] Significantly, the three-year mark corresponds with

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

[162] For our purposes, we define institutional investors in a manner that is similar to the definition that is used by the Commission in the attribution rules applied to assess compliance with the broadcast multiple ownership rules. We modify that definition slightly, however, to fit this service. Specifically, we expect that investment companies will be important sources of capital formation for designated entities. Accordingly, we adopt a definition that specifically includes venture capital firms and other smaller investment companies that may not be included in the definition of investment companies found in 15 U.S.C. § 80a-3 (which is cited in our broadcast rules at 47 C.F.R. § 73.3555 Note 2(c)). Specifically, we define an *institutional investor* as an insurance company, a bank holding stock in trust accounts through its trust department, or an investment company as defined under 15 U.S.C. § 80a-3(a). We include in the definition any entity that would otherwise meet the definition of investment company under 15 U.S.C. § 80a-3(a), but is excluded by the exemptions set forth in 15 U.S.C. § 80a-3(b) and (c) and we do so without regard to whether the entity is an issuer of securities. However, if the investment company is owned, in whole or in part, by other entities, the investment company, other entities and *affiliates* of other entities, taken as a whole, must be primarily engaged in the business of investing, reinvesting or trading in securities or in distributing or providing investment management services for securities. *See* Section 24.720(h).

[163] *See* Lehman Bros. Petition at 4-5.

[164] *See id.* at 2-4.

the end of the no transfer period under our license holding rule. In the case of a licensee that has chosen the 25 percent minimum equity option, the principals in the control group will only be required to hold 10 percent of the licensee's equity after three years, with no further equity requirements imposed on the control group. Similarly, in the case of a licensee that has used the 50.1 percent minimum equity option, the principals in the control group will be required to hold 20 percent of the licensee's equity, and no further equity requirements will be imposed on the control group.

67. After reviewing the record, we are persuaded that these changes will afford the control group greater flexibility in raising the necessary equity for participation in the entrepreneurs' blocks. In particular, we are allowing that 10 (or 20.1) percent of the equity can come from sources that otherwise would not qualify for the control group. In making these limited changes to the control group equity requirements, we believe the amended rules will: (1) promote investment in designated entities generally; (2) attract and promote skilled management for applicants; and (3) encourage involvement by existing firms that have valuable management skills and resources to contribute to the success of applicants.

68. With respect to our decision to allow investment in the control group by investors of preexisting firms, the business involved must be a going concern that has been in existence for a reasonable period of time prior to adoption of our rules in order to avoid any sham arrangements. Specifically, the business involved must have been operating and earning revenues for at least two years prior to December 31, 1994 to qualify for this provision. While we want to relax the control group equity requirements slightly, we also recognize there may be an incentive for nonqualifiying investors to purchase substantial interests in "preexisting" businesses unless we place some restrictions on those investors. As a practical matter, however, we realize that the identity of noncontrolling investors in such businesses, particularly if they are publicly-traded companies, will change regularly. As we state *infra* in our discussion on the treatment of preexisting businesses that are the sole control group member, we intend that the allowed equity (10 or 20.1 percent) portion should be held by existing investors in such a company although we will not place limits on who qualifies as such an investor. We emphasize, however, that we will scrutinize any significant equity restructuring of preexisting companies that occurs after adoption of our rules. We would presume that any change of equity by an investor in a preexisting company (that is in an applicant's control group) that is five percent or less would not be significant, and the burden is on the applicant to demonstrate whether changes in equity that exceed five percent are *not* significant.

69. We also agree with petitioners and commenters that greater flexibility should be afforded to any applicant whose ownership structures were established before our designated entity requirements were formulated.[165] Therefore, as a further modification, if the sole control group member of an applicant is a business that was in existence and had earnings from operations

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[165] *See, e.g.*, BET Petition at 12-15; CTIA Petition at 8-9; EATEL Petition at 2-3; MEANS/SDN Opposition at 10.

for at least two years prior to December 31, 1994, we offer the option that control group principals establishing the applicant's status as a minority and/or women-owned business, small or entrepreneurial business may hold 10 percent of the applicant's equity if the 25 percent equity option is used, or a 20 percent equity interest if the 50.1 percent equity option is used.[166] The balance of the control group's equity contribution (*i.e.*, 15 or 30.1 percent) must be held in the form of shares or stock options by any of the following:
(1) qualifying principals in the control group; (2) individuals who are members of the applicant's management team (which could include "nonqualifying" individuals); or (3) existing investors of businesses in the control group that were operating and earning revenues for two years prior to December 31, 1994.

70. The lower equity requirement of 10 percent for preexisting companies that are sole control group members addresses the concerns of these firms, many of which have already undergone successive rounds of financing that may have diluted the qualifying investors' original equity interest in the business. Existing firms that were structured prior to the adoption of the entrepreneurs' block regulatory scheme are less likely to become "fronts" for businesses that would not qualify for the entrepreneurs' blocks or the special provisions accorded designated entities. This option is solely intended to accommodate long-standing capital structures of applicants that have already been required to dilute equity ownership to raise capital. Thus, we will require that the portion of equity not held by qualifying principals (15 or 30.1 percent, as the case may be) to be comprised entirely of existing investors of the company (unless the equity is held by management or qualified principals of the control group). As we stated above, we recognize that for many companies, especially those that are publicly-traded, the identities of noncontrolling investors change regularly. Thus, as stated *supra*, we will not place limits on the amount of time a particular individual or entity must have been an investor in the company. We emphasize, however, that we will scrutinize carefully applicants that engage in significant equity reshuffling after adoption of our rules.[167] By giving preexisting applicants additional flexibility, we do not intend to place other applicants at a competitive disadvantage by permitting greater capital infusion from institutional investors.[168]

71. In implementing our requirements, we will provide that where the interests in question are not held directly in the applicant, a multiplier will be used to calculate the effective interests held by the control group principals toward fulfillment of the minimum equity requirement. In

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[166] As described *supra* at ¶ 65, this equity may be held outright or in the form of options provided these options are exercisable at any time, solely at the holder's discretion, and at an exercise price equal to or less than the current market valuation of the underlying shares at the time of the filing of the short-form application.

[167] As stated *supra* at ¶ 68, we will presume that a change in equity by an investor (in a preexisting business) of five percent or less is not significant, and the burden is on the applicant to demonstrate whether equity changes above five percent are *not* significant.

[168] *See* BET *ex parte* comments, filed Nov. 3, 1994, at 2-4.

addition, we will use a multiplier to calculate the interests of noncontrolling investors in the control group so as to assess compliance with the 25 percent nonattributable equity limit.[169] A multiplier is a traditional tool used by the Commission to calculate the effective ownership levels of investors that, through one or more intervening corporations, hold indirect interests in a licensee.[170]

72. Additionally, in a written *ex parte* presentation, Metricom requests that we exempt small, publicly-traded corporations with widely dispersed voting stock ownership from our control group requirement.[171] Metricom contends that the control group concept is unworkable for small, publicly-traded companies, because it would not be possible to identify a group of shareholders that own 50.1 percent of the corporation's voting stock.[172] As a result, such corporations could be unable to establish eligibility for the entrepreneurs' blocks, or status as a small business. Metricom proposes a test for identifying small, publicly-traded corporations with widely dispersed voting stock ownership that closely follows guidelines used by the Securities and Exchange Commission.[173]

73. We will adopt Metricom's proposal, and create a limited exemption from the control group requirement for small, publicly-traded corporations with widely dispersed voting stock ownership. As Metricom points out, a significant number of small, publicly- traded companies have such widely dispersed voting stock ownership that no identifiable control group exists or can

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[169] We illustrate the application of a multiplier as follows: If a member of a minority group or a woman holds a 25 percent equity interest in a corporate member of the control group and that corporation holds a 25 percent equity interest in the applicant, the effective interest for purposes of assessing compliance with the minimum equity requirement would be 6.25 percent (*i.e.*, 0.25 x 0.25 = 6.25). This falls well below the 25 percent requirement of our original rule. Correspondingly, if a noncontrolling (and nonqualifying) investor holds a 40 percent interest in a corporate member of a control group and that corporation holds 25 percent of the applicant's total equity, the effective interest held in the applicant by the investor would be 10 percent (*i.e.*, 0.25 x .40 = 10.00). If that same investor also owns more than 15 percent of the applicant's equity outside of the control group, it would exceed the 25 percent nonattributable equity limit.

[170] *See, e.g.*, 47 C.F.R. § 73.3555 Note 2(d) (indicating that attribution ownership interests in a broadcast licensee, cable television system or daily newspaper that are held indirectly by a party through one or more intervening corporations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain). We note that the multiplier used here does not employ the 51 percent control exception used in the broadcast context since we are using a multiplier only to determine a control group member's equity investment, not whether such member has control or substantial influence over the applicant.

[171] Metricom, Inc. *ex parte* comments, filed Oct. 20, 1994.

[172] *Id.* at 6-7.

[173] *Id.* at 10-11.

be created.[174] Without a control group, such companies may not be able bid for entrepreneurs' block licenses or qualify for small business status even though their gross revenues and assets meet our financial caps. It was not the Commission's intent that these companies be denied the opportunity to bid on the entrepreneurs' block, or to qualify for treatment as a small business.

74. Consistent with Metricom's proposal, a small, publicly-traded corporation will be found to have dispersed ownership of voting stock if no person (including any "group" as that term is used in the Securities Exchange Act of 1934)[175] has the power to control the election of more than 15 percent of the corporation's directors. In addition, we will require that no person shall have an equity interest in the applicant of more than 15 percent, which is consistent with our revised equity requirements for small business applicants utilizing a control group. Under those requirements, discussed *supra* at paragraph 64, small business principals in an applicant's control group must hold at least a 15 percent interest in the applicant (in combination with an additional, 10 percent equity interest that may come from "nonqualifying" sources). A 15 percent equity requirement is appropriate here because the same percentage of equity is needed for a small business applicant's control group to satisfy its equity obligations (unless it is a preexisting company), and because a 15 percent equity cap is likely to ensure that no control questions arise. We emphasize that this control group exemption will only apply to an applicant or licensee that is not controlled by any entity or group other than corporate management, as should be the case where there is no identifiable group of shareholders holding a controlling interest in the company's voting stock. A small corporation that has dispersed voting stock ownership and no controlling affiliates will therefore not be required to aggregate with its own revenues and assets the revenues and assets of management and shareholders for purposes of entrepreneurs' block eligibility or small business status.

75. Small, publicly-traded corporations that choose to exempt themselves from the control group requirement must own all the equity and voting stock of the applicant or licensee. We find their ability to rely on the corporation's existing capital structure to introduce new passive investment on an ongoing basis provides a level of flexibility that is comparable to applicants/licensees with an identifiable control group. We note that minority and/or women-owned businesses would not qualify for this exemption since a control group is necessary to determine whether the applicant is controlled by minorities or women.

76. Finally, we consider a few other points. First, as BET requests, we clarify that an individual can be the control group of an applicant, so long as our equity requirements and other provisions are satisfied. In response to Lehman Brothers' concerns, we clarify the control group

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[174] *See id.* at 6-7.

[175] *See id.* at 10-11; *see also* 15 U.S.C. § 78(a) *et seq.* (Section 13(d) and Section 13(g) state that "when two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities in an issuer, such syndicate or group shall be deemed a 'person' and therefore required to make the disclosures indicated in those subsections").

requirements to provide that control group investors must receive dividends, profits, and regular and liquidating distributions in proportion to their actual possession of equity holdings, rather than in proportion to their interest in the total equity (which may include options not yet exercised). Finally, we see no conflict in our rules with a Pacific Telesis' proposal to allow designated entities and their partners to allocate amongst themselves tax benefits on a non-pro rata basis.[176]

### 2. *De Facto* Control Issues and Management Contracts

77. In the *Fifth Report and Order*, we provided that the designated entity control group must have *de facto* as well as *de jure* control of the applicant and must be prepared to demonstrate that it controls the enterprise.[177] The requirement of *de facto* control arises from Section 310(d) of the Communications Act, which prohibits any transfer or assignment of license or transfer of control of a corporation holding a license without the Commission's authorization.[178] To help in determining what constitutes a transfer of control under this statutory provision, we follow precedent defining *de facto* control.[179] We also apply this standard in the case of designated entities to determine whether the applicant is in fact controlled by qualifying individuals or entities. Several petitioners seek reconsideration or clarification of our *de facto* control standard, particularly as it applies to questions of *de facto* control by the designated entity control group and use of management contracts by licensees.[180]

#### a. Definition of *De Facto* Control

78. Background. The *Fifth Report and Order* does not set forth specific guidelines defining *de facto* control in the entrepreneurs' block context. Because issues of *de facto* control are necessarily fact-specific, we have treated the issue as one to be handled on a case-by-case basis.[181] Consequently, a wide variety of factors may be relevant to determining whether a control group has *de facto* control of a particular applicant, applying in the entrepreneurs' blocks.

79. Petitions. Some petitioners ask us to provide more specific guidelines with respect to what does and does not constitute *de facto* control. Omnipoint states that such guidelines would

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[176] *See* Pacific Telesis *ex parte* comments, dated Oct. 19, 1994, at 4.

[177] *Fifth Report and Order*, FCC 94-178 at ¶¶ 115, 164; 47 C.F.R. § 24.720(k).

[178] 47 U.S.C. § 310(d).

[179] *See Rochester Telephone v. United States*, 23 F. Supp. 634, 636 (S.D.N.Y. 1938), *aff'd*, 307 U.S. 125 (1939); *Lorain Journal Co. v. FCC*, 351 F.2d 824, 827-828 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966).

[180] *See* discussion *infra* at ¶¶ 79, 84.

[181] *Stereo Broadcasters, Inc.*, 55 FCC 2d 819, 821 (1975), *modified*, 59 FCC 2d 1002 (1976).

help designated entity applicants in setting up their management structure.[182] Others seek assurance that designated entity control groups can meet the *de facto* control test even if they enter into agreements containing "standard" covenants for the protection of non-majority or non-voting shareholders, *e.g.*, supermajority voting requirements for major corporate changes, liquidation preferences (commonly in the form of preferred stock), rights of first refusal, veto rights concerning particular corporate transactions, or the preemptive right to purchase stock to prevent dilution.[183]

80. Decision. We continue to believe that determinations of *de facto* control for purposes of determining designated entity eligibility for entrepreneurs' blocks are inherently factual and therefore will require case-by-case determination. Nevertheless, to provide a level of certainty for designated entities and to ensure that designated entities maintain *de facto* control, we believe it is appropriate to articulate some guidelines for defining *de facto* control in this context. We therefore clarify that a designated entity or entrepreneurs' control group must demonstrate at least the following indicia of control to establish that it retains *de facto* control of the applicant: (1) the control group must constitute or appoint more than 50 percent of the board of directors or partnership management committee; (2) the control group must have authority to appoint, promote, demote and fire senior executives that control the day-to-day activities of the licensee; (3) the control group must play an integral role in all major management decisions; and (4) in the case of applicants controlled by minorities and women, at least one minority or female control group member must have senior managerial responsibility over day-to-day operations, *e.g.*, as President or CEO of the licensee.[184] We emphasize, however, that these criteria are guidelines only and are not necessarily dispositive of the issue of *de facto* control in all situations. Even where these criteria are met, therefore, the determination of whether *de facto* control exists will depend on the totality of circumstances in the particular case.

81. With respect to provisions benefitting non-majority or non-voting shareholders, we recognize that inclusion of such provisions is a common practice to induce investment and ensure that the basic interests of such shareholders are protected. For example, many corporations require a supermajority of shareholders to approve major corporate decisions such as taking on additional debt, significant corporate acquisitions, or issuance of new stock. Similarly, strategic investors making large passive equity contributions to a company frequently insist on a right of

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[182] Omnipoint Petition at 11-12.

[183] *See* Media Communications Partners *ex parte* comments, filed October 11, 1994; Pacific Telesis *ex parte* comments, filed October 19, 1994.

[184] These same four indicia will be used to determine whether the "qualified" members of the control group (*i.e.*, women, minorities, and small business or entrepreneurial principals) have *de facto* control over the control group. For example, in a women-owned limited partnership applicant with one corporate general partner, the women shareholders of that corporation must constitute, or be able to appoint more than 50 percent of the board, appoint, promote, demote and fire senior executives, play an integral role in all major management decisions, and at least one of the women must have senior managerial responsibility over day-to-day operations.

first refusal exercisable in the event that a third party seeks to purchase the company. We agree with petitioners that allowing such provisions enhances the ability of designated entities to raise needed capital from strategic investors, thereby bolstering their financial stability and competitive viability.[185] We believe, however, that precedent provides guidance in determining the appropriate extent to which these safeguards may protect investment.[186] We therefore clarify that under our case law non-majority or non-voting shareholders may be given a decision-making role (through supermajority provisions or similar mechanisms) in major corporate decisions that fundamentally affect their interests as shareholders without being deemed to be in *de facto* control.[187] Such decisions generally include: (1) issuance or reclassification of stock; (2) setting compensation for senior management; (3) expenditures that significantly affect market capitalization; (4) incurring significant corporate debt or otherwise encumbering corporate assets; (5) sale of major corporate assets; and (6) fundamental changes in corporate structure, including merger or dissolution.[188] We also clarify that non-majority or non-voting investors may hold rights of first refusal, provided that right is exercisable only to prevent dilution of the investor's interest or a transfer of control by the control group to a third party. We also observe that we would not look favorably upon an assignment or transfer of a license that resulted from rights of first refusal being exercised if (1) the holder of such rights was a manager of the licensee, and (2) there was evidence the manager had not acted to maximize the profitability of the business in order to ensure that the options would be exercised at a lower price.

82. While we conclude that the provisions described above will generally not be considered to deprive an otherwise qualified control group of *de facto* control, some proposals made by petitioners and commenters to benefit non-majority shareholders would violate this standard. For example, non-majority shareholders should not have the power to select or replace members of the control group or key employees of the corporation. Further, as discussed in the *Second Report and Order* in this docket, we do not intend to restrict the use of preferential

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[185] *See* note 183 *infra*.

[186] *See* GO Communications *ex parte* comments, filed Nov. 3, 1994, at 5-6.

[187] *See, e.g., News International*, 97 FCC 2d 349, 357-66 (1984) (describing minority shareholder voting and consent rights that serve to protect interests and do not constitute a transfer of control); *Data Transmissions*, 44 FCC 2d 935, 936-37 (1974) (same).

[188] Our most recent decision on such voting and consent rights addressed an agreement between MCI Communications Corporation (MCI) and British Telecommunications plc (BT). In that *Order*, we evaluated whether particular voting and consent rights intended to protect BT's investment in MCI triggered a transfer of control. *See Declaratory Ruling and Order*, 9 FCC Rcd 3960 (1994). We indicated that covenants that give a party the power to block certain major transactions of a company do not in and of themselves represent the type of transfer of corporate control envisioned by Section 310(d) of the Communications Act. We found it significant, however, that while BT could block certain major transactions by MCI, BT could not compel MCI to engage in such major transactions. Thus, we concluded that BT's power was permissibly limited to protecting its own investment in MCI. *Id.* 9 FCC Rcd at 3962. *See also McCaw Cellular Communications, Inc.*, 4 FCC Rcd 3784 (Com. Car. Bur. 1989).

dividends and liquidation preferences. We will scrutinize, however, any mechanisms that deprive the control group of the ability to realize a financial benefit proportional to its ownership of the applicant.[189] Finally, we emphasize that any final determination of whether a control group has yielded *de facto* control to outside investors must depend on the circumstances of the particular case. For example, while certain provisions benefitting non-majority investors may not give rise to a transfer of control when considered individually, the aggregate effect of multiple provisions could be sufficient to deprive the control group of *de facto* control, particularly if the terms of such provisions vary from recognized standards.[190] To facilitate review of such provisions, we will amend the Form 401 (long-form)[191] to require winners of C and F block auctions to disclose any such covenants and terms that protect non-majority investors' rights in the licensee.

**b. Management Contracts**

83. Background. An issue of concern to many petitioners and commenters is whether designated entities may enter into management agreements with third parties without being deemed to have engaged in an unauthorized transfer of control. Although we did not expressly address this issue in the *Fifth Report and Order*, we have traditionally scrutinized common carrier management agreements for this purpose under the *Intermountain Microwave* test,[192] and we recently extended the use of this test to all CMRS providers in our *Fourth Report and Order* in Gen. Docket 93-252.[193] Under this test, a licensee may enter into a management agreement with a

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[189] *See Second Report and Order,* 9 FCC Rcd 2348 at ¶ 278.

[190] In assessing whether such provisions vary from recognized standards, the Commission may assess whether the provisions are accepted measures to protect financial interests of noncontrolling investors. *See, e.g.*, discussion *supra* at paragraph 81 and *infra* at paragraphs 94-95; Model Business Corporations Act and Uniform Limited Partnership Act.

[191] FCC Form 600 will replace both Form 401 (used under Part 22 of the Commission's Rules) and Form 574 (used under Part 90 of the Commission's Rules). *Third Report and Order* in Gen. Docket No. 93-252, FCC 94-212 (released September 23, 1994) at ¶ 286. Applicants must use Form 600 beginning January 2, 1995. *Id*. ¶¶ 298, 414. The Commission has received a Motion for Stay of the January 2, 1995 effective date, which is currently pending. National Association of Business and Educational Radio, Inc., *Motion for Partial Stay of the Third Report and Order* in Gen. Docket No. 93-252, filed November 4, 1994.

[192] *See Intermountain Microwave, Inc.*, 24 Rad. Reg. (P&F) 983 (1963) (*Intermountain Microwave*). *See also Memorandum Opinion and Order* in CC Docket No. 90-257 *(La Star Cellular Telephone Company*), FCC 94-299 (adopted Nov. 18, 1994; released ____) (on remand from the D.C. Circuit).

[193] *Fourth Report and Order*, Gen. Docket No. 93-252, FCC 94-270 (released Nov. 18, 1994) ¶ 20. In this order, we also concluded that management contracts could be considered "attributable interests" for purposes of the PCS/cellular/SMR spectrum cap even if they did not confer control under the *Intermountain Microwave* standard. This conclusion applies only for spectrum cap purposes, however, and does not affect our underlying analysis of when a management contract gives rise to an unauthorized transfer of control. *Id.* at ¶ 25.

third party provided that the licensee retains exclusive responsibility for operation and control of the licensed facilities, as determined by the following six factors: (1) unfettered use of licensed facilities and equipment; (2) day-to-day operation and control; (3) determination of and carrying out of policy decisions; (4) employment, supervision, and dismissal of personnel; (5) payment of financial obligations; and (6) receipt of profits from operation of the licensed facilities.[194]

84. Petitions. In its petition, Pacific Bell contends that the *Intermountain Microwave* test needs to be clarified to eliminate uncertainty about the permissible scope of management agreements.[195] Pacific Bell notes that the D.C. Circuit has recently remanded a case in which the Commission purportedly misapplied the *Intermountain* test and argues that further guidance from the Commission is therefore needed to prevent sham agreements between designated entities and third party managers.[196] Other parties also support the view that the Commission should clarify its standards regarding management contracts, but do not necessarily agree about what standard should be articulated. NABOB, for example, argues that the *Intermountain* test is too rigid and that a more flexible standard should be applied to designated entities who enter into management agreements.[197] Columbia PCS, on the other hand, contends that the Commission should apply a stricter standard by limiting managers to performing discrete functions on a subcontractor basis as opposed to assuming broad responsibility for system management.[198]

85. Decision. As noted above, we have recently held in Gen. Docket 93-252 that the *Intermountain Microwave* standard applies to all CMRS licensees who enter into management contracts. Because we have determined that broadband PCS licensees will be presumptively classified as CMRS providers,[199] we reaffirm the applicability of the *Intermountain* standard here. We disagree with NABOB's view that this standard is not sufficiently flexible to account for the management needs of designated entities. The six *Intermountain* factors provide reasonable benchmarks for ensuring retention of control by the licensee while allowing for full consideration of the circumstances in each case. In the case of designated entity applicants, they will ensure that designated entities participate actively in the day-to-day management of the company while allowing reasonable flexibility to obtain services from outside experts as well. We believe that relaxing the *Intermountain* standard, by contrast, could give rise to sham agreements in which

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[194] *Intermountain Microwave*, 24 Rad. Reg. at 984.

[195] Pacific Bell Petition at 9.

[196] *Id.* at 11-12 (*citing Telephone and Data Systems v. FCC*, 19 F.3d 655 (D.C. Cir. 1994), *vacating and remanding La Star Cellular Telephone Co.*, 7 FCC Rcd 3762 (1992)).

[197] NABOB Petition at 7.

[198] Columbia PCS Opposition to Petitions for Reconsideration (Columbia PCS Opposition), filed Sept. 9, 1994, at 5-6.

[199] *See Second Report and Order*, Gen. Docket No. 93-252, 9 FCC Rcd 1411 (1994) at ¶ 119.

designated entities do not exercise actual control.

86. While we reject the view that scrutiny of management contracts should be relaxed, we also disagree with the view that such contracts should be subject to a stricter standard than we have applied previously. We conclude that limiting managers to discrete "subcontractor" functions, as Columbia PCS proposes, could prevent designated entities from drawing on managers with broad expertise.[200] Moreover, whether a manager undertakes a large number of operational functions is irrelevant to the issue of control so long as ultimate responsibility for those functions resides with the licensee.

### 3. Attribution Rules

#### a. Voting Equity

87. Background. The *Fifth Report and Order* provided that an investor may hold a 25 percent passive equity interest in the entrepreneurs' block applicant before its interest is attributable for purposes of our eligibility rules.[201] In addition, the passive equity investment for closely-held companies could include no more than five percent voting equity, while publicly-traded companies could include no more than 15 percent voting equity.[202] In a subsequent *Order*, we increased the threshold percentage of non-attributable voting equity from five percent to 15 percent for closely-held companies.[203] Similarly, for the alternative equity option available to women and/or minority principals, the 49.9 percent passive investment could include no more than 15 percent voting equity.

88. Petitions. Petitioners request that the Commission increase the threshold percentage of non-attributable voting equity from 15 percent to an amount ranging from 20 percent to 49 percent.[204] In addition, petitioners request that the Commission clarify whether the existing rules permit nonattributable investors outside of the control group to hold a less than 25 percent or a

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[200] *See e.g.* NABOB Petition at 7-8; Pacific Bell Reply Comments (Pacific Bell Reply), filed Sept. 27, 1994, at 1-3; AIDE Opposition to Petitions for Reconsideration (AIDE Opposition), filed Sept. 9, 1994, at 8.

[201] *Fifth Report and Order*, FCC 94-178 at ¶ 158.

[202] *Id.* at ¶¶ 158, 163.

[203] *Order on Reconsideration*, FCC 94-217 at ¶ 8-10.

[204] Omnipoint Petition at 10 (20 percent); CTIA Petition at 6 (25 percent); BET Petition at 14-15 (25 percent); Pacific Telecom Cellular, Inc. Petition for Reconsideration, filed Aug. 22, 1994, at 4 (49 percent).

less than or equal to 25 percent equity interest in the applicant.[205] Also, on reconsideration of our *Order on Reconsideration* (discussed *supra*), parties have debated our decision to raise the voting equity threshold for closely-held applicants from five to 15 percent.[206] AIDE argues that raising the voting level of closely-held applicants is imprudent because it increases the likelihood that big business will control the applicant.[207] AMP disagrees with AIDE that 15 percent voting control would increase the likelihood of shams, because 15 percent is still not a controlling percentage.[208] Rather, AMP argues that increasing the permissible level of voting equity will enable applicants to attract more equity financing, thereby increasing the applicant's likelihood of success.[209]

89. Decision. We amend our attribution rules to raise the voting equity threshold that qualifies an investor as having an attributable interest in an applicant to 25 percent. We will raise the voting equity level for both publicly-traded and closely-held corporations, and will apply the 25 percent threshold for the 25/75 percent equity option available to all applicants and to the 49.9/50.1 percent equity option additionally available to minority and/or women applicants. We observe that 25 percent is the percentage suggested by both CTIA and BET.[210] We agree with CTIA that investors will be more likely to invest in new companies if they have the ability to protect their investment through increased voting rights.[211] We also agree that a 25 percent voting interest will not convey a significantly greater risk of control than a 15 percent voting interest.[212] BET asserts that higher voting thresholds will enable a larger number of existing companies -- those which have established financial structures with a higher percentage of voting stock owned by noncontrolling stockholders -- to compete in the entrepreneurial block. Furthermore, in other contexts, Congress has used a 25 percent threshold as a measure of determining control. For example, under Section 310(b) of the Communications Act, foreign

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[205] CTIA Petition at 6, n. 9

[206] *See* AIDE Petition for Reconsideration of *Order on Reconsideration* (filed Sept. 21, 1994); AMP Opposition to Petition for Reconsideration of *Order on Reconsideration* (filed Oct. 17, 1994).

[207] *See* AIDE Petition for Reconsideration of *Order on Reconsideration* at 4.

[208] AMP Opposition to Petition for Reconsideration of *Order on Reconsideration* at 3-4.

[209] *Id.* at 4.

[210] CTIA Petition at 6; BET Petition at 14-15.

[211] CTIA Petition at 6.

[212] *Id*. *See also* AMP Opposition to Petition for Reconsideration of the *Order on Reconsideration* at 3-4. *But see* AIDE Petition for Reconsideration of *Order on Reconsideration* at 4 (likelihood of abuse of nonattributable investor rule becomes greater if big business permitted to acquire 15 percent of voting stock of closely-held applicant).

companies are permitted to directly or indirectly control up to 25 percent of CMRS licensees.[213] We believe that in this context as well, a 25 percent threshold strikes an appropriate balance between the need to encourage investment and our goal of ensuring that designated entities remain in clear control. Finally, for purposes of clarification, the maximum permissible nonattributable equity level may be no greater than 25 percent of the applicant's total equity and includes the right to vote such shares (*e.g.*, through voting trusts or other arrangements).[214]

90. Additionally, however, to discourage large investors from circumventing our equity limitations for nonattributable investors, we clarify that persons or entities that are affiliates of one another, or that have an "identity of interests," will be treated as though they are one person or entity and their ownership interests aggregated for purposes of determining compliance with our maximum nonattributable equity limits. We will aggregate their ownership interests in calculating their total equity interests in the applicant and in determining whether their gross revenues and assets will be attributed to the applicant. Thus, for example, if two entities form a joint venture or consortium to apply for broadband PCS A and B block licenses, they have an identity of interests that is characteristic of affiliates, and will be treated as a single entity when investing in the same entrepreneurs' block applicant.[215] Consequently, under our rules we would aggregate all equity investments in the applicant and count it as a single, possibly attributable investment in the applicant where such investors have an identity of interests.

**b. Ownership Interests**

91. Background. The *Fifth Report and Order* states that ownership interests are to be calculated on a fully diluted basis and that all agreements such as warrants, stock options and convertible debentures will generally be treated as if the rights thereunder have been fully exercised.[216] Designated entities are required to disclose any business five percent or more of whose stocks, warrants, options or debt securities are owned by the applicant or an officer, director, stockholder or key management personnel of the applicant.[217]

92. Petitions. Petitioners and *ex parte* commenters request that we clarify our rules

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[213] 47 U.S.C. § 310(b)(4); *see* CTIA Petition at 6-7. *See also* 22 C.F.R. § 122.1 - 122.2 (Office of Thrift Supervision regulation, which defines control as representing more than 25 percent of the voting stock).

[214] For example, an investor holding 25 percent of an applicant's voting stock will not be considered a nonattributable equity investor if it also has the right, through a voting trust or other arrangement, to vote additional shares.

[215] *See* 47 C.F.R. § 24.720(1)(3); *see also* 47 C.F.R. § 24.204 note 1.

[216] *See Fifth Report and Order*, FCC 94-178 at ¶ 158 n.133.

[217] *See* 47 C.F.R. § 24.813(a)(1)) (Form 175 and Form 401 application requirements).

regarding the treatment of various ownership instruments such as warrants, stock options and convertible debentures.[218] Additionally, commenters have asked whether rights of first refusal are considered options and how stock "calls" and "puts" will be treated.[219] A"put" option gives the holder the right to sell a share of stock at a specified price at any time up to the expiration date. Conversely, a "call" option gives the holder the right to buy a share of stock at a specified price, known as the "exercise price."

93. Decision. In general, we will treat stock options as fully exercised with the exception of some ownership instruments discussed *infra* at paragraphs 95-96. We recognize that some forms of options are common and often beneficial to the management of a company. Many companies, for example, include stock options in senior management compensation packages. We also recognize that treating options as fully exercised will encourage companies to hire minorities and women for top management positions, because any options they receive will count toward the equity eligibility requirement.

94. We decide that for purposes of calculating ownership interests, however, some ownership instruments will not be treated as "fully diluted," or will not be considered options generally. For example, we will not consider rights of first refusal as options when calculating ownership interests.[220] Rights of first refusal differ from other types of options because they cannot be exercised unless there is a proposed sale to a third party. Sales and transfers to third parties are restricted during the holding period, so rights of first refusal do not threaten the composition of designated entities.[221] At the end of the five-year period, it will still be the designated entity's decision as to whether to sell the business, which ensures that the designated entity controls the decision whether to sell. We agree that without these rights, investors are likely to shy away from investing in designated entities.[222] As Pacific Telesis and BellSouth point out, rights of first refusal are a valued safeguard mechanism because they give investors some

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[218] *See, e.g.*, Terry Rakolta *ex parte* comments, filed Oct. 4, 1994, at 2; Pacific Telesis *ex parte* comments, filed Oct. 25, 1994, at 2-4; Airtouch *ex parte* comments, filed Oct. 12, 1994, at 4-6; Fleischman and Walsh *ex parte* comments, filed Aug. 10, 1994, at 2.

[219] *See e.g.* BellSouth *ex parte* comments, filed Sept. 14, 1994, at 2; Pac Tel *ex parte* comments, filed Oct. 19, 1994, at 5-6.

[220] A "right of first refusal" is an agreement between parties which grants an investor the right to match a purchase offer from a third party.

[221] *See* 47 C.F.R. § 24.839 (d) (restrictions on assignment or transfer of control of C and F block licensees). In any event, the Commission would have to approve any sale or transfer that would result from a noncontrolling investor exercising a right of first refusal.

[222] *See* The Marshall Company *ex parte* comments, filed Oct. 6, 1994, at 1.

control over the entry of new business associates.[223] They also enable investors to prevent their own shares from becoming diluted as a result of a sale.

95. "Put" options held by the designated entity -- which can be realized only after the licensee can permissibly transfer the license -- will not be treated as fully diluted for purposes of determining ownership interests. Put options held by the designated entity leave the ownership decision in the designated entity's control and do not force an unwanted sale upon the designated entity.[224] We observe, however, that while such options will not be factored in for purposes of determining *de jure* control, we will continue to look at whether put options in combination with other terms to an agreement deprive an otherwise qualified control group of *de facto* control over the applicant. Thus, a "put" in combination with other terms to an agreement may result in an applicant not retaining *de facto* control. For example, if an agreement between a strategic investor and a designated entity provides that (1) the investor makes debt financing available to the applicant on very favorable terms (*e.g.,* 15 year-term, no payments of principal or interest for six years) and (2) that the designated entity has a one-time put right that is exercisable at a time and under conditions that are designed to maximize the incentive of the licensee to sell (*e.g.,* six years after issue, option to put partnership interest in lieu of payment of principal and accrued interest on loan), we may conclude that *de facto* control has been relinquished. "Call" options held by investors will be considered exercised immediately to calculate ownership levels because they can be used to force a designated entity to sell its ownership interests. Finally, we observe that such a call option would vest an impermissible degree of control in the applicant's so-called "noncontrolling" investors.

96. In summary, agreements between designated entities and strategic investors that involve terms (such as management contracts combined with rights of first refusal, loans, puts, etc.) that cumulatively are designed financially to force the designated entity into a sale (or major refinancing) will constitute a transfer of control under our rules. We will look at the totality of circumstances in each particular case. We emphasize that our concerns are greatly increased when a single entity provides most of the capital and management services and is the beneficiary of the investor protections.

## D. Special Provisions For Designated Entities

### 1. Bidding Credits

97. Background. In the *Fifth Report and Order*, we determined that bidding credits were necessary to better ensure that women and minority-owned businesses and small businesses have

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[223] Pacific Telesis *ex parte* comments, filed Oct. 19, 1994, at 5; *See also* BellSouth *ex parte* comments, filed Sept. 14, 1994, at 2 ("right of first refusal is necessary so each partner can preempt sale to outsider who may not be a desirable partner for strategic or other business reasons").

[224] *See* The Marshall Company *ex parte* comments, filed Oct. 6, 1994, at 1.

meaningful opportunities to participate in broadband PCS. [225] Accordingly, our rules provided that small businesses will receive a 10 percent credit, women and minority-owned businesses will receive a 15 percent credit, and small businesses owned by women and minorities will receive an aggregate credit of 25 percent.[226] Our decision in the *Fifth Report and Order* to enhance the effectiveness of the entrepreneurs' blocks through the addition of bidding credits reflected our expectation that broadband PCS will be a capital intensive undertaking. We stated that bidding credits would function as a discount on the bid price a firm will actually have to pay to obtain a license and, thus, would directly address the obstacles to raising capital encountered by small, women and minority-owned firms.[227]

98. Petitions. Several petitioners request that we increase the level of bidding credits. For example, while some petitioners argue in favor of higher bidding credits for all designated entities,[228] others seek to raise the bidding credit for women and minority-owned businesses,[229] or only for minority-owned small businesses.[230] Many of these petitioners find support in our *Third Memorandum Opinion and Order* in this docket, where we raised the bidding credit for minority and women-owned businesses bidding on regional narrowband PCS licenses from 25 percent to 40 percent.[231] Two petitioners contend that rural telephone companies should receive a 10 percent bidding credit, that would be cumulative with any other bidding credits for which the applicant would be eligible.[232] Finally, consistent with its argument that the entrepreneurs' blocks should be abolished, GTE supports availability of bidding credits across all broadband PCS channel blocks.[233]

99. Decision. We will retain our existing bidding credit scheme. Present levels of bidding credits, coupled with other provisions directed at the capital formation problems of designated

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[225] *Fifth Report and Order*, FCC 94-178 at ¶ 130.

[226] *See* 47 C.F.R. §§ 24.712(a)-(c).

[227] *Fifth Report and Order*, FCC 94-178 at ¶ 131-132.

[228] *See, e.g.*, USIMTA/USIPCA Petition at 6-7 and NPPCA Petition at 4-6 .

[229] *See* Hernandez Petition at 3-4 and BET Petition at 1-2, 9-12.

[230] *See* NABOB Petition at 6-7.

[231] *Third Memorandum Opinion and Order*, FCC 94-219 at ¶ 58. *See also* 47 C.F.R. § 24.309(b)(2).

[232] *See* MEANS/SDN Petition at 9; *accord*, United States Telephone Association Opposition to Petitions for Reconsideration (USTA Opposition), filed Sept. 9, 1994, at 3 n.1. *But see* BET Opposition at 15-17.

[233] GTE Petition at 10.

entities, such as size limitations on the entrepreneurs' block and installment payments, are sufficient to achieve our regulatory objectives.[234] Moreover, additional measures that we have adopted on reconsideration, including elimination of the limits on personal net worth and relaxation on the attribution of affiliates owned and controlled by minorities, will further enhance the value of the bidding credits to women and minority-owned firms in particular. We find that our action on reconsideration of the narrowband PCS auction rules does not dictate raising the bidding credit in this instance. As the *Third Memorandum Opinion and Order* makes clear, the 40 percent bidding credit for women and minorities bidding on regional narrowband PCS licenses was adopted in the absence of any entrepreneurs' blocks.[235] Further, we state that in the insulated entrepreneurs' block setting, a 25 percent bidding credit for minority and/or women-owned small firms is more appropriate.[236]

100. We also find that the record does not support creation of a new bidding credit for rural telephone companies. In this regard, we agree with BET that petitioners have failed to demonstrate a historical lack of access to capital that was the basis for according bidding credits to small businesses, minorities and women.[237] To the extent that a rural telephone company is also a small business, or minority or women-owned, then bidding credits would, of course, be available. We also decline to adopt GTE's scheme to eliminate the entrepreneurs' blocks, and distribute bidding credits throughout the broadband PCS channel blocks. As Omnipoint, Columbia PCS and BET observe, the insulation provided by the entrepreneurs' block is key to the utility of bidding credits in such a capital intensive undertaking.[238]

**2. Installment Payments**

101. Background. In the *Fifth Report and Order* we made installment payments available to most businesses that obtain entrepreneurs' block licenses. Installment payments directly address the significant barriers that smaller businesses face in accessing private financing.[239] With the expectation of enormous costs associated with obtaining and operating a broadband PCS license, installment payments provide low-cost government financing that reduces the amount of

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[234] *Accord*, Encompass Opposition at 2-3 and United States Small Business Administration Reply Comments (SBA Reply), filed Sept. 16, 1994, at 3-5.

[235] *Third Memorandum Opinion and Order*, FCC 94-219 at ¶ 87.

[236] *Id.*

[237] BET Opposition at 15-16.

[238] Omnipoint Opposition at 7-12; Columbia PCS Opposition at 2-3; and BET Opposition at 7.

[239] *Fifth Report and Order*, FCC 94-178 at ¶ 135.

private financing needed before and after the auction.[240] Our installment payment plan was made available to all entrepreneurs' block eligibles granted licenses in the 50 largest BTAs.[241] In the smaller BTAs where the costs of license acquisition and operation are expected to be lower, installment payments are only available to licensees owned by women and minorities, and licensees with less than $75 million in gross revenues.[242] We also provided an "enhanced" installment payment plan for small businesses and businesses owned by women and minorities where interest-only payments were required for such entities for as long as five years from the date of license grant if the firm is both small and owned by women or minorities.[243] By tailoring the deferral of principal payments to the needs of the particular designated entities, we promoted greater participation in broadband PCS by viable competitors.[244]

102. Petitions. Vanguard asks us to offer installment payments to all entrepreneurs' block winners for all BTAs.[245] Without this relief, Vanguard contends that small cellular carriers that are, in fact, more likely to serve the smaller markets would be forced to comply with the same payment schedule as large carriers bidding for smaller markets.[246] SBPCS seeks to eliminate interest on installment payments altogether, and limit availability of a installment payment plans to revenues less than $75 million dollars.[247] Hernandez requests that the Commission require bidders to demonstrate their ability to meet the terms of an installment payment plan when the short-form application is filed.[248]

103. Decision. We will extend availability of installment payments to all entrepreneurs' block licensees, regardless of gross revenues. A key factor to the overall success of the entrepreneurs' blocks is the installment payment plan. The installment plan was established to facilitate the entry of small and minority-owned businesses into the broadband PCS market. The

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[240] *Id.* at ¶ 136.

[241] *Id.* at ¶ 137.

[242] *Id.*

[243] *See generally* 47 C.F.R. § 24.711.

[244] *Fifth Report and Order*, FCC 94-178 at ¶¶ 139-140.

[245] Vanguard Cellular Systems, Inc. Opposition to Petitions for Reconsideration (Vanguard Opposition), filed Sept. 9, 1994, at 2-4.

[246] *Id.* at 4.

[247] Small Business PCS Association Petition for Reconsideration (SBPCS Petition), filed Aug. 22, 1994, at 2-3.

[248] Hernandez Petition at 5.

top 50 BTAs will be the most competitive wireless communications markets in the country and will require inordinately large amounts of capital. It will be extremely challenging for any entrepreneurs' block participant to compete in these markets. The installment plans will greatly enhance the ability of all entrepreneurs' block participants to raise capital to succeed against major, well-capitalized competitors. As Vanguard points out, disallowing installment payments to large entrepreneurs' block winners of smaller BTAs unfairly restricts these companies from competing for markets in which they will have a logical interest.[249] In addition, the larger entrepreneurs would be forced to pay for BTAs on the same terms as major companies that do not qualify for the entrepreneurs' blocks. While we accept these arguments, and therefore extend installment payments to all entrepreneurs' block licensees, we note that the terms of these payments should be less generous than those extended to smaller companies, less able to access traditional sources of capital. Therefore, we will require entrepreneurs with gross revenues exceeding $75 million to make a post-auction down payment equaling ten percent of their winning bids, but then pay the remaining 90 percent of the auction price in installments with interest charges to be fixed at the time of licensing at a rate equal to that for ten year U.S. Treasury obligations plus 3.5 percent, with payments on both interest and principal required.

104. We decline to reduce or eliminate interest rates entirely because we believe that the present approach achieves the proper balance among our regulatory objectives. In particular, our present tailoring of interest rates to the needs of the designated entity enables licenses to be disseminated to small businesses and furthers the congressional goal of allowing taxpayers to reap a portion of the value of the licenses. Reducing or eliminating interest payments could result in very high bids, which could reduce competition and promote defaults among entrepreneurs. Such an approach could also encourage speculation instead of legitimate applicants who can attract capital. On our own motion, however we will amend 47 C.F.R. § 24.711 to permit small businesses owned by minorities and/or women to make interest-only payments for six years from the date of license grant. Under our current rules, principal payments start to come due at the same time the entrepreneur is permitted to transfer the license and immediately following the first, build-out requirement. By deferring payment of principal an additional year, we intend to assist the designated entity in avoiding an unwanted sale of business at the five-year mark in order to avoid payment of principal. Finally, for the reasons discussed in the *Fourth Memorandum Opinion and Order*, we believe that our existing requirements for broadband PCS auction applicants adequately measure an applicant's ability to pay.[250] We therefore decline to impose more stringent requirements to determine whether an applicant can meet the terms of an installment payment plan.

### 3. Rural Telephone Company Provisions

105. Background. In the *Fifth Report and Order*, the Commission established several

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[249] Vanguard Opposition at 4.

[250] *Fourth Memorandum Opinion and Order*, FCC 94-246 at ¶ 45.

provisions to help rural telephone companies become meaningful participants in the emerging PCS market. In that proceeding, we defined a rural telephone company as a local exchange carrier having 100,000 or fewer access lines, including all affiliates.[251] In departing from the more restrictive definition adopted in the *Second Report and Order*, the Commission stated that the revised definition strikes an appropriate balance by facilitating the rapid deployment of broadband PCS to rural areas, without giving benefits to large companies that do not require special assistance.[252] Qualified rural telephone companies are eligible for broadband PCS licenses through a partitioning system, which permits rural telephone companies to obtain licenses that are geographically partitioned from larger PCS service areas.[253] These companies will be permitted to acquire partitioned broadband PCS licenses in any frequency block in two ways: (1) they may form bidding consortia consisting entirely of rural telephone companies to participate in the auctions, and then partition the licenses won among consortia participants; and (2) they may acquire partitioned broadband PCS licenses from other licensees through private negotiation and agreement either before or after the auction.[254]

106. Under our rules, if a rural telephone company receives a partitioned license from another PCS licensee in a post-auction transaction, the partitioned area must be reasonably related to the rural telephone company's wireline service area that lies within the PCS service area. We recognized in the *Fifth Report and Order* that rural telephone companies will require some flexibility in fashioning areas in which they will receive partitioned licenses, so we did not adopt a strict rule concerning the reasonableness of the partitioned area.

107. Petitions. Petitioners variously request the Commission modify our rural telephone company provisions. Century Telephone Enterprises, Inc. (Century) and Citizens Utilities Company (Citizens) argue that the rural telephone company definition adopted in the *Fifth Report and Order* is overly restrictive and excludes local exchange carriers that exceed the access line standard but nevertheless serve predominantly rural areas.[255] Alternatively, Citizens requests the Commission implement waiver procedures.[256] In addition, Hicks and Ragland and TEC urge the Commission to eliminate its partitioned service area limitations, stating that the present rules

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[251] *Fifth Report and Order*, FCC 94-178 at ¶ 198.

[252] *Id. See also Second Report and Order*, 9 FCC Rcd 2348 at ¶ 282.

[253] *Fifth Report and Order*, FCC 94-178 at ¶ 151.

[254] *Id.*

[255] Century Telephone Enterprises, Inc. Petition for Reconsideration (Century Petition), filed Aug. 22, 1994, at 2-7. *See also* USTA Opposition at 2; Telephone and Data Systems, Inc. Opposition to Petitions for Reconsideration, filed Sept. 9, 1994, at 4-5.

[256] Citizens Utilities Company Petition for Reconsideration (Citizens Petition), filed Aug. 19, 1994, at 5-9.

unnecessarily impede the ability of a rural telephone company to provide service in a technically and economically feasible manner.[257] Finally, MEANS/SDN and TEC contend that rural telephone companies should be afforded the same benefits as other designated entities, including outside passive investment in rural telephone company consortia and bidding credits.[258]

108. Decision. We generally will retain the rural telephone company provisions adopted in the *Fifth Report and Order*. We remain convinced that our definition of rural telephone company, which reflects the views of numerous parties to this proceeding, will ensure that broadband PCS will be deployed rapidly to rural areas. At the same time, it is narrowly tailored to exclude large local exchange carriers that do not require special treatment.[259] We observe that we can entertain and grant a waiver request if a local exchange carrier that does not satisfy our rural telephone company definition can meet our waiver standard set forth in Section 24.819 of the Commission's Rules to warrant qualifying the LEC for a partitioned broadband PCS license.[260]

109. We continue to believe that our existing rules, which allow rural telephone companies to obtain broadband PCS licenses that are geographically partitioned from larger PCS service areas, will provide a viable opportunity for these entities to successfully acquire PCS licenses and offer service to rural areas.[261] We are confident that the partitioning system articulated in the *Fifth Report and Order* satisfies the directive of Congress to ensure that rural telephone companies have the opportunity to provide PCS services to all areas of the country, including rural areas. In addition, we believe that the other benefits afforded to designated entities, combined with the cellular attribution threshold for rural telephone companies adopted in Gen. Docket No. 90-314, will further ensure that rural areas have expedient access to PCS services.[262]

110. We disagree with MEANS/SDN's contention that modifications to our consortia provisions are needed to fulfill Congress' mandate that rural telephone companies have an

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[257] Hicks and Ragland Petition for Reconsideration (Hicks and Ragland Petition), filed Aug. 22, 1994, at 2-5.

[258] MEANS/SDN Petition at 4-9; TEC Petition at 8.

[259] As we noted in the *Second Report and Order*, we do not believe that Congress intended for us to give special treatment to large LECs that happen to serve small rural communities. *See Second Report and Order*, 9 FCC Rcd 2348 at ¶ 196.

[260] *See* 47 C.F.R. § 24.819.

[261] *See Fifth Report and Order*, FCC 94-178 at ¶¶ 148-153.

[262] *See Fifth Report and Order*, FCC 94-178 at ¶ 153 (discussing designated entity eligibility criteria and accompanying benefits); *see also Memorandum Opinion and Order* in Gen. Docket No. 90-314 (*Broadband PCS Reconsideration Order*), FCC 94-144 (released June 13, 1994) at ¶¶ 125-132.

opportunity to acquire PCS licenses. As we noted in the *Fifth Report and Orde*r, we expect that virtually all rural telephone company consortia will be eligible to bid on licenses in Blocks C and F without competition from "deep pocket" bidders.[263] Additionally, if consortia members qualify as small businesses, the Commission will provide the bidding credit and installment payment provisions extended to similarly-situated applicants. Accordingly, we believe it is unnecessary to permit passive equity investments in rural telephone company consortia, as MEANS/SDN request.

111. We also reject TEC's and MEANS/SDN's proposal to extend bidding credits to rural telephone companies even if they are not small businesses or owned by minorities and/or women. We continue to believe that existing benefits for rural telephone companies will allow them to effectively compete for licenses that serve rural territories. In addition to the partitioning and consortia provisions, we also note that rural telephone companies qualify for significant financial benefits from the Rural Electrification Administration and the Universal Service Fund which, as BET suggests, adequately compensates these entities for the lack of bidding credits.[264] Additionally, we note that our bidding credits were specifically tailored to address the discriminatory market barriers faced by women and minority-owned entities.[265] We concur with BET's assessment that rural telephone companies do not face the same kinds of barriers raising capital.

112. We note that most, if not all, rural telephone companies meet the entrepreneurs' block size standards and are permitted to bid directly on entrepreneurs' blocks licenses. To the extent that a rural telephone company does not qualify for the entrepreneurs' blocks, however, we disagree that it will be forced to negotiate with other licensees that may not be willing to sell their broadband PCS interests in the form of partitioned licenses or other ownership arrangements. On the contrary, we believe that other applicants and licensees will find rural telephone companies attractive entities to negotiate with, because of the efficiencies associated with rural telephone companies existing infrastructure. Additionally, since a licensee will be permitted to assign a portion of its license to a rural telephone company without violating the transfer and holding requirements, we expect that licensees will actively solicit participation by rural telephone companies. For the reasons discussed above, we continue to believe that our existing scheme, which is narrowly tailored to satisfy Congress' mandate, will provide rural telephone companies with a meaningful opportunity to participate in the provision of broadband PCS services and further the objective of rapidly getting service to rural areas.

113. Finally, we dismiss concerns raised by TEC and Hicks and Ragland concerning the permissible size of a rural telephone company's service area. We addressed these concerns in the

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[263] *Fifth Report and Order*, FCC 94-178 at ¶ 153.

[264] BET Opposition at 16.

[265] *Id.* at 16-17.

*Fifth Report and Order* and concluded that a partitioned area containing no more than twice the population of that portion of a rural telephone company's wireline service area provides a reasonable presumption of a permissible service territory.[266] However, we agree that rural telephone companies will require some flexibility in fashioning a partitioned service area and thereby affirm our prior conclusion that a strict rule is not needed.[267]

## E. Aggregation of and Holding Period for the Entrepreneurs' Block Licenses

### a. Single Entity Purchase Limit

114. Background. To ensure that C and F block licenses are disseminated among a wide variety of applicants, our rules as adopted in the *Fifth Report and Order*, restrict the number of licenses within the entrepreneurs' block that a single entity may win at auction.[268] Specifically, we impose a limitation that no single entity may win more than 10 percent of the licenses available in the entrepreneurs' blocks, or 98 licenses. We indicated that the 98 licenses may all be in frequency block C or all in frequency block F, or in some combination of the two blocks. We observed that such a limit would ensure that at least 10 winning bidders enjoy the benefits of the entrepreneurs' blocks, while also allowing bidders to effectuate aggregation strategies that include large numbers of licenses and extensive geographic coverage. We provided that the limit would apply only to the total number of licenses that may be won at auction on the C and F blocks. Furthermore, we indicated that for purposes of this restriction we will consider licenses to be won by the same entity if an applicant (or other entity) that controls, or has the power to control licenses won at the auction, controls or has the power to control another license at the auction.[269]

115. Petitioners. On reconsideration, the Small Business PCS Association (SBPCS) recommends that the maximum number of entrepreneurs' block licenses purchased by a single entity be limited to licenses that cover no more than a total of 10 percent of the national population, or approximately 25 million "pops." SBPCS expresses concern that the existing limit does not provide for enough diversity of ownership since it would allow a single entity to acquire the top 98 BTA licenses on the 30 MHz entrepreneurs' block.[270]

116. Decision. After considering SBPCS' concerns, we will retain the existing limit, which prevents any single entity from acquiring more than 10 percent of the entrepreneurs' block

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[266] *Fifth Report and Order*, FCC 94-178 at ¶ 151.

[267] *See id.*

[268] *Id.* at ¶¶ 169-171.

[269] *See id.* at ¶¶ 169-171. *See also* 47 C.F.R. § 24.710.

[270] SBPCS Petition for Reconsideration (SBPCS Petition), filed Aug. 22, 1994, at 4.

licenses.[271] We believe that changing the limit to 10 percent of the population or 25 million "pops" rule would be overly restrictive. We note, for example, that successful entrepreneurs will need to form coherent regional "cluster" strategies to compete against large communications companies, such as dominant cellular providers, and that such regional clusters may come together into a national alliance with common technology and marketing strategies, including a common brand name. A 25 million "pops" per entity limit would severely restrict entrepreneurs that win the New York BTA (with 18 million "pops") and the Los Angeles BTA (with 15 million "pops") from any meaningful regional cluster strategy, given the size of adjoining markets.[272] In light of this concern, we want to be careful not to impose a restriction that would unfairly disadvantage C and F block new entrants in the new PCS marketplace. We are satisfied that the present limit achieves the proper balance between promoting fair distribution of benefits and ensuring that entrepreneur block winners have enough flexibility to develop competitive systems on a regional and nationwide basis.

### b. Restrictions on Transfer or Assignment

117. Background. In the *Fifth Report and Order*, restrictions on the transfer or assignment of licenses were adopted to ensure that designated entities do not take advantage of special entrepreneurs' block provisions by immediately assigning or transferring control of their licenses to non-designated entities. We indicated that the "trafficking" of licenses in this manner would unjustly enrich the auction winners and would undermine the congressional objective of giving designated entities the opportunity to provide spectrum-based services. Thus, our rules prohibit licensees in the entrepreneurs' blocks from voluntarily assigning or transferring control of their licenses during the three years after the date of the license grant.[273] For the subsequent two years (or the fourth and fifth years of the term), the licensee is permitted to assign or transfer control of its authorization only to an entity that satisfies the entrepreneurs' blocks entry criteria.

118. We also provided that during the five-year period licensees cannot assign an attributable interest in the license that would cause them to exceed the financial eligibility requirements.[274] Additionally, we stated that a transferee or assignee who receives a C or F block

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[271] *See also* Media Communications Partners, et. al, *ex parte* comments, filed Oct. 11, 1994, at 11-12 (requesting that a designated be limited to acquiring licenses serving no more than 10 percent of the national population, rather than given a maximum of 98 licenses). *But see* BET Petition at 15 (opposing SBPCS' proposal).

[272] *See* Columbia PCS Opposition at 4-6.

[273] *See* 47 C.F.R. § 24.839(d). We indicated that we would consider exceptions to the three-year holding period on a case-by-case basis in the event of a judicial order decreeing bankruptcy or a judicial foreclosure if the licensee proposes to assign or transfer its authorization to an entity that meets the financial thresholds for bidding in the entrepreneurs' blocks. *See Fifth Report and Order*, FCC 94-178 at ¶ 128 n. 101.

[274] *See* 47 C.F.R. § 24.709(a)(3).

license during the five-year holding period will remain subject to the transfer restrictions for the balance of the holding period. Thus, if a C-block authorization is assigned to an eligible business in year four of the license term, it will be required to hold that license until the original five-year period expires, subject to the same exceptions that applied to the original licensee. Moreover, we stated that we will conduct random pre- and post-auction audits to ensure that applicants receiving preferences are in compliance with the Commission's rules.[275]

119. In the *Fifth Report and Order*, we also adopted rules to prevent entrepreneur block license holders from realizing any unjust enrichment that is gained through a transfer or assignment that occurs during the original license term.[276] Specifically, we provided that if, within the original license term, a licensee applies to assign or transfer control of a license to an entity that is not eligible for as high a level of bidding credit, then the difference between the bidding credit obtained by the assigning party and the bidding credit for which the acquiring party would qualify, must be paid to the U.S. Treasury as a condition of approval of the transfer or assignment.[277]

120. We adopted similar requirements with respect to repayment of installment payments. Specifically, if a licensee that was awarded installment payments seeks to assign or transfer control of its license during the term of a license to an entity not meeting the applicable eligibility standards, we require payment of the remaining principal and any interest accrued through the date of assignment as a condition of approval of the transfer or assignment. Accordingly, we explained that if an entity seeks to assign or transfer control of a license to an entity that does not qualify for as favorable an installment payment plan, the installment payment plan, if any, for which the acquiring entity qualifies will become effective immediately upon transfer or assignment of the license. Thus, a higher interest rate and earlier payment of principal may begin to be applied.[278]

121. Petitions. Two petitioners discussed the holding period and limited transfer restrictions imposed on entrepreneurs' block licenses. Specifically, AIDE requests the Commission repeal the five-year holding period, contending that the unjust enrichment provisions

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[275] *See* i*d.* at ¶ 128. *See also* 47 C.F.R. § 24.709(d).

[276] While we indicated that the five-year holding and limited transfer requirements in the entrepreneurs' blocks limit the applicability of unjust enrichment provisions generally during the first five-years of the license term (*i.e.*, in cases where the license-holder has engaged in a permissible transfer or assignment where the buyer is eligible for comparable bidding credits or is qualified for installment payments), we indicated that such provisions were still useful, particularly since they are applicable for the full ten-year license term. *See Fifth Report and Order*, FCC 94-178 at ¶ 141 n. 119.

[277] *See id.* at ¶ 134. *See also* 47 C.F.R. § 24.712(d).

[278] *See Fifth Report and Order*, FCC 94-178, at ¶ 141. *See also* 47 C.F.R. § 24.711(e).

(to the extent they promote recovery of bidding credits and installment payments) eliminate the need for such a restriction. AIDE also argues that once a designated entity receives a spectrum-based license, the mandate of Congress to provide these entities with a fair opportunity to provide spectrum-based services is satisfied, and that there is no justification for any further restrictions beyond that point in time. AIDE also wants clarification of how our unjust enrichment provisions will apply if a transfer or assignment does occur during the five-year holding period.[279]

122. Additionally, CTIA requests that the Commission amend its transfer restrictions to allow all PCS licensees (including entrepreneurs' blocks and designated entities) to transfer 5 MHz of spectrum immediately after license grant. Alternatively, CTIA asks that transfer be permitted within one year after service is initiated by a new PCS entrant in the relevant PCS service area. CTIA contends that this change is needed to provide cellular carriers with reasonable flexibility to reach the 40 MHz PCS spectrum cap (especially in secondary market transactions), and may increase the value of spectrum at auction (*i.e.*, by providing designated entities with an added source of funding and ensuring that market forces place the spectrum in the hands of those who value it most highly).[280]

123. Decision. We will not modify our five-year holding period and limited transfer restrictions. While AIDE and CTIA ask us to eliminate or significantly relax our restrictions, many commenters generally support the idea of a holding and limited transfer period for entrepreneurs' block licenses.[281] BET, for example, contends that without a holding requirement, the opportunities for circumventing the Commission's rules are increased as non-designated entities weigh the benefits of sacrificing certain preferences (*e.g.*, bidding credits) in exchange for control of a valuable PCS license.[282] Contrary to AIDE's point of view, we believe that unjust enrichment provisions alone do not provide adequate safeguards for ensuring that designated entities retain *de jure* and *de facto* control over their licenses. We are satisfied that the five-year holding period and limited transfer restrictions adopted in the *Fifth Report and Order* are justified for our purposes in meeting our congressional mandate.

124. Additionally we reject CTIA's request to permit 5 MHz of spectrum to be transferred after the license grant because it would contradict our determinations in the PCS

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[279] *See* AIDE Petition at 17-19.

[280] *See* CTIA Petition at 2-4.

[281] *See* Hernandez, Roland, *ex parte* comments, filed Oct. 11, 1994; NABOB *ex parte* comments, field Nov. 3, 1994, at 2. *Bur see* Pacific Bell Opposition to Petitions for Reconsideration (Pacific Bell Opposition), filed Sept. 9, 1994, at 13 (supporting AIDE's position); The Marshall Company *ex parte* comments, Aug. 3, 1994 (opposing more than a five-year holding period).

[282] BET Petition at 2-3. *See also* Omnipoint Reply Comments (Omnipoint Reply), Sept. 16, 1994, at 2; SBA Reply at 4-5; Hernandez *ex parte* comments (Oct. 14, 1994).

service rules docket (Gen. Docket 90-314) concerning the disaggregation of broadband PCS spectrum. In that docket, we decided that no disaggregation of spectrum should be allowed until a broadband PCS licensee had met our five-year construction requirements.[283] We also determined that in-region cellular interests should not be permitted to acquire 10 MHz of broadband PCS spectrum until the year 2000 -- when they would be eligible for an additional 5 MHz of spectrum in their service areas.[284] CTIA's proposal would permit disaggregation sooner than is permissible under our PCS service rules, and should be rejected for reasons that we have previously established.[285]

125. In addition, we wish to clarify the application of our holding rule to our financial caps.[286] As we have stated, under certain circumstances we will allow licensees to retain their eligibility during the holding period, even if the company has grown beyond our size limitations for the entrepreneurs' block and for small business eligibility. Thus, we will permit entrepreneurs' block licensees to transfer their licenses in years four through five to other entrepreneurs' block licensees even if it would result in growth beyond the permissible gross assets and total revenues caps, as long as it otherwise complies with our control group and equity requirements. We believe this encourages designated entities to grow, instead of penalizing them for their success, which was a concern expressed by some commenters.[287]

126. Further, we clarify that between years four and five we will allow licensees to transfer a license to any entity that either holds other entrepreneurs' block licenses (and thus at the time of auction satisfied the entrepreneurs' block criteria) or that satisfies the criteria at the time of transfer. Unjust enrichment penalties (as described above) apply if these requirements are not met, or if they qualified for different provisions at the time of licensing. For purposes of determining size eligibility for transfers or assignments that occur between the fourth and fifth years, we will use the most recently available audited financial statements in cases where the entity to whom the license is being transferred did not win a license in the original entrepreneurs' block

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[283] *See Broadband PCS Reconsideration Order*, FCC 94-144 at ¶¶ 69-70, *further recon. Third Memorandum Opinion and Order* in Gen. Docket 90-314, FCC 94-265 (released Oct. 19, 1994).

[284] *Id*. at ¶ 67. *See also* 47 C.F.R. § 24.404.

[285] *See Second Report and Order* in Gen. Docket 90-314, 8 FCC Rcd 7700 (1993), *recon. Memorandum Opinion and Order*, 9 FCC Rcd 4441 (1994), *Order on Reconsideration,* 9 FCC Rcd 4441 (1994), *on further recon. Third Memorandum Opinion and Order*, FCC 94-265 (released Oct. 19, 1994). *See also* BET Petition at 3 (opposing CTIA proposal); McCaw Opposition to Petitions for Reconsideration (McCaw Opposition), filed Sept. 9, 1994, at 2-3 (supporting CTIA proposal).

[286] *See Fifth Report and Order*, FCC 94-178 at ¶ 167 (for a discussion of application of holding rule to the financial caps).

[287] *See, e.g.*, MasTec Opposition to Petitions for Reconsideration (MasTec Opposition), filed Sept. 9, 1994, at 8; MEANS/SDN Opposition at 9-10; Omnipoint at 3.

auction.

127. AIDE sought clarification concerning the application of our unjust enrichment provisions to our holding period and limited transfer rules. In response to their request, we reiterate that if a designated entity transfers or assigns its license before year five to a company that qualifies for no bidding credit, then such a sale will entail full payment of the bidding credit as a condition of transfer. If, however, the same transaction occurs (during the same time frame), but the buyer is eligible for a lesser bidding credit, then the difference between the bidding credit obtained by the seller and the bidding credit for which the buyer would qualify, must be paid to the U.S. Treasury for the transaction to be approved by the FCC. With respect to installment payments, we confirm that we expect that when the purchaser is not to an entity that qualifies for any installment payment plan, we will require payment of the unpaid balance in full before the sale will be approved.

## F. Miscellaneous

### 1. Audits

128. In the *Fifth Report and Order*, we expressed our intention to conduct random pre- and post-auction audits to ensure that designated entities retain *de facto* and *de jure* control of their facilities and licenses and to ensure that all applicants receiving preferences are in compliance with the eligibility requirements.[288] On reconsideration, we clarify on our own motion that the Commission's use of the term "random" in the *Fifth Report and Order* was generic and that the Commission does not intend to limit itself to conducting "random" audits. While random selection for audit may be one, acceptable enforcement technique in some cases, it may not be the most efficient. We expect that audits might also be undertaken on information received from third parties or on the basis of other factors.[289] Since the audit process will involve the application of in-house and contract resources, we intend to pursue a course of audits that will be efficient as well as effective. Consequently, we are amending the rules to more fully reflect the variety of circumstances that might lead to an audit. We will also add an audit consent to the FCC short-

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[288] *See Fifth Report and Order*, FCC 94-178 at ¶¶ 117, 128; 47 C.F.R. § 24.709(d). *See also Second Memorandum Opinion and Order*, FCC 94-215 at ¶ 135 (general auction rules); 47 C.F.R. § 1.2110(h); *Third Memorandum Opinion and Order*, FCC 94-219 at ¶¶ 56, 63 (general auction rules and narrowband PCS); 47 C.F.R. § 24.309(d).

[289] While we anticipate that public scrutiny of entrepreneurs' block applications and the petition to deny process, together with audits, will assist the Commission in uncovering potentially unqualified applicants for the entrepreneurs' blocks, we will in no way condone the filing of frivolous complaints or petitions. We will take appropriate action against those who abuse our processes. We also emphasize that the initiation of an investigation by the Commission (whether pursuant to a complaint or on our own initiative) will not result in the suspension of construction or operation of a licensee's facilities pending the outcome of such investigation.

form and other forms where eligibility must be established. Because the Commission's audit program will cover all auction applications, regardless of the service involved, we will promulgate conforming amendments to Subpart Q in Part 1 of the Commission's regulations in a separate Order.

129. Audits and other enforcement vehicles are a necessary adjunct to a self-certification process to implement the measures to assist designated entities adopted pursuant to Section 309(j) of the Communications Act. To facilitate our audit program and to provide preliminary assurances that those applicants claiming eligibility for such preferences are in compliance with the regulatory requirements concerning ownership and financial status, we will require that applicants list their control group members, affiliates, attributable investors, gross revenues, total assets and other basic ownership and eligibility information in an exhibit to their short-form applications. Additional, more detailed information concerning eligibility will be required of winning bidders. All applicants are required to maintain an updated file of documentary evidence supporting the information and the status claimed. Applicants that do not win the licenses for which they applied, shall maintain such records until final grant of the license(s) in question, or one year from the date of the filing of their short-form applications, whichever is earlier. Licensees shall maintain such records for the term of the license.

**2. Defaults**

130. Parties have asked questions about how the Commission would resolve issues associated with an entrepreneurs' block licensee becoming financially insolvent. In particular, there is concern about the status of the license when the licensee cannot make the required installment payments, and in the case of when a licensee enters bankruptcy.[290]

131. In the *Second Report and Order*, we clarified that "a designated entity that has defaulted or that anticipates default under an installment payment program" may request a three to six-month grace period before the Commission cancels its license.[291]

> "During this grace period, a defaulting licensee could maintain its construction efforts and/or operations while seeking funds to continue payments or seek from the Commission a restructured payment plan. We will evaluate requests for a grace period on a case-by-case basis . . . deciding whether to grant such requests or to pursue other measures, we may consider, for example, the licensee's payment history, including whether it has defaulted before and how far into the license term the default occurs, the reasons for default, whether the licensee has met construction

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[290] North American Wireless *ex parte* comments, filed Nov. 3, 1994, at 2-3; Nation's Bank and NationsBanc Capital Markets, Inc. *ex parte* comments, Nov. 3, 1994, at 2-3.

[291] *See Second Report and Order*, FCC 94-61 at ¶ 240.

> build-out requirements, the licensee's financial condition, and whether the licensee is seeking a buyer under a distress sale policy. Following a grace period without successful resumption of payment or upon denial of a grace period request, we will declare the license cancelled and take appropriate measures under the Commission's debt collection rules and procedures."[292]

132. Since several commenters (discussed *supra* at note 287) requested clarification as to what the Commission would allow in the event a licensee defaults on payment of its installment monies, we clarify that lenders and entrepreneurs' block licensees are free to agree contractually to their own terms regarding situations where the licensee has defaulted under the Commission's installment payment program, and possibly other obligations. As long as there is no transfer of control, we would not become involved in the particulars of a voluntary workout arrangement between a designated entity and a third-party lender.

133. Specifically, an entrepreneurs' block licensee and its lenders may agree that, in the event the licensee defaults on its installment payments, the lenders to that licensee will cure this default by assuming the designated entity's payments to the government. Barring any transfer of control, we would not object to such an arrangement.

134. In the event a transfer of control is sought under the terms of the workout, the licensee and its lenders must apply for Commission approval of the transfer, in accordance with Section 310(d) of the Communications Act. In a situation where the lender itself is the proposed buyer or transferee, we would scrutinize such an application to determine whether, by virtue of the loan agreement, an earlier transfer of control was effectuated. We clarify that we would also expect that any requirements that arise by virtue of a licensee's status as an entrepreneur or as a designated entity would be satisfied with respect to such a sale. Thus, for example, the transfer would need to be to another qualified entrepreneur if it is to occur within our five-year holding period.

135. In the event an entrepreneurs' block licensee becomes subject to bankruptcy, our existing rules and precedent clarify how the Commission would dispose of a license in such a circumstance. Specifically, transfer to a bankruptcy trustee is viewed as an involuntary transfer or assignment to another party under Section 24.839 of the Commission's Rules.[293] In such a case therefore, there would be a *pro forma* involuntary assignment of the license to a court-appointed trustee in bankruptcy, or to the licensee, as a debtor-in-possession. Assuming the bankrupt estate is liquidated or the trustee finds a qualified purchaser for the licensee's system, and assuming payments to the Commission are maintained or a grace period granted, we will continue generally

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[292] *Id.*

[293] In the case of an involuntary transfer, FCC Form 490 shall be filed within thirty days following the event that gives rise to the transfer. *See* 47 C.F.R. § 24.839.

to defer to federal bankruptcy laws on many matters.[294] We would, however, ultimately have to approve any final transfer of the license. As stated above, we would expect that any requirements that arise by virtue of a licensee's status as an entrepreneur or as a designated entity would be satisfied with respect to such a sale. Thus, for example, the transfer would need to be to another qualified entrepreneur if it is to occur within our five-year holding period.

## IV. PROCEDURAL MATTERS

### A. Final Regulatory Flexibility Analysis

136. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. § 604, the Commission's final analysis for the *Memorandum Opinion and Order* is as follows:

Need for, and Purpose of, this Action. As a result of new statutory authority, the Commission may utilize competitive bidding mechanisms in the granting of certain initial licenses. The Commission published an Initial Regulatory Flexibility Analysis, *see generally* 5 U.S.C. § 603, in the *Notice of Proposed Rule Making* in this proceeding and published Final Regulatory Flexibility Analyses in the *Second Report and Order* (at ¶¶ 299-302) and the *Fifth Report and Order* (at ¶¶ 219-222). As noted in these previous final analyses, this proceeding will establish a system of competitive bidding for choosing among certain applications for initial licenses, and will carry out statutory mandates that certain designated entities, including small entities, be afforded an opportunity to participate in the competitive bidding process and in the provision of spectrum-based services.

Summary of the Issues Raised by the Public Comments. No commenters responded specifically to the issues raised by the *Fifth Report and Order*. We have made some modifications to the proposed requirements as appropriate.

Significant Alternatives Considered and Rejected. All significant alternatives have been addressed in the *Fifth Report and Order* and in this *Memorandum Opinion and Order*.

### B. Ordering Clauses

137. Accordingly, **IT IS ORDERED** that the Petitions for Reconsideration and/or Clarification of the *Fifth Report and Order* in this proceeding **ARE GRANTED** to the extent described above and **DENIED** in all other respects.

138. **IT IS FURTHER ORDERED** that the Petition for Rulemaking filed by David J. Lieto on September 21, 1994 is hereby **DISMISSED**.

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[294] *See LaRose v. FCC*, 494 F.2d 1145 (D.C.Cir. 1974). *See also* 47 C.F.R. § 24.839(d)(4).

139. **IT IS FURTHER ORDERED** that the Petitions for Reconsideration of the *Order on Reconsideration*, FCC 94-217, adopted in this proceeding **ARE GRANTED** to the extent described above and **DENIED** in all other respects.

140. **IT IS FURTHER ORDERED** that Part 24 of the Commission's Rules **IS AMENDED** as set forth in Appendix B.

141. **IT IS FURTHER ORDERED** that these rule changes made herein **WILL BECOME EFFECTIVE** sixty (60) days after publication in the Federal Register. This action is taken pursuant to Sections 4(i), 303(r) and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r) and 309(j).

142. **IT IS FURTHER ORDERED** that the appropriate Bureau, in consultation with the Managing Director, is delegated authority to revise FCC Forms 175, 401 (and any successor forms) and to modify and create any additional forms to ensure that PCS applicants are in compliance with the requirements set forth in Parts 1 and 24 of the Commission's Rules, as amended.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

## Appendix A

**List of Parties who Filed Petitions for Reconsideration of the *Fifth Report and Order* in PP Docket 93-253**

American Personal Communications (APC)
Association of Independent Designated Entities (AIDE)
BET Holdings, Inc. (BET)
Cellular Telecommunications Industry Association (CTIA)
Century Telephone Enterprises, Inc. (Century)
Citizens Utilities Company (Citizens)
Columbia PCS, Inc. (Columbia PCS)
Cook Inlet Region, Inc. (Cook Inlet)
EATELCORP, Inc. (EATEL)
GTE Service Corporation (GTE)
Hernandez, Roland A. (Hernandez)
Hicks and Ragland Engineering Company, Inc. (Hicks and Ragland)
Karl Brothers, Inc. (Karl Brothers)
Lehman Brothers (Lehman)
MasTec, Inc. (MasTec)
McCaw Cellular Communications, Inc. (McCaw)
Metrex Communications Group, Inc. (Metrex)
Minnesota Equal Access Network Services, Inc. and
South Dakota Network, Inc. (Joint) (MEANS/SDN)
National Association of Black Owned Broadcasters, Inc. (NABOB)
National Paging and Personal Communications Association (NPPCA)
Omnipoint Communications, Inc. (Omnipoint)
Pacific Bell Mobile Services (Pacific Bell)
Pacific Telecom Cellular, Inc.(PTC)
Small Business PCS Association (SBPCS)
Telephone Electronics Corporation (TEC)
United States Interactive & Microwave Television Association (USIMTA)

**Oppositions filed in Response to Petitions for Reconsideration**

Association of Independent Designated Entities (AIDE)
American Personal Communications (APC)
BET Holdings, Inc. (BET)
Columbia PCS, Inc. (Columbia)
Cook Inlet Region, Inc. (Cook)
DCR Communications, Inc. (DCR)

Encompass, Inc. (Encompass)
Mankato Citizens Telephone Co. (Mankato)
MasTec (MasTec)
McCaw Cellular Communications, Inc. (McCaw)
Minnesota Equal Access Network Services, Inc. and South Dakota Network, Inc.
Omnipoint Communications, Inc. (Omnipoint)
Pacific Bell Mobile Services (PacBell)
Personal Communications Industry Association (PCIA)
Telephone and Data Systems, Inc. (TDS)
United States Telephone Association (USTA)
Vanguard Cellular Systems, Inc. (Vanguard)

**Replies filed in Response to Petitions for Reconsideration**

BET Holdings, Inc. (BET)
City of Dallas (Dallas)
GO Communications Corporation (formerly Columbia PCS, Inc.) (Columbia PCS)
McCaw Cellular Communications, Inc. (McCaw)
Minnesota Equal Access Equal Access Network Services, Inc.
and South Dakota Network, Inc. (Minnesota)
National Paging & Personal Communications Association (NPPCA)
Omnipoint Communications (Omnipoint)
Small Business Administration (SBA)

***Ex parte* filings in Response to *Fifth Report and Order***

Airtouch Communications (Airtouch)
Allied Communications, L.P.
Bachow & Associates
Bastion Capital Fund, L.P., LM Capital Fund II, L.P.
BellSouth Corporation (BellSouth)
BET Holdings, Inc. (BET)
Cellular Telecommunications Industry Association (CTIA)
Columbia PCS/Go Communications (Columbia/GO)
Columbus Grove Telephone Co. (CGTC)
Comcast Corp. (Comcast)
Congress of the United States
Cook Inlet Communications (Cook Inlet)
Cox Enterprises, Inc. (Cox)
DCR Communications (DCR)
EATELCORP, Inc. (EATEL)
Encompass, Inc. (Encompass)
Fidelity Capital

Fleischman and Walsh (F&W)
GTE Service Corporation (GTE)
Gurman et al. (Gurman)
Hart Engineers (Hart)
Hernandez, Roland, Interspan Communications, Corp.
Impulse Telecommuncations, Corp. (Impulse)
In-Flight Phone International (In-Flight)
Jordan, Vernon E.
Kraskin & Associates (Kraskin)
Lehman Brothers (Lehman)
Marshall Company (Forming New Communications Services, Inc. [NEWCOM])
MasTec, Inc. (MasTec)
Media Communications Partners (Providence, Fleet Equity, Spectrum)
Metro-Sound, USA (L.A. Sound)
Minority Business Enterprise Legal Defense and Education Fund, Inc. (MBELDEF)
Minority Media Ownership & Employment Council (MMOEC)
Montgomery Securities (Montgomery)
NationsBank and NationsBanc Capital Markets, Inc. (NationsBank)
North American Wireless, Incorporated
Murray, James B. Jr.
National Rainbow Coalition
Omnipoint Corporation (Omnipoint)
Pacific Bell (Pac Bell)
Pacific Telesis
Rakolta, Terry
Skadden, Arps, Slate, Meagher & Flom
Small Business Administration (SBA)
Small Business Advisory Committee (SBAC)
Small Business PCS Association (SBPCSA)
Telephone Electronics Corporation (TEC)
Unterberg Harris
U.S. Intelco Networks, Inc. (USIN)
Utilities, Inc. (Utilities)
Vanguard Cellular Systems, Inc. (Vanguard)
Venture Capital Representatives: The Carlyle Group, Daniels & Associates, Fleet Equity Partners, Madison Dearborn, MC Partners, Providence Ventures Inc., Spectrum Equity Investors. (Venture Capital Representatives)
Wiley, Rein & Fielding

## Appendix B

## Amended Rules

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

1. Section 24.709 is revised to read as follows:

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

(a) General Rule.

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

(2) The *gross revenues* and *total assets* of the applicant (or licensee), and its *affiliates*, and (except as provided in paragraph (b) of this section) of persons or entities that hold interests in the applicant (or licensee), and their *affiliates*, shall be attributed to the applicant and considered on a cumulative basis and aggregated for purposes of determining whether the applicant (or licensee) is eligible for a license for frequency block C or frequency block F under this section.

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

(b) Exceptions to General Rule.

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

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

(3) 25 Percent Equity Exception. The *gross revenues* and *total assets* of a person or entity that holds an interest in the applicant (or licensee), and its *affiliates*, shall not be considered so long as:

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

(ii) Except as provided in paragraph (b)(5) of this section, such person or entity is not a member of the applicant's (or licensee's) *control group*; and

(iii) The applicant (or licensee) has a *control group* that complies with the minimum equity requirements of paragraph (b)(5) of this section, and, if the applicant (or licensee) is a corporation, owns at least 50.1 percent of the applicant's (or licensee's) voting interests, and, if the applicant (or licensee) is a partnership, holds all of its general partnership interests.

(4) 49.9 Percent Equity Exception. The *gross revenues* and *total assets* of a person or entity that holds an interest in the applicant (or licensee), and its *affiliates*, shall not be considered so long as:

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

(ii) Except as provided in paragraph (b)(6) of this section, such person or entity is not a member of the applicant's (or licensee's) *control group*; and

(iii) The applicant (or licensee) has a *control group* that complies with the minimum equity requirements of paragraph (b)(6) of this section and, if the applicant (or licensee) is a corporation, owns at least 50.1 percent of the applicant's (or licensee's) voting interests, and, if the applicant (or licensee) is a partnership, holds all of its general partnership interests.

(5) Control Group Minimum 25 Percent Equity Requirement. In order to be eligible to exclude *gross revenues* and *total assets* of persons or entities identified in paragraph (b)(3) of this section, an applicant (or licensee) must comply with the following requirements:

(i) Except for an applicant (or licensee) whose sole control group member is a *preexisting entity*, as provided in paragraph (b)(5)(ii) of this section, at the time the applicant's short-form application (Form 175) is filed and until at least three years following the date of initial license grant, the applicant's (or licensee's) *control group* must own at least 25 percent of the applicant's (or licensee's) total equity as follows:

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

time the applicant files its short-form application (Form 175);

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

(C) The remaining 10 percent of the applicant's (or licensee's) total equity may be owned by *qualifying investors*, either unconditionally or in the form of stock options not subject to the restrictions of paragraph (b)(5)(i)(A) of this section, or by any of the following entitites, which may not comply with section 24.720(n)(1):

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

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

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

(D) Following termination of the three-year period specified in paragraph (b)(5)(i) of this section, *qualifying investors* must continue to own at least 10 percent of the applicant's (or licensee's) total equity, either unconditionally or in the form of stock options subject to the restrictions in paragraph (b)(5)(i)(A) of this section. The restrictions specified in paragraph (b)(5)(i)(C)(1)-(4) of this section no longer apply to the remaining equity after termination of such three-year period.

(ii) At the election of an applicant (or licensee) whose *control group's* sole member is a *preexisting entity*, the 25 percent minimum equity requirements set forth in paragraph (b)(5)(i) of this section shall apply, except that only 10 percent of the applicant's (or licensee's) total equity must be held by *qualifying investors* and that the remaining 15 percent of the applicant's (or licensee's) total equity may be held by *qualifying investors* or noncontrolling *existing investors* in such *control group* member or individuals that are members of the applicant's (or licensee's) management. These restrictions on the identity of the holder(s) of the remaining 15 percent of the licensee's total equity no longer apply after termination of the three-year period specified in paragraph (b)(5)(i) of this section.

(6) Control Group Minimum 50.1 Percent Equity Requirement. In order to be eligible to exclude *gross revenues* and *total assets* of persons or entities identified in paragraph (b)(4) of this section, an applicant (or licensee) must comply with the following requirements:

(i) Except for an applicant (or licensee) whose sole control group member is a *preexisting entity*, as provided in paragraph (b)(6)(ii) of this section, at the time the applicant's short-form application (Form 175) is filed and until at least three years following the date of initial license

grant, the applicant's (or licensee's) *control group* must own at least 50.1 percent of the applicant's (or licensee's) total equity as follows:

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

(B) Such *qualifying minority and/or women investors* must hold 50.1 percent of the voting stock and all general partnership interests within the control group and must have *de facto* control of the control group and of the applicant;

(C) The remaining 20.1 percent of the applicant's (or licensee's) total equity may be owned by *qualifying investors*, either unconditionally or in the form of stock options not subject to the restrictions of paragraph (b)(5)(i)(A) of this section, or by any of the following entitites, which may not comply with section 24.720(n)(1):

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

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

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

(D) Following termination of the three-year period specified in paragraph (b)(6)(i) of this section, *qualifying minority and/or women investors* must continue to own at least 20 percent of the applicant's (or licensee's) total equity, either unconditionally or in the form of stock options subject to the restrictions in paragraph (b)(6)(i)(A) of this section. The restrictions specified in paragraph (b)(6)(i)(C)(1)-(4) of this section no longer apply to the remaining equity after termination of such three-year period.

(ii) At the election of an applicant (or licensee) whose *control group's* sole member is a *preexisting entity*, the 50.1 percent minimum equity requirements set forth in paragraph (b)(6)(i) of this section shall apply, except that only 20 percent of the applicant's (or licensee's) total equity must be held by *qualifying minority and/or women investors* and that the remaining 30.1 percent of the applicant's (or licensee's) total equity may be held by *qualifying minority and/or women investors* or noncontrolling *existing investors* in such *control group* member or individuals that are members of the applicant's (or licensee's) management. These restrictions on the identity of the holder(s) of the remaining 30.1 percent of the licensee's total equity no longer apply after termination of the three-year period specified in paragraph (b)(6)(i) of this section.

(7) Calculation of Certain Interests. Except as provided in paragraphs (b)(5) and (b)(6) of

this section, ownership interests shall be calculated on a fully diluted basis; all agreements such as warrants, stock options and convertible debentures will generally be treated as if the rights thereunder already have been fully exercised, except that such agreements may not be used to appear to terminate or divest ownership interests before they actually do so, in order to comply with the *nonattributable equity* requirements in paragraphs (b)(3)(i) and (b)(4)(i) of this section.

(8) Aggregation of *Affiliate* Interests. Persons or entities that hold interests in an applicant (or licensee) that are *affiliates* of each other or have an identity of interests identified in § 24.720(l)(3) will be treated as though they were one person or entity and their ownership interests aggregated for purposes of determining an applicant's (or licensee's) compliance with the *nonattributable equity* requirements in paragraphs (b)(3)(i) and (b)(4)(i) of this section.

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

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

(c) Short-form and Long-Form Applications: Certifications and Disclosure.

(1) Short-form Application. In addition to certifications and disclosures required by Part 1, subpart Q of the this Chapter and § 24.813, each applicant for a license for frequency Block C or frequency Block F shall certify on its short-form application (Form 175) that it is eligible to bid on and obtain such license(s), and (if applicable) that it is eligible for designated entity status pursuant to this section and § 24.720, and shall append the following information as an exhibit to its Form 175:

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

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

(B) The identity of each *affiliate* of the applicant if not disclosed pursuant to § 24.813; and

(C) The applicant's *gross revenues* and *total assets*, computed in accordance with

paragraphs (a) and (b) of this section.

(ii) For all other applicants:

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

(B) The citizenship and the gender or minority group classification for each member of the applicant's *control group* if the applicant is claiming status as a *business owned by members of minority groups and/or women*;

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

(D) The identity of each *affiliate* of the applicant and each *affiliate* of individuals or entities identified pursuant to paragraphs (c)(1)(ii)(A) and (c)(1)(ii)(C) of this section if not disclosed pursuant to § 24.813;

(E) A certification that the applicant's sole *control group* member is a *preexisting entity*, if the applicant makes the election in either paragraph (b)(5)(ii) or (b)(6)(ii) of this section; and

(F) The applicant's *gross revenues* and *total assets*, computed in accordance with paragraphs (a) and (b) of this section.

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

(2) Long-form Application. In addition to the requirements in subpart I of this part and other applicable rules (e.g., §§ 24.204(f), 20.6(e), 20.9(b)), each applicant submitting a long-form application for license(s) for frequency blocks C and F shall, in an exhibit to its long-form application:

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

(ii) List and summarize all agreements or other instruments (with appropriate references to specific provisions in the text of such agreements and instruments) that support the applicant's eligibility for a license(s) for frequency Block C or frequency Block F and its eligibility under §§ 24.711 through 24.720, including the establishment of *de facto* and *de jure* control; such agreements and instruments include articles of incorporation and bylaws, shareholder agreements,

voting or other trust agreements, partnership agreements, management agreements, joint marketing agreements, franchise agreements, and any other relevant agreements (including letters of intent), oral or written; and

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

(3) Records Maintenance. All applicants, including those that are winning bidders, shall maintain at their principal place of business an updated file of ownership, revenue and asset information, including those documents referenced in paragraphs (c)(2)(ii) and (c)(2)(iii) of this section and any other documents necessary to establish eligibility under this section or under the definitions of *small business* and/or *business owned by members of minority groups and/or women*. Licensees (and their successors in interest) shall maintain such files for the term of the license. Applicants that do not obtain the license(s) for which they applied shall maintain such files until the grant of such license(s) is final, or one year from the date of the filing of their short-form application(s) (Form 175), whichever is earlier.

(d) Audits.

(1) Applicants and licensees claiming eligibility under this section or §§ 24.711 through 24.720 shall be subject to audits by the Commission, using in-house and contract resources. Selection for audit may be random, on information, or on the basis of other factors.

(2) Consent to such audits is part of the certification included in the short-form application (Form 175). Such consent shall include consent to the audit of the applicant's or licensee's books, documents and other material (including accounting procedures and practices) regardless of form or type, sufficient to confirm that such applicant's or licensee's representations are, and remain, accurate. Such consent shall include inspection at all reasonable times of the facilities, or parts thereof, engaged in providing and transacting business, or keeping records regarding licensed broadband PCS service and shall also include consent to the interview of principals, employees, customers and suppliers of the applicant or licensee.

(e) Definitions. The terms *affiliate, business owned by members of minority groups and women, consortium of small businesses, control group, existing investor, gross revenues, institutional investor, members of minority groups, nonattributable equity, preexisting entity, publicly traded corporation with widely dispersed voting power, qualifying investor, qualifying minority and/or woman investor,* and *total assets* used in this section are defined in § 24.720.

2. Section 24.711 is amended to read as follows:

**§ 24.711 Upfront payments, down payments and installment payments for licenses for**

**frequency Blocks C and F.**

(a) Upfront Payments and Down Payments.

(1) Each eligible bidder for licenses on frequency Blocks C or F subject to auction shall pay an upfront payment of $0.015 per MHz per pop for the maximum number of licenses (in terms of MHz-pops) on which it intends to bid pursuant to § 1.2106 of this Chapter and procedures specified by Public Notice.

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

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

(1) For an eligible licensee with *gross revenues* exceeding $75 million (calculated in accordance with § 24.709(a)(2) and (b)) in each of the two preceding years (calculated in accordance with 24.720(f)), interest shall be imposed based on the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted, plus 3.5 percent; payments shall include both principal and interest amortized over the term of the license.

(2) For an eligible licensee with *gross revenues* not exceeding $75 million (calculated in accordance with § 24.709(a)(2) and (b)) in each of the two preceding years, interest shall be imposed based on the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted, plus 2.5 percent; payments shall include interest only for the first year and payments of interest and principal amortized over the remaining nine years of the license term.

(3) For an eligible licensee that qualifies as a *small business* or as a *consortium of small businesses*, interest shall be imposed based on the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted, plus 2.5 percent; payments shall include interest only for the first two years and payments of interest and principal amortized over the remaining eight years of the license term.

(4) For an eligible licensee that qualifies as a *business owned by members of minority groups and/or women*, interest shall be imposed based on the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted; payments shall include interest only for the first three years and payments of interest and principal amortized over the remaining seven years of the license term.

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

(c) Unjust Enrichment.

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

(2) If a licensee that utilizes installment financing under this section seeks to make any change in ownership structure that would result in the licensee losing eligibility for installment payments, the licensee shall first seek Commission approval and must make full payment of the remaining unpaid principal and any unpaid interest accrued through the date of such change as a condition of approval. A licensee's (or other attributable entity's) increased *gross revenues* or increased *total assets* due to *nonattributable equity* investments (*i.e.*, from sources whose *gross revenues* and *total assets* are not considered under § 24.709(b)), debt financing, revenue from operations or other investments, business development or expanded service shall not be considered to result in the licensee losing eligibility for installment payments.

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

3. Section 24.712 is amended by revising paragraph (d) to read as follows:

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

* * * * *

(d) Unjust Enrichment.

(1) If during the term of the initial license grant (*see* § 24.15), a licensee that utilizes a bidding credit under this section seeks to assign or transfer control of its license to an entity not meeting the eligibility standards for bidding credits or seeks to make any other change in ownership that would result in the licensee no longer qualifying for bidding credits under this section, the licensee must seek Commission approval and reimburse the government for the amount of the bidding credit as a condition of the approval of such assignment, transfer or other ownership change.

(2) If during the term of the initial license grant (*see* § 24.15), a licensee that utilizes a bidding credit under this section seeks to assign or transfer control of its license to an entity meeting the eligibility standards for lower bidding credits or seeks to make any other change in ownership that would result in the licensee qualifying for a lower bidding credit under this section, the licensee must seek Commission approval and reimburse the government for the difference between the amount of the bidding credit obtained by the licensee and the bidding credit for which the assignee, transferee or licensee is eligible under this section as a condition of the approval of such assignment, transfer or other ownership change.

4. Section 24.720 is revised to read as follows:

**§ 24.720 Definitions**.

(a) Scope. The definitions in this section apply to §§ 24.709 through 24.714, unless otherwise specified in those sections.

(b) *Small Business; Consortium of Small Businesses.*

(1) A *small business* is an entity that, together with its *affiliates* and persons or entities that hold interests in such entity and their *affiliates*, has average annual *gross revenues* that are not more than $40 million for the preceding three years.

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

(3) A *small business consortium* is a conglomerate organization formed as a joint venture between or among mutually-independent business firms, each of which individually satisfies the definition of a *small business* in paragraphs (b)(1) and (b)(2) of this section.

(c) *Business Owned by Members of Minority Groups and/or Women.* A *business owned by members of minority groups and/or women* is an entity:

(1) In which the *qualifying investor* members of an applicant's *control group* are members of minority groups and/or women who are United States citizens; and

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

(d) *Small Business Owned by Members of Minority Groups and/or Women; Consortium of Small Businesses Owned by Members of Minority Groups and/or Women.* A *small business owned by*

*members of minority groups and/or women* is an entity that meets the definitions in both paragraphs (b) and (c) of this section. A *consortium of small businesses owned by members of minority groups and/or women* is a conglomerate organization formed as a joint venture between mutually-independent business firms, each of which individually satisfies the definitions in paragraphs (b) and (c) of this section.

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

(f) *Gross Revenues*. *Gross revenues* shall mean all income received by an entity, whether earned or passive, before any deductions are made for costs of doing business (*e.g.* cost of goods sold), as evidenced by audited financial statements for the relevant number of calendar years preceding January 1, 1994, or, if audited financial statements were not prepared on a calendar-year basis, for the most recently completed fiscal years preceding the filing of the applicant's short-form application (Form 175). For short-form applications filed after December 31, 1995, gross revenues shall be evidenced by audited financial statements for the preceding relevant number of calendar or fiscal years. If an entity was not in existence for all or part of the relevant period, gross revenues shall be evidenced by the audited financial statements of the entity's predecessor-in-interest or, if there is no identifiable predecessor-in-interest, unaudited financial statements certified by the applicant as accurate.

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

(h) *Institutional Investor*. An *institutional investor* is an insurance company, a bank holding stock in trust accounts through its trust department, or an investment company as defined in 15 U.S.C. § 80a-3(a), including within such definition any entity that would otherwise meet the definition of investment company under 15 U.S.C. § 80a-3(a) but is excluded by the exemptions set forth in 15 U.S.C. § 80a-3(b) and (c), without regard to whether such entity is an issuer of securities; provided that, if such investment company is owned, in whole or in part, by other entities, such investment company, such other entities and the *affiliates* of such other entities, taken as a whole, must be primarily engaged in the business of investing, reinvesting or trading in securities or in distributing or providing investment management services for securities.

(i) *Members of Minority Groups*. *Members of minority groups* includes Blacks, Hispanics, American Indians, Alaskan Natives, Asians, and Pacific Islanders.

(j) *Nonattributable Equity*.

(1) *Nonattributable equity* shall mean:

(i) For corporations, voting stock or non-voting stock that includes no more than

twenty-five percent of the total voting equity, including the right to vote such stock through a voting trust or other arrangement;

(ii) For partnerships, joint ventures and other non-corporate entities, limited partnership interests and similar interests that do not afford the power to exercise control of the entity.

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

(k) *Control Group.* A *control group* is an entity, or a group of individuals or entities, that possesses *de jure* control and *de facto* control of an applicant or licensee, and as to which the applicant's or licensee's charters, bylaws, agreements and any other relevant documents (and amendments thereto) provide:

(1) That the entity and/or its members own unconditionally at least 50.1 percent of the total voting interests of a corporation;

(2) That the entity and/or its members receive at least 50.l percent of the annual distribution of any dividends paid on the voting stock of a corporation;

(3) That, in the event of dissolution or liquidation of a corporation, the entity and/or its members are entitled to receive 100 percent of the value of each share of stock in its possession and a percentage of the retained earnings of the concern that is equivalent to the amount of equity held in the corporation; and

(4) That, for other types of businesses, the entity and/or its members have the right to receive dividends, profits and regular and liquidating distributions from the business in proportion to the amount of equity held in the business.

Note: Voting control does not always assure de facto control, such as, for example, when the voting stock of the *control group* is widely dispersed (*see, e.g.*, § 24.720(l)(2)(iii)).

(l) *Affiliate*.

(1) Basis for Affiliation. An individual or entity is an *affiliate* of an applicant or of a person holding an attributable interest in an applicant (both referred to herein as "the applicant") if such individual or entity :

(i) Directly or indirectly controls or has the power to control the applicant, or

(ii) Is directly or indirectly controlled by the applicant, or

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

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

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

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

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

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

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

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

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

*Example 1.* Two shareholders in Corporation Y each have attributable interests in the

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

*Example 2.* One shareholder in Corporation Y, shareholder A, has an attributable interest in a PCS application. Another shareholder in Corporation Y, shareholder B, has a nonattributable interest in the same PCS application. While neither shareholder has enough shares to individually control Corporation Y, together they have the power to control Corporation Y. Through the common investment of shareholders A and B in the PCS application, Corporation Y would still be deemed an affiliate of the applicant.

(i) Spousal Affiliation. Both spouses are deemed to own or control or have the power to control interests owned or controlled by either of them, unless they are subject to a legal separation recognized by a court of competent jurisdiction in the United States.

(ii) Kinship Affiliation. Immediate family members will be presumed to own or control or have the power to control interests owned or controlled by other immediate family members. In this context "immediate family member" means father, mother, husband, wife, son, daughter, brother, sister, father- or mother-in-law, son- or daughter-in-law, brother- or sister-in-law, step-father or -mother, step-brother or -sister, step-son or -daughter, half brother or sister. This presumption may be rebutted by showing that

(A) The family members are estranged,

(B) The family ties are remote, or

(C) The family members are not closely involved with each other in business matters.

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

(4) Affiliation through stock ownership.

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

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

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

(5) Affiliation arising under stock options, convertible debentures, and agreements to merge. Stock options, convertible debentures, and agreements to merge (including agreements in principle) are generally considered to have a present effect on the power to control the concern. Therefore, in making a size determination, such options, debentures, and agreements will generally be treated as though the rights held thereunder had been exercised. However, neither an affiliate nor an applicant can use such options and debentures to appear to terminate its control over another concern before it actually does so.

*Example 1.* If company B holds an option to purchase a controlling interest in company A, who holds an attributable interest in a PCS application, the situation is treated as though company B had exercised its rights and had become owner of a controlling interest in company A. The gross revenues of company B must be taken into account in determining the size of the applicant.

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

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

(6) Affiliation under voting trusts.

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

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

(iii) If the primary purpose of a voting trust, or similar agreement, is to separate voting power from beneficial ownership of voting stock for the purpose of shifting control of or the

power to control a concern in order that such concern or another concern may meet the Commission's size standards, such voting trust shall not be considered valid for this purpose regardless of whether it is or is not recognized within the appropriate jurisdiction.

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

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

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

(10) Affiliation under joint venture arrangements.

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

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

(11) Exclusions from affiliation coverage.

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

(b) of this section, unless such applicant establishes that it will not receive a substantial unfair competitive advantage because significant legal constraints restrict the applicant's ability to access such *gross revenues*.

(ii) For purposes of § 24.709(a)(2) and paragraph (b)(2) of this section, an entity controlled by *members of minority groups* is not considered an *affiliate* of an applicant (or licensee) that qualify as a *business owned by members of minority groups and/or women* if *affiliation* would arise solely from control of such entity by members of the applicant's (or licensee's) control group who are *members of minority groups*. For purposes of this subparagraph, the term minority-controlled entity shall mean, in the case of a corporation, an entity in which 50.1 percent of the voting interests is owned by *members of minority groups* or, in the case of a partnership, all of the general partners are *members of minority groups* or entities controlled by *members of minority groups*; and, in all cases, one in which *members of minority groups* have both *de jure* and *de facto* control of the entity.

(m) *Publicly Traded Corporation with Widely Dispersed Voting Power*. A *publicly traded corporation with widely dispersed voting power* is a business entity organized under the laws of the United States:

(1) Whose shares, debt, or other ownership interests are traded on an organized securities exchange within the United States;

(2) In which no person

(i) Owns more than 15 percent of the equity; or

(ii) Possesses, directly or indirectly, through the ownership of voting securities, by contract or otherwise, the power to control the election of more than 15 percent of the members of the board of directors or other governing body of such publicly traded corporation; and

(3) Over which no person other than the management and members of the board of directors or other governing body of such publicly traded corporation, in their capacities as such, has *de facto* control.

(4) The term *person* shall be defined as in section 13(d) of the Securities and Exchange Act of 1934, as amended (15 U.S.C. § 78(m)), and shall also include investors that are commonly controlled under the indicia of control set forth in the definition of *affiliate* in paragraphs (l)(2) through (10) of this section.

(n) *Qualifying Investor; Qualifying Minority and/or Woman Investor*.

(1) A *qualifying investor* is a person who is (or holds an interest in) a member of the applicant's (or licensee's) *control group* whose *gross revenues* and *total assets*, when aggregated

with those of all other attributable investors and *affiliates*, do not exceed the *gross revenues* and *total assets* limits specified in § 24.709(a), or, in the case of an applicant (or licensee) that is a *small business*, do not exceed the *gross revenue*s limit specified in paragraph (b) of this section.

(2) A *qualifying minority and/or woman investor* is a person who is a *qualifying investor* under paragraph (n)(1), who is (or holds an interest in) a member of the applicant's (or licensee's) *control group* and who is a *member of a minority group* or a woman and a United States citizen.

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

(o) *Preexisting Entity; Existing Investor*. A *preexisting entity* is an entity was operating and earning revenues for at least two years prior to December 31, 1994. An *existing investor* is a person or entity that was an owner of record of a *preexisting entity's* equity as of November 10, 1994, and any person or entity acquiring de minimis equity holdings in a *preexisting entity* after that date.

*Note*: In applying the term *existing investor* to de minimis interests in *preexisting entities* obtained or increased after November 10, 1994, the Commission will scrutinize any significant restructuring of the *preexisting entity* that occurs after that date and will presume that any change of equity that is five percent or less of the *preexisting entity's* total equity is de minimis. The burden is on the applicant (or licensee) to demonstrate that changes that exceed five percent are not significant.

5. Section 24.839 is amended by revising paragraphs (a) and (d) to read as follows:

**§ 24.839 Transfer of control or assignment of license.**

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

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(d) Restrictions on Assignments and Transfers of Licenses for Frequency Blocks C and F. No

assignment or transfer of control of a license for frequency Block C or frequency Block F will be granted unless --

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

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

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