

Before the
Federal Communications Commission
Washington, D.C. 20554

PP Docket No. 93-253

In the Matter of

Implementation of Section 309(j)
of the Communications Act -
Competitive Bidding

SECOND MEMORANDUM OPINION AND ORDER

Adopted: August 12, 1994; Released: August 15, 1994

By the Commission:

TABLE OF CONTENTS

	Paragraph
I. INTRODUCTION	1
II. APPLICABILITY OF COMPETITIVE BIDDING	7
A. CELLULAR UNSERVED AREAS	7
B. PRINCIPAL USE OF PCS	11
III. AUCTION DESIGN AND PROCEDURES	12
A. ACTIVITY AND STOPPING RULES	12
B. SUGGESTED OPENING BID	19
C. COMMISSION DISCRETION DURING AUCTIONS	21
D. TREATMENT OF UPFRONT PAYMENTS	27
E. DEFAULT PENALTY	34
F. DISCLOSURE OF BIDDING INFORMATION	37
G. STANDBY QUEUE	43
H. FILING FEES	45
I. WAIVER REQUESTS IN SHORT FORM APPLICATIONS	47
J. RULES PROHIBITING COLLUSION	48
K. INFORMATION DISCLOSURE BY APPLICANTS AND LICENSEES	54
L. APPLICATION-PROCESSING RULES	58

M. FINANCIAL QUALIFICATIONS	61
IV. DESIGNATED ENTITIES	64
A. INTRODUCTION	64
B. RURAL TELEPHONE COMPANY DEFINITION	67
C. RURAL TELEPHONE CONSORTIA	81
D. AFFILIATION RULES	86
E. RURAL TELEPHONE COMPANY BIDDING CREDITS	105
F. RURAL TELEPHONE COMPANY ELIGIBILITY FOR INSTALLMENT PAYMENTS	116
G. RURAL TELEPHONE COMPANY PARTITIONING	123
H. UNJUST ENRICHMENT PROVISIONS	125
I. UPFRONT PAYMENT	129
J. INSTALLMENT PAYMENTS	132
K. ELIGIBILITY ISSUES	134
L. SMALL BUSINESS	144
V. FINAL REGULATORY FLEXIBILITY ANALYSIS	151
VI. PROCEDURAL MATTERS AND ORDERING CLAUSES	155
APPENDIX A	
APPENDIX B	

I. INTRODUCTION

1. By this action, we respond to petitions for reconsideration or clarification of the rules and policies adopted in the *Second Report and Order* in this proceeding, which sets forth general rules for the use of competitive bidding to award licenses.¹ Twenty-one such petitions were received, as well as eight oppositions and five replies. A list of the petitions, oppositions and replies is contained in Appendix A.

2. 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 USC §309(j).² Section 309(j) gives the Commission express authority to employ competitive bidding procedures to choose among mutually exclusive applications for initial licenses. The Commission adopted a *Notice of Proposed Rulemaking* in this proceeding on September 23, 1993.³ The *Second Report and Order* prescribing the required regulations was adopted on March 8, 1994. The Commission has subsequently adopted specific rules for auction of

¹ *Second Report and Order*, PP Docket No. 93-253, 9 FCC Rcd 2348, 59 FR 22980 (May 4, 1994) (*Second Report and Order*).

² See Omnibus Budget Reconciliation Act of 1993, 47 U.S.C. 309(j)(3)(B).

³ *Notice of Proposed Rule Making* in PP Docket No. 93-253, 8 FCC Rcd 7635, 58 FR 53489 (Oct 15, 1993), (*NPRM*). In the *First Report and Order* in PP Docket No. 93-253, FCC 94-32,

released February 4, 1994, 59 FR 09100 (Feb 25, 1994), (*First Report and Order*), the Commission prescribed transfer disclosure requirements with respect to licenses awarded by random selection.

narrowband Personal Communications Service (PCS) licenses,⁴ Interactive Video and Data Service (IVDS) licenses,⁵ and broadband PCS licenses.⁶

3. The *Second Report and Order* established rules for determining what types of services and licenses may be subject to auctions. The *Second Report and Order* also set forth a range of auction designs and procedures, from which the Commission stated it would choose in establishing procedures for awarding licenses in specific services. The *Second Report and Order* addressed a variety of procedural issues regarding announcement of auctions, filing of applications, bidder and licensee qualifications, payment requirements, and penalties for default or disqualification, as well as safeguards to deter possible abuses of the bidding and licensing process. In response to statutory directive, the *Second Report and Order* also identified provisions designed to ensure that small businesses, rural telephone companies, and businesses owned by women or members of minority groups (designated entities) are given the opportunity to participate in the provision of spectrum-based services.

4. In many cases, the appropriate auction procedures and rules vary from service to service. In the *Second Report and Order* we retained the flexibility to choose, from within a defined range, the appropriate procedures for particular services, depending on characteristics of the service such as the likely value and interdependence of the licenses being auctioned and the capital required to construct a system. We also retained the flexibility to alter our procedures in response to our experience with different auction techniques.

5. We dispose of all but two of the petitions for reconsideration of the *Second Report and Order* in this Order. We defer consideration of Brown and Schwaninger's petition concerning Finders's Preferences. We plan to issue a Further Notice addressing the applicability of Finder's Preferences to auctionable services in the near future, and we will consider Brown and Schwaninger's petition in the context of that Notice. We also defer to a future Order consideration of MCI's petition concerning auctioning of BETRS licenses.

6. The issues raised in the petitions for reconsideration fall into three categories: those dealing with the applicability of competitive bidding to specific services and particular circumstances, those dealing with auction design and procedures, and those dealing with the definition of the groups eligible for special provisions (the "designated entities") and the nature of these provisions. We consider issues raised by these petitions below.

II. APPLICABILITY OF COMPETITIVE BIDDING

A. Cellular Unserved Areas

7. Two cellular systems operate on separate frequency blocks in each cellular market.⁷ The geographic areas not covered after five years by the initial licensees are considered cellular "unserved areas" that are licensed separately. In 1991, we adopted random selection procedures to govern licensing of the cellular unserved areas,⁸ and stated that we would revisit this decision to use lotteries if Congress authorized Commission use of competitive bidding procedures.⁹ As noted above, competitive bidding authority was in fact enacted in 1993.¹⁰

8. After receiving comment and considering the extensive record, the Commission indicated in the *Second Report and Order* that, unless specifically excluded, mutually exclusive applications for licenses in the Public Mobile Services, including the Cellular Service, will be subject to competitive bidding if they were filed after July 26, 1993.¹¹ We noted, however, that applications filed before July 26, 1993 present special issues due to the "special rule" of Section 6002(e) of the Budget Act.¹² That rule does not require the Commission to award licenses or permits by competitive bidding if the license applications were filed before July 26, 1993, even if the applications otherwise meet the criteria that would subject them to selection by bidding.¹³ We therefore stated in the *Second Report and Order* that we would determine in a separate order how to authorize Public Mobile systems if applications were filed before July 26, 1993.¹⁴ Subsequently, after thorough consideration of the record, we adopted a Memorandum Opinion and Order stating that in such situations we will award licenses for the unserved areas by random selection.¹⁵

9. *Petitions.* We received three petitions for reconsideration of the provisions of the *Second Report and Order* related to authorization of the cellular unserved areas.¹⁶ John G. Andrikopoulos, et al. (Andrikopoulos) states that where applications for cellular unserved area licenses were accepted for filing before July 26, 1993, the applications should not be subject to competitive bidding. Andrikopoulos asserts that auctioning these licenses would be unreasonable, retroactive application of the Budget Act.¹⁷ The Houston, Dallas, Oxnard and Huntington Cellular Settlement Groups (Cellular Settlement Groups) assert that the Commission should accept full-market settlements between mutually exclusive applicants for cellular unserved area licenses.¹⁸ These Groups state that Congress intended the Commission to continue use of its existing policy favoring full-market settlements, and ex-

⁴ *Third Report and Order* in PP Docket No. 93-253, 9 FCC Rcd 2941, 59 FR 26741 (May 24, 1994) (*Third Report and Order*).

⁵ *Fourth Report and Order* in PP Docket No. 93-253, 59 FR 24947 (May 13, 1994) (*Fourth Report and Order*).

⁶ *Fifth Report and Order* in PP Docket No. 93-253, FCC 94-178, 59 FR 37566 (Jul 29, 1994) adopted June 29, 1994, released July 15, 1994 (*Fifth Report and Order*).

⁷ The Domestic Public Cellular Service is governed by Part 22 of the Commission's Rules, 47 CFR Part 22.

⁸ See *First Report and Order and Memorandum Opinion and Order on Reconsideration*, CC Docket No. 90-6, 6 FCC Rcd 6185, 56 FR 58503 (Nov 20, 1991).

⁹ *Id.* at 6217.D

¹⁰ See Budget Act, 107 Stat. 387-392.

¹¹ See *Second Report and Order* at ¶ 61 & n.58.

¹² See *id.* at n.55, citing Budget Act, § 6002(e).

¹³ See Budget Act, § 6002(e).

¹⁴ See *Second Report and Order* at n.55.

¹⁵ See Memorandum Opinion and Order, PP Docket No. 93-253, FCC No. 94-123, 59 FR 37163 (Jul 21, 1994), adopted May 27, 1994, released July 14, 1994 (*Memorandum Opinion and Order*).

¹⁶ See petitions of Thumb Cellular Limited Partnership (Thumb Cellular), John Andrikopoulos, et al. (Andrikopoulos), and cellular settlement groups in Houston, Dallas, Oxnard and Huntington (Cellular Settlement Groups).

¹⁷ See Andrikopoulos Petition at 4-5.

¹⁸ See Cellular Settlement Groups Petition at 3-7.

press concern that the Second Report and Order appears to prohibit full-market settlements where licenses will be awarded through competitive bidding procedures.¹⁹ Finally, Thumb Cellular, a party to a full-market settlement agreement filed for a Detroit unserved area, asks the Commission to process its settlement agreement immediately.²⁰

10. *Discussion.* The issues raised by these petitioners are fully addressed in the Memorandum Opinion and Order, which was released shortly after these petitions were filed. We stated in that item that we will grant licenses for cellular unserved areas by random selection from the pool of applicants that filed lottery applications prior to July 26, 1993, and we will permit full-market settlements among lottery applicants to avoid mutual exclusivity.²¹ Applications for cellular unserved areas accepted for filing prior to July 26, 1993 will not be subject to competitive bidding. Accordingly, the issues raised by these three petitioners are moot.

B. Principal Use of PCS

11. Section 309(j)(1) of the Communications Act, as amended, permits auctions only where mutually exclusive applications for initial licenses or construction permits are accepted for filing by the Commission and where the principal use of the spectrum will involve or is reasonably likely to involve the receipt by the licensee of compensation from subscribers in return for enabling those subscribers to receive or transmit communications signals.²² In the *Second Report and Order* we concluded that PCS service would meet the criteria for auctionability.²³ Millin requests that we reverse that decision and conduct further inquiry concerning the possibility of non-subscription PCS.²⁴ We considered and rejected Millin's arguments in the *Fifth Report and Order* in this docket, stating that the overwhelming weight of the comments in that proceeding, as well as our experience with the PCS experiments that we have licensed, reflect that licensed PCS spectrum is likely to be used principally for the provision of service to subscribers for compensation.²⁵ We continue to believe that the record strongly supports the likelihood that PCS spectrum will be used principally for the provision of service to subscribers for compensation. Accordingly, we deny Millin's request.

III. AUCTION DESIGN AND PROCEDURES

A. Activity and Stopping Rules

12. Activity rules and stopping rules are intended to govern the speed and duration of bidding in an auction. An activity rule encourages each bidder to participate actively through the course of an auction. Activity rules are intended to ensure that simultaneous auctions with simultaneous stopping rules will close within a reasonable pe-

riod of time and that bid prices will convey meaningful information during the course of the auction. In the *Second Report and Order*, the Commission adopted a three-stage Milgrom-Wilson activity rule as the preferred activity rule when a simultaneous stopping rule is employed.²⁶ Under this rule the auction moves from stage I to stage II when, in each of three consecutive rounds of bidding, the high bid has increased on less than some specified percent of the spectrum (measured in terms of MHz-pops) being auctioned.²⁷ The auction will move from stage II to stage III when in each of three consecutive rounds the high bid has increased on less than some specified percent of the spectrum (measured in terms of MHz-pops). The Commission, however, retained the flexibility to decide whether to use an activity rule, and if so what type of activity rule to use. We described possible activity rules, and stated the range of alternatives from which we would choose and the circumstances that might cause us to choose particular rules. We stated that we would announce the activity rule to be used by Public Notice before an auction.²⁸ A stopping rule specifies when an auction is over. In the *Second Report and Order* we stated that, for simultaneous auctions, our preferred stopping rule was that all markets would close simultaneously if a single round passed in which no new acceptable bids are submitted for any license. We retained the discretion, however, to announce at any point during a multiple round auction that the auction would end after a specified number of rounds.²⁹

13. *Petitions.* Southwestern Bell Corporation (SBC), the GTE Service Corporation (GTE), and the Association of Independent Designated Entities (AIDE) argue that the three-stage Milgrom-Wilson activity rule is unnecessarily complex and should be simplified or eliminated.³⁰ SBC points out that the three-stage Milgrom-Wilson activity rule would require the Commission to track a large number of upfront payments and eligibility levels, and notes that the software the Commission intends to develop to track activity levels may not be developed in time. SBC states that allowing five automatic waivers, as the Commission proposes to do, does not reduce the uncertainty and expense which the activity rule imposes and may make bidding strategy more complex.³¹ GTE states that the upfront payment formula, when combined with the activity rule, unnecessarily restricts bidder flexibility.³² GTE states that the activity rules limit the ability of bidders to revise their plans in the course of the auction, particularly if information revealed during the latter stages of the auction causes a bidder to become interested in additional properties. The activity rules, according to GTE, discourage qualified entities from participating as fully as they might otherwise do, so that some licenses may not be awarded to the entity placing the highest value on them.³³ SBC urges the Commission to alter the stopping rule to allow the agency to issue a notice that bidding will close after a given number

¹⁹ *Id.*;

²⁰ Thumb Cellular Petition at 3-4.

²¹ See *Memorandum Opinion and Order* at ¶¶ 10-18.

²² 47 U.S.C. § 309(j)(1).

²³ See *Second Report and Order* at ¶¶ 55-56.

²⁴ See petition of Millin Publications, Inc. (Millin).

²⁵ *Fifth Report and Order* at n.8.

²⁶ *Second Report and Order* at ¶ 144.

²⁷ The number of "MHz-pops" is calculated by multiplying the population of the license service area by the amount of spectrum authorized by the license.

²⁸ *Id.* at ¶ 133.

²⁹ *Id.* at ¶ 132.

³⁰ SBC Petition at 1-6; GTE Petition at 6-11; AIDE Petition at 12-13.

³¹ SBC Petition at 3-6.

³² GTE Petition at 7.

³³ *Id.* at 9-10.

of rounds.³⁴ GTE and SBC ask the Commission to adopt a simpler activity rule, such as a requirement that bidders be active on a single license in each round.³⁵ AIDE urges that the activity rules be withdrawn, at least in the case of designated entities.³⁶ PacBell counters that the three-stage Milgrom-Wilson activity rule avoids delay, provides meaningful information, and allows bidders the flexibility to react to that information, and that software is available to help ensure that the Milgrom-Wilson rule will not be hard to implement.³⁷

14. *Discussion.* As we noted in the *Second Report and Order*, the decision to use activity rules and the choice among activity rules involve tradeoffs among the speed of the auction, bidder flexibility, and simplicity.³⁸ The petitioners raise no issues relating to activity rules that we did not consider carefully in the *Second Report and Order*.³⁹ We see nothing in the petitions for reconsideration to cause us to change our opinion concerning the choices we made among these goals.

15. We do not believe that the Milgrom-Wilson activity rules will excessively restrict bidders' flexibility to bid for desired combinations of licenses or cause licenses to be awarded to bidders who value them less than other bidders. The rules were expressly designed to counteract the incentive to delay serious bidding that occurs in simultaneous auctions, without unduly limiting bidders' flexibility to pursue backup strategies and to use new information.⁴⁰ The restrictions placed on bidders at the beginning of the three-stage auction procedure are modest. In the first stage, to retain full eligibility a bidder need only bid on, or have the highest bid from the previous round on, licenses representing at least one-third of the MHz-pops he or she ultimately hopes to win. In the second stage, the bidder must bid on, or hold the high bid on, two-thirds of the MHz-pops he or she hopes to win. Only in the third stage are bidders required to bid on the full amount of MHz-pops they hope to acquire.⁴¹ Bidders may shift bids among any combination of licenses from round to round.⁴² Paul Milgrom points out that at the shift from stage I to stage II there will be no more than three bidders on an average license, and at the shift to stage III there will be at most bidders on an average license.⁴³ Because the progression to higher stages imparts such information, it gives the bidders important signals concerning the state of bidding. By stage III, bidding should be rapidly drawing to a close, and any major shifts in strategy should already have been implemented. Bidders who believe that they may want to expand their purchases if prices are unexpectedly low can guarantee their ability to do so by making a sufficiently high upfront payment.

16. In the *Second Report and Order*, we also stated our intention to reduce the complexity faced by bidders by developing bidding software and making it available to all

bidders in auctions in which a Milgrom-Wilson activity rule is used.⁴⁴ SBC expresses concern that the software may not be available in time. Software was in fact developed in time for the July nationwide narrowband auction, and performed successfully in that auction. In light of that success, we have no doubt that appropriate software will also be available for the remaining narrowband and broadband auctions.

17. Finally, we remind petitioners that, in the *Second Report and Order*, we adopted the three-stage Milgrom-Wilson activity rules only as a preferred option.⁴⁵ We deferred to later, service-specific Orders the choice of actual rules to be used in auctions for individual services, depending, as discussed in the *Second Report and Order*, on the characteristics of the services and our experience with the conduct of auctions. In addition, we retained the flexibility to decide on an auction-by-auction basis, and to announce by Public Notice before the auction, whether to use an activity rule, and if so what type of rule.⁴⁶ Thus, if experience shows that the Milgrom-Wilson rules are unduly difficult to administer, we may shift to other activity rules, including the one recommended by petitioners requiring only that bidders be active on a single license in each round. We also expressly retained the discretion, requested by SBC, to announce at any point during a multiple round auction that the auction will end after some specified number of additional rounds.⁴⁷

18. In the *Second Report and Order* the Commission also retained the ability to speed up an auction by announcing at any time during an auction that the next stage of the auction will begin in the next bidding round.⁴⁸ In this Order the Commission wishes to make explicit that this discretion could be exercised by employing an alternative rule for moving from one stage of the auction to the next. The Commission will announce by Public Notice prior to an auction its intent to use an alternative rule. One possible alternative rule would be that the auction will move to the next stage if in each of some fixed number of rounds, bidding activity is below some level measured as the ratio of new bids (measured in terms of MHz-pops) to available licenses (measured in terms of MHz-pops). The ratio of new bids to licenses may be a better measure of bidding activity than the percentage of total licenses on which the high bid has increased (measured in terms of MHz-pops) because it accounts for the possibility that bidding may be concentrated on a few licenses. In contrast, the latter measure indicates the same level of bidding activity regardless of how many bids are made on a given set of licenses.

B. Suggested Opening Bid

that a bidder would have more flexibility with the three-stage Milgrom-Wilson rule than with another possible activity rule, that of starting the bidding with the third stage of the Milgrom-Wilson rule. See *Second Report and Order* at ¶ 142.

³⁴ *Id.*

³⁴ SBC Petition at 5.

³⁵ GTE Petition at 10-11; SBC Petition at 5.

³⁶ AIDE Petition at 12-13.

³⁷ PacBell Opposition at ii.

³⁸ *Second Report and Order* at ¶ 134.

³⁹ For instance, GTE notes that a bidder may be interested in some properties only if it can also acquire other key properties. GTE states that "under the modified Milgrom-Wilson rule, the bidder could be forced to choose between dropping out of the auction prematurely or staying active in markets that may prove to be less valuable if the bidder loses out in the other key markets." GTE Petition at 9-10. The *Second Report and Order* considers the same situation of interdependency and concludes

⁴⁰ *Id.*

⁴¹ *Id.* at ¶ 137.

⁴² *Id.* at ¶ 136.

⁴³ *Ex parte* submission of Paul Milgrom, June 21, 1994 at 2.

⁴⁴ *Second Report and Order* at ¶ 143.

⁴⁵ *Second Report and Order* at ¶ 144.

⁴⁶ *Id.* at ¶ 133.

⁴⁷ *Id.* at ¶ 132.

⁴⁸ *Id.* at n.110.

19. In the *Second Report and Order*, we stated that in multiple round auctions the Commission will generally specify minimum bid increments to speed the progress of the auction.⁴⁹ The bid increment is the amount or percentage by which the bid must be raised above the previous round's high bid in order to be accepted as a valid bid in the current round. We retained the discretion to use a "suggested" minimum bid increment rather than a required bid increment.⁵⁰

20. In the recent nationwide narrowband auctions, it became apparent that the Commission may need further tools to avoid unnecessarily long auctions. In order to expedite the auction process further, we also reserve the discretion to establish a suggested opening bid on each license in addition to the minimum bid increment.⁵¹ Where we adopt a suggested opening bid, initial bids will have to be above the minimum bid increment but may be below the suggested opening bid. Generally, we will establish suggested opening bids in the range of \$.03 - \$.20 per pop per MHz for each license. This suggested opening bid will provide bidders with an incentive to start bidding at a substantial portion of the license value, thus ensuring a rapid conclusion of the auction.

C. Commission Discretion During Auctions

21. In the *Second Report and Order*, as discussed *supra*, we chose our primary auction methodology, but noted that no one auction design is optimal for all auctionable services. We stated that we would adopt auction rules for specific services in subsequent Reports and Orders, based on criteria established in the *Second Report and Order*. We further stated that when we announced individual auctions for specific services, we would specify more detailed procedures for those auctions in a Public Notice, but that those procedures also would be governed by criteria set forth in the *Second Report and Order*.⁵² Our rules also afforded flexibility with respect to some auction procedures, such as those governing the duration of bidding rounds, minimum bid amounts, and stopping rules, and we stated that we might make decisions regarding such matters during the course of an auction.⁵³

22. *Petition*. The National Association of Business and Educational Radio, Inc. ("NABER") asserts that the auction rules do not comply with the public interest and the Administrative Procedure Act⁵⁴ because they allow the Commission to circumvent the normal notice and comment procedure, and that the rules prevent providers of service from devising a business plan and auction strategy in advance.⁵⁵ NABER states that the Commission should eliminate its discretion to change the auction rules or procedures during a particular auction, that bidders need to know the rules which will apply for a particular service auction, and that interested parties should have the opportunity to provide meaningful comment before the final

auction rules for particular services and frequencies are set.⁵⁶ NABER asserts that should the Commission change bidding methods in mid-stream without prior public comment, the Commission would violate the notice and comment rulemaking requirements of the Administrative Procedure Act, by its failure to keep a record and analyze and consider all relevant matter regarding those new rules.⁵⁷

23. *Discussion*. We believe that the process we have used to adopt auction designs and implementation procedures and the rules themselves fully comply with the Administrative Procedure Act. In the NPRM in this docket, we provided notice of the auction designs we were considering and requested comment on issues of auction design and procedure. We received voluminous public comment on these issues. In the *Second Report and Order*, we carefully considered all comments and suggestions concerning a wide variety of proposed auction designs, including the comments and proposals of numerous experts in auction theory. We have established a broad framework for the conduct of license auctions, specifying a menu of auction designs and procedures from which we will choose for individual auctions. We have identified our preferred options, and have discussed the circumstances in which we believe the various options will be most appropriate in order to serve our statutory goals, and which are therefore most likely to be chosen. After the *Second Report and Order* was issued, we made, in addition, more specific choices of auction designs for particular services in Orders dealing with those services.⁵⁸ We have also established application, payment, and penalty procedures for individual services.⁵⁹ The procedures, we believe, afforded members of the public all of the procedural rights to which they are entitled under the Administrative Procedure Act.

24. Our rules, however, must also be flexible enough so that we can adjust our procedures to fit the circumstances of individual auctions. We will not know until we have gained some experience with simultaneous multiple round auctions exactly what values of such parameters as bidding increments and triggers for movement to the next auction phase work best under what circumstances. Consequently, we believe that it is important for those running the auctions to be able to use information generated in the early auctions and in the early rounds of individual auctions. Further, it may be important to be able to respond to the behavior of bidders in the course of particular auctions. We may find it desirable to allow more time for consultation between bidding rounds in complex auctions, for instance, or, in light of the statutory requirement to issue licenses expeditiously, to increase the bidding increment to hasten the conclusion of an auction if the auction is proceeding slowly. Clearly, notice and comment procedures would be unworkable in such cases. The flexibility that our rules permit us is analogous to the *ad hoc* decisional authority that may be exercised within other types of li-

⁴⁹ *Second Report and Order* at ¶ 124.

⁵⁰ Under a suggested minimum bid increment rule, the auction would close if no bids or only one bid was submitted that was above the minimum bid increment. *Id.* at n.102.

⁵¹ See *ex parte* submission of Paul Milgrom, May 19, 1994.

⁵² *Id.* at ¶ 68.

⁵³ *Id.* at ¶¶ 123, 126, 132.

⁵⁴ See Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*

⁵⁵ NABER Petition at 2.

⁵⁶ *Id.* at 8.

⁵⁷ *Id.* at 9; see 5 U.S.C. § 553.

⁵⁸ See *Third Report and Order* at ¶¶ 16-40, *Fourth Report and Order* at ¶¶ 11-18, and *Fifth Report and Order* at ¶¶ 27-57.

⁵⁹ See *Third Report and Order* at ¶¶ 41-60, *Fourth Report and Order* at ¶¶ 19-29, and *Fifth Report and Order* at ¶¶ 58-92.

censing proceedings, and our discretion here is similarly constrained by the general framework and standards embodied in our rules. The latitude remaining to the Commission to alter auction procedures is, however, necessary to ensure that we can make improvements as we become aware of the need for them, and that we can manage auctions efficiently. The Commission will exercise its discretion in a manner consistent with our clearly articulated goals and the general procedures we have established.

25. We have also taken care to safeguard bidders' interests. During the course of an auction only minor adjustments in procedures are permitted that will necessitate no major changes of strategy on their part. Further, we have stated clearly which procedures are, and which are not, subject to change during the course of an auction, so that bidders will know what kinds of changes to expect and to prepare for. We have stated that when we announce auctions for a particular services by public notice, we will also announce the procedures to be used in those auctions.⁶⁰ We believe that this approach will provide prospective bidders with ample information to plan rational bidding strategies.

26. Finally, although the Commission has never before used auctions as a licensing method, we note that our auction procedures afford as much, or more, detailed guidance to bidders than is usually provided in advance of an auction. For example, in conventional oral auctions the auctioneer customarily has the discretion to alter bid increments and other procedures at will in any manner and at any time during an auction. As in other types of auctions, we believe that it will be critically important to the success of our auctions to leave the Commission some discretion to fine-tune auction procedures between auctions and, in some cases, on an *ad hoc* basis, during the course of an auction. Accordingly, we affirm our original decisions to adopt rules that afford the Commission some flexibility to modify its procedures during the course of an auction, within the scope of the options we have delineated and under the circumstances described above.

D. Treatment of Upfront Payments

27. In the *Second Report and Order* we required bidders to tender a substantial payment in advance of the auction in order to deter frivolous or insincere bidding.⁶¹ Upfront payments were also intended to provide a source of funds for collection of penalties for bid withdrawal.⁶² The amount of the upfront payment was related to the level of eligibility the bidder wished to establish, measured in terms of the population and amount of spectrum encompassed by the licenses on which the bidder was permitted to bid. In some cases the upfront payment could amount to millions of dollars.⁶³ We required that upfront payments be submitted prior to bidding, and we did not permit use of letters of credit or Treasury bills for upfront deposits due to administrative difficulties in accepting payment in such forms, at least until the Commission has more experience in conducting auctions.⁶⁴ We stated that upfront payments made

by a winning bidder would be applied to satisfy its down payment obligations, and that losing bidders' upfront payments would be returned if they wished to withdraw from further bidding.⁶⁵

28. *Petitions.* GTE asserts that the Commission should adopt an interest-bearing evergreen deposit procedure for upfront deposits.⁶⁶ GTE states that, since the Commission is not currently authorized to establish interest-bearing accounts, substantial sums of money could be tied up in upfront deposits without any accrual of interest for substantial periods of time. GTE asserts that maximum bidder flexibility can be achieved by allowing bidders to add or withdraw deposit funds during the course of the auction. GTE states that the Commission needs to ensure that it has the requisite authority to permit the accumulation and payment of interest.

29. AIDE states that when a winning bidder's upfront payments, less bid withdrawal penalties, exceed the required deposit, the excess upfront payment should remain available for crediting to another auction or for refund to the winning bidder.⁶⁷ AIDE points out that, in the case of designated entities, the required deposit is only 10 percent. AIDE notes that the Commission has stated that it will apply this policy for losing bidders, and as a matter of equal protection the Commission should apply the same policy to winning bidders with excess upfront payments.⁶⁸

30. AIDE requests clarification of footnote 133 in the *Second Report and Order*.⁶⁹ Footnote 133 reads:

For example, an entity that is interested in bidding on several 30 MHz PCS licenses with a goal of providing service to a population of at most 50 million should make an upfront payment of \$30 million (\$0.2 x 30 MHz x 50,000,000). That bidder will not be permitted to bid (at any time) in the auction, or be permitted to win, 30 MHz licenses covering more than 50 million pops.

31. *Discussion.* Allowing bidders to add funds to upfront deposits in order to increase their eligibility level, or to withdraw funds from upfront deposits, as GTE recommends, would add greatly to the complexity of the Commission's administrative task. The Commission would have to keep track of changes in eligibility due to changes in upfront payments, as well as to changes in bidders' activity levels, and would have to ascertain that fund transfers had taken place before permitting bidders to bid at the levels to which the additional payments entitled them. Because of the short intervals between bidding rounds, delays in the transfer of funds would likely create problems for both bidders and the Commission. For these reasons, we believe it is prudent to require bidders to submit upfront payments that represent the maximum level of bidding that they anticipate before the beginning of the auction. Bidders can always ensure that they will be able to expand their bid-

⁶⁰ *Second Report and Order* at ¶ 68.

⁶¹ *Second Report and Order* at ¶ 171.

⁶² *Id.* at ¶ 176.

⁶³ *Id.* at ¶ ¶ 172, 173.

⁶⁴ *Id.* at ¶ ¶ 182, 184, 185.

⁶⁵ *Id.* at ¶ 187, n.140.

⁶⁶ GTE Petition at 11-13.

⁶⁷ AIDE Petition at 15.

⁶⁸ *Id.* at 16.

⁶⁹ *Id.* at 13.

ding above their originally anticipated level by submitting a sufficiently large upfront payment and maintaining a high activity level.

32. We agree with AIDE that winners' upfront deposits, in excess of their required down payment deposits and any penalties they may owe, should be refunded expeditiously. We intend to refund excess upfront deposits of all bidders as soon as possible. We will not apply excess upfront deposit balances to subsequent auctions, however, due to the additional administrative difficulty of tracking the funds.

33. With respect to AIDE's request for clarification, we clarify that footnote 133 means that in any round of the auction, a bidder who has made an upfront payment of \$30 million may bid on, or hold the high bid from the previous round on, 30 MHz licenses in markets with a combined population totaling not more than 50 million. The specific licenses on which the bidder submits bids may vary from round to round, but the total MHz-pop ceiling cannot be exceeded in any single round.

E. Default Penalty

34. In the *Second Report and Order* the Commission imposed a default penalty for withdrawing a bid after a simultaneous multiple round auction has closed.⁷⁰ This default penalty was set at 3 percent of the amount of the winning bid the next time the license is offered by the Commission, or 3 percent of the amount of the defaulting bidder's bid, whichever is less. The default penalty would be imposed in addition to the bid withdrawal penalty, which was set at the difference between the amount bid and the amount of the subsequent winning bid. We stated that the default penalty was intended to provide an incentive for bidders who wished to withdraw their bids to do so before the close of the auction. We stated that such a penalty was appropriate because a withdrawal that occurs after an auction closes is likely to be more harmful than one that occurs before closing. We stated that if a withdrawal occurs after the auction closes, other bidders will have little opportunity to revise their strategies, and the likelihood will be lower that the licenses will be awarded to those who value them most. We also stated that default imposes on the government the extra costs of re-auctioning the license.

35. *Petition.* AIDE asserts that the default penalty will produce a windfall to the Treasury if the winning bid exceeds the defaulting bid by more than 3 percent.⁷¹ AIDE states that the defaulting bidder should pay no penalty if the second bid exceeds the defaulting bid by 3 percent or more, and that if the second bid exceeds the defaulting bid by less than 3 percent, the defaulting bidder's penalty should be the difference between the second winning bid and 103 percent of the defaulting bid.

36. *Discussion.* We believe that it is appropriate to charge the full 3 percent default penalty in addition to the bid withdrawal penalty whether or not the winning bid in the second auction exceeds the defaulting bid. As we stated in the *Second Report and Order*, the function of the default penalty is to encourage bidders who plan to withdraw their

bids to do so before the close of the auction.⁷² The additional costs to the Commission and to other bidders of auctioning the license a second time, and the increased likelihood that the license will not be won by the bidder who values it most, are incurred as a consequence of default regardless of the level of the bids. Even if the winning bid is higher than the defaulting bid, we have no reason to believe that it is higher than the winning bid would have been had the defaulting bidder withdrawn before the close of the auction, nor have we reason to believe that a high winning bid compensates for the undesirable effects of default. Consequently, we retain the default penalty as set forth in the *Second Report and Order*.

F. Disclosure of Bidding Information

37. In the *Second Report and Order* the Commission recognized the informational benefits to be gained from releasing bidder identities during an auction, but concluded that such information should not be released because "the risk of collusion and strategic manipulation outweighs the benefits of the additional information." Instead the Commission adopted an intermediate approach pursuant to which the bidder identification numbers and bid amounts for each bidder will be released at the end of each round of bidding. This approach provides bidders with useful information without incurring excessive risks of collusion and strategic manipulation.⁷³

38. *Petitions.* GTE and Southwestern Bell request that the identities of bidders be released during the course of the auction. GTE requests that the identity of the bidder associated with each bidder identification number be disclosed during the bidding process.⁷⁴ SBC states that the Commission should announce both the identity of the highest bidder and the bid amount for each round of the auction.⁷⁵ GTE argues that a bidder must construct a strategy based on its own valuation of the spectrum as well as estimates of its competitors' valuations and past bids, and that a fundamental component of this exercise is knowledge of who the competitors are. GTE notes that the Commission's sole justification for not furnishing information about the identity of bidders is a concern for collusion, and states that the *Second Report and Order* includes other mechanisms for minimizing collusion. GTE states that increases in available information raise the level of competition and the efficiency of license assignments, and that access to bidder identification information may increase revenue from the auction process while ensuring award to the bidder who most highly values the license.⁷⁶ SBC argues that the decision to keep winning bidder identities secret creates an opportunity for collusive behavior because cartels could coordinate activities and punish violators without detection. SBC notes that if the identity of all bidders is known, the Commission and bidders need not be concerned with protecting bidders' identity. SBC states that knowing who the successful bidders are affects other bidders' ability to assess the accuracy of their valuation of the spectrum and allows them to ascertain that an aggregation of licenses is underway which might pose a competitive

⁷⁰ *Second Report and Order* at ¶ 154.

⁷¹ AIDE Petition at 14.

⁷² *Second Report and Order* at ¶ 154.

⁷³ *Id.* at ¶ 158.

⁷⁴ GTE Petition at 4-6.

⁷⁵ SBC Petition at 8-10.

⁷⁶ GTE Petition at 5-6.

threat. MCI states that because of the potential for bidder collusion and strategic manipulation, bidder identities should not be revealed.⁷⁷

39. *Discussion.* Arguments in favor of disclosing bidder identities primarily turn on the value of the information in improving the quality of bids. Some auction experts argue that bidders' estimates of license values can be improved by comparing them to the valuations of their competitors.⁷⁸ Bidders' valuations of licenses may also be highly dependent on knowing the identity of neighboring carriers, especially regional leaders and competitors, and on knowing the manner in which complementary licenses are likely to be used and the compatibility of standards both inside and outside their desired service areas. Maximizing information available to bidders may increase bids by decreasing bidders' incentives to reduce their bids to avoid the "winner's curse," the tendency for the bidder who most overestimates the value of the item for sale to win an auction. Revealing bidder identities may facilitate awarding licenses to those who value them most highly by providing more information to bidders. More accurate valuation of licenses by bidders can thus improve the efficiency of license assignments. In addition, publicly disclosing the identity of other bidders may encourage vigorous bidding for licenses. Releasing bidder identities may increase interest in and media coverage of the auctions.

40. Our experience with the first narrowband PCS auction showed that preventing bidder identities from being revealed can be extremely difficult. In addition, if some but not all bidders know other bidders' identities, those bidders have an advantage in the quality of information available to them and in the potential ability to thwart others' bidding strategies. Concealing bidder identities may give an advantage to larger bidders that have the resources to devote to discovering other bidders' identities.

41. As we noted in the *Second Report and Order*, however, releasing the identities of high bidders may foster strategic manipulation, such as bidding up the prices of licenses needed by rivals, and may facilitate collusion.⁷⁹ Some auction experts argue that anonymity makes it harder to target a firm for strategic hold-up because the bidding and aggregation strategies of specific competitors cannot be easily detected.⁸⁰ Concealing bidder identities makes initiating collusive arrangements during the course of an auction more difficult because bidders will not easily be able to identify the parties against whom they are bidding, unless those parties voluntarily reveal their identities. On the other hand, concealing bidders' identities may not be critical to preventing collusion during an auction; existing antitrust laws and the FCC's collusion rules should be adequate to prevent collusive conduct. In any event, under an anonymous bidding scenario, if bidders want to collude they can simply disclose their bidder identification numbers to one another before the auction.

42. Because of the advantages of providing more information to bidders and the difficulties involved in ensuring that bidder identities remain confidential, we will generally release the identities of bidders before each auction. However, we recognize that experts disagree on the potential for knowledge of bidders' identities to facilitate

collusion and other strategic behavior. Consequently we wish to have the flexibility to conceal bidder identities if further experience shows that it would be feasible and desirable to do so. We may also wish to test the effects of releasing identities of bidders. Consequently we are reserving the option to withhold bidder identities on an auction-by-auction basis. If we decide to withhold bidder identities for a particular auction, we will announce that decision by a service-specific auction Order. We will announce by Public Notice prior to each auction whether the identities of bidders will be made public in that auction.

⁷⁷ MCI Comments at 3.

⁷⁸ See e.g. comments of PacBell on NPRM, Attachment by Paul R. Milgrom and Robert B. Wilson at 21.

⁷⁹ *Second Report and Order* at ¶ 158.

⁸⁰ Comments of NYNEX on NPRM, attachment by Robert G. Harris and Michael L. Katz, "A Public Interest Assessment of Spectrum Auctions for Wireless Telecommunications Services" at 9.

G. Standby Queue

43. *Petition.* GTE states that for 10 MHz blocks in broadband PCS the Commission should adopt the "standby queue" bidding mechanism considered in experiments sponsored by the National Telecommunications and Information Administration and conducted at the California Institute of Technology.⁸¹ The standby queue allows parties seeking individual licenses to coordinate their bids in order to beat a bid for a combination of licenses. GTE asserts that the standby queue would allow bidders seeking to combine smaller blocks into a larger set of frequencies, or to combine blocks on a geographic basis, to obtain information about the status of bidding that would permit them to bid rationally and efficiently.

44. *Discussion.* The standby queue is a mechanism to be used in conjunction with combinatorial auctions. In the *Fifth Report and Order* we concluded that the disadvantages of combinatorial bidding were likely to outweigh the advantages for auctions of broadband PCS licenses, and we adopted simultaneous multiple round bidding as our auction methodology for broadband PCS licenses. Nevertheless, we left open the option to use combinatorial auctions if simultaneous multiple round auctions do not result in efficient aggregation of licenses, and if there are significant advances in the development of combinatorial auctions.⁸² Although we have no current plans to use combinatorial auctions, if in future we do adopt such an auction methodology we will consider the use of a standby queue mechanism.

H. Filing Fees

45. *Petition.* William E. Zimsky (Zimsky) states that the rule imposing filing fees for the filing of short-form applications for auctions should be deleted.⁸³ Zimsky asserts that because there is no provision in 47 U.S.C. § 158(g) for imposing the filing fee for the new short-form application, the Commission lacks the statutory authority to impose such a fee. Zimsky also asserts that, even if the Commission has such statutory power, to impose a filing fee on all bidders is unreasonable because the filing fee was designed to recoup the costs of fully processing the application. Since only auction winners will submit long-form applications and have their applications scrutinized, the losing bidders do not receive this service. Consequently, the Commission's proposed scheme is unconstitutional, he argues, because a user fee which is not reasonably related to, or a fair approximation of, the cost incurred by the government in providing the service for which the fee is assessed, effects a taking of applicants' property without just compensation, in violation of their fifth amendment rights. Zimsky cites *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163 (1980); *United States v. Sperry Corp.*, 493 U.S. 52, 60 (1989) in support of his argument.

46. *Discussion.* The Commission has requested express statutory authority to impose section 8 application fees for short form applications. In the absence of such express

authority, we do not currently impose fees for short-form applications. However, long-form applications in most services are subject to fees under section 8. Consequently we find Zimsky's petition to be moot, and we dismiss it.

I. Waiver Requests in Short-Form Applications

47. Cable & Wireless, Inc. (CWI) asks that the Commission reconsider its rules that appear to mandate dismissal of the short-form application, (Form 175) that do not certify compliance with the foreign ownership provision of Section 310 of the Communications Act, notwithstanding the filing of a request for waiver or other relief.⁸⁴ CWI asserts that the Commission should permit participation at auction where the applicant certifies to the pendency of such a waiver request. In considering the acceptance for filing of short-form applications, the Commission will accept certifications that state that a request for waiver or declaratory ruling concerning the requirements of section 310 is pending.⁸⁵

J. Rules Prohibiting Collusion

48. In order to prevent collusion in bidding, the Commission in the *Second Report and Order* stated, . . . bidders will be required to identify on their short-form applications any parties with whom they have entered into any consortium arrangements, joint ventures, partnerships or other agreements or understandings which relate in any way to the competitive bidding process. Bidders will also be required to certify on their short-form applications that they have not entered into any explicit or implicit agreements, arrangements or understandings of any kind with any parties, other than those identified, regarding the amount of their bid, bidding strategies or the particular properties on which they will or will not bid. . . . After such applications are filed and prior to the time that the winning bidder has made its required down payment, all bidders will be prohibited from cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies with other bidders, unless such bidders are members of a bidding consortium or other joint bidding arrangement identified on the bidder's short form application.⁸⁶

49. *Petition.* BET Holdings, Inc. (BET) states that the above requirements prevent bidders from entering into any new agreements, joint ventures or similar arrangements with other entities after filing a short-form application.⁸⁷ BET claims that as a consequence bidders may be locked into bidding arrangements significantly before the commencement of the auctions, and will be unable to modify their bidding strategies, consult with experts or others, or enter into additional alliances with new parties any time after the filing of the short-form application. BET states that the collusion rule is an unrealistic constraint on lawful business behavior. For example, according to BET, if a company does not identify affiliates or others with whom it must consult, the company would be forbidden from solic-

⁸¹ GTE Petition at 13-14.

⁸² *Fifth Report and Order* at ¶ 35.

⁸³ See William E. Zimsky Petition.

⁸⁴ See petition of CWI.

⁸⁵ On January 5, 1994, CWI also filed a petition seeking a declaratory ruling that the public interest warrants grant of common carrier radio license applications to U.K. citizens and/or corporations that possess ownership interests in excess of

the foreign ownership benchmarks in Section 310(b)(4) of the Communications Act. We expect to address the merits of this petition in a separate Declaratory Ruling.

⁸⁶ *Second Report and Order* at ¶ 225.

⁸⁷ BET Petition at 10.

iting research, sharing resources, or discussing its bids until after the winning bidder tenders its down payment.⁸⁸ BET requests that the Commission rely on antitrust law as a safeguard against collusion.

50. *Discussion.* While we intend to rely primarily on the antitrust laws to prevent bidding collusion, we believe that the anticollusion rules in the *Second Report and Order* will provide an important additional tool that will enable the Commission to detect, prevent, and punish collusion. To prevent and detect collusion, we believe that it is important to have clearly stated rules concerning the entities with whom communication about bidding strategies is permissible. The requirement that an entity identify at the time of the short-form application those affiliates, subsidiaries, or others with whom it has agreements concerning bidding, and the prohibition of communication concerning bidding with entities identified by other bidders, serve this purpose and are not particularly burdensome. Similarly, prohibiting additional agreements and alliances concerning bidding between applicants bidding for the same licenses, after applications have been filed and the identities of all applicants are known, seems a prudent deterrent to collusion that should have only a minimal and temporary effect on bidders' flexibility. We wish to make explicit our intention that the prohibition extend to post-application settlement agreements and discussions concerning settlement agreements.

51. We do believe, however, that our prohibition on communication among bidders and formation of agreements among bidders after applications have been filed may have been excessively broad in that it includes communications and agreements with bidders who are not bidding against each other, and so may prevent useful agreements that have no effect on the competitiveness of bidding. Consequently, we are modifying our collusion rules, which currently prohibit bidders from communicating with one another after short-form applications have been filed regarding the substance of their bids or bidding strategies and which also prohibit bidders from entering into consortium arrangements or joint bidding agreements of any kind after the deadline for short-form applications has passed. In order to permit certain bidders to respond to higher than expected license prices by combining their resources during an auction, we will now permit bidders who have not filed Form 175 applications for any of the same licenses to engage in discussions and enter into bidding consortia or joint bidding arrangements during the course of an auction. We conclude that where bidders have not applied for any of the same licenses there is little risk of anticompetitive conduct and therefore we believe that it is appropriate to relax our collusion rules to permit bidders in this context to have greater flexibility to increase their competitiveness in the auction by combining their resources, provided that no change of control of any applicant takes place.

52. In addition, we now believe that entering into consortium arrangements or adding equity partners during an auction may have a useful effect in enabling bidders to acquire the capital necessary to bid successfully for licenses. We have concluded that formation of consortia or

changes in ownership after the filing of short-form applications will not necessarily have anticompetitive effects, provided they do not involve parties that might have bid against each other and do not result in a change in control of the applicant. Consequently, we wish to modify our rules regarding amendments to short-form applications. As a result of our experience in the nationwide narrowband PCS auction, we believe that it is necessary to allow applicants to amend their FCC Form 175 applications to make ownership changes after the filing deadline has passed, provided such changes do not result in a change in control of the applicant. Permitting such amendments will provide bidders with flexibility to seek additional capital after applications have been filed, while ensuring that the real party in interest does not change. Accordingly, we will modify Section 1.2105(c) to permit applicants to amend their FCC Form 175 applications to reflect ownership changes that do not result in a change in control of the applicant, provided the parties have not filed Form 175 applications for any of the same licenses. Such changes shall not be regarded as major amendments to an application, provided they do not result in a transfer of control of the license or the applicant and do not change control of the company.

53. Situations may arise in which an applicant has some common ownership interest with another bidder. We wish to clarify that, unless that other entity is expressly identified as an entity with whom the applicant has an agreement concerning bidding, we will prohibit communication concerning bidding with that bidder, as described in the *Second Report and Order*, even if the other bidder is identified on the applicant's short-form application as having some common ownership interest with the applicant. We will retain the anticollusion rules as set forth in the *Second Report and Order*, with these clarifications.

K. Information Disclosure by Applicants and Licensees

54. *Petitions.* Two petitions deal with the amount of information auction participants are required to disclose. GTE requests that the Commission require applicants to provide full ownership disclosure in their short-form applications.⁸⁹ GTE asserts that by enabling the Commission and competing applicants to assess the legitimacy of auction applicants, full disclosure facilitates the award of licenses to qualified and eligible service providers. According to GTE, full disclosure also promotes open and informed bidding decisions.

55. SBC asks that the Commission minimize requirements for disclosure of information upon transfer of licenses.⁹⁰ SBC states that the point of transfer disclosures is to "prevent unjust enrichment as a result of the methods employed to issue licenses and permits."⁹¹ SBC asserts that rules designed to prevent unjust enrichment should be solely applicable, if at all, to designated entities that receive special accommodations, since the risk of unjust enrichment is high only in auctions where such special accommodations are provided. SBC asserts that the formation of reasonable and efficient alliances would be discouraged by the mandate to expose the details of the alliance to competitors. SBC particularly objects to the requirement that

⁸⁸ *Id.* at 11.

⁸⁹ GTE Petition at 2-4.

⁹⁰ SBC Petition at 6-8.

⁹¹ *Id.* at 6 (citing 47 U.S.C. §309(j)(4)(E)).

any management agreements or consulting contracts be filed. SBC seeks clarification that the disclosure requirements will apply only to the licensees which either have not begun to offer service or have only offered service for some minimal period of time.

56. *Discussion.* With respect to ownership disclosure in short-form applications, in the *Second Report and Order* we decided to require applicants to furnish only minimal information in short-form applications and bidder certifications prior to auctions in order to reduce administrative burdens and minimize the potential for delay.⁹² Further ownership disclosure requirements, however, were adopted on a service-specific basis in later Reports and Orders.⁹³ We believe that GTE's concerns are fully met by these requirements.

57. As for transfer disclosure requirements, Congress in the Budget Act required us to develop and test alternative auction designs.⁹⁴ We noted in the *Second Report and Order* that in addition to allowing detection of unjust enrichment, transfer disclosure requirements would provide data necessary for evaluation of our auction designs.⁹⁵ We noted that the reporting requirements would allow us to monitor our compliance with the Congressional directive in Section 309(j)(3)(B) to 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. . . ."⁹⁶ The information will be useful in meeting our statutory obligation to report to Congress on the outcome of the auctions.⁹⁷ The information we acquire from transfer disclosures, including purchase price and other aspects of the sale contracts and management agreements, will enable us to determine the ultimate distribution of licenses and the value of the spectrum for particular uses, and will permit comparisons between licenses awarded with and without designated entity provisions. Such analyses require collection of data from all licensees, not just from designated entities or those who have not begun to offer service or have only offered service for a short period of time. As we stated in the *Second Report and Order*, we do not expect the transfer disclosure requirements to be burdensome to licensees because the documents to be submitted will have been prepared for other purposes in any event. Moreover, parties may request confidential treatment of competitively sensitive information pursuant to Sections 0.457 and 0.459 of our Rules.⁹⁸ Consequently we will retain transfer disclosure requirements for all transfers of licenses obtained by competitive bidding.

L. Application-Processing Rules

58. In the *NPRM* in this proceeding the Commission stated:

In order to avoid needless duplication, we propose that the following general filing and processing rules apply to all PCS: Sections 22.3-22.45 and 22.917(f), and 22.918-22.945, 47 C.F.R §§ 22.3-22.45, 22.917(f), and 22.918-22.945. For those PCS applicants who file on Form 574, we believe that Sections 90.113-90.159 of our rules, 47 CFR §§ 90.113-90.159, could be used to process those applications with appropriate modifications.⁹⁹

59. *Petition.* AIDE asserts that the Commission acted improperly in proposing substantive PCS application-processing rules in the *NPRM* because, it argues, such rules are outside the scope of this rulemaking, which is limited to implementation of the competitive bidding requirements of §309(j) of the Communications Act.¹⁰⁰ AIDE argues that the Commission's proposal of application-processing rules is legally insufficient to constitute a valid notice of proposed rules, and that some of the rules cited have no immediate applicability to PCS service. AIDE asserts that in the *Second Report and Order* the Commission failed to respond to the merits of the arguments concerning filing and processing rules in AIDE's comments on the *NPRM*. AIDE concludes that the Commission needs to issue a supplemental *Notice of Proposed Rulemaking* to adopt license-processing rules for PCS.

60. *Discussion.* The competitive bidding process is a means of assigning licenses, and rules and procedures for processing of license applications are an integral and necessary part of that process. The Commission adopted few filing or processing rules in the *Second Report and Order*. Those rules that the Commission did adopt pertaining to the filing and processing of applications and certifications were clearly proposed in the *NPRM*.¹⁰¹ The rules to which AIDE refers were adopted not in the *Second Report and Order* but in subsequent Orders establishing auction rules for specific services.¹⁰² We address AIDE's petition relating to those rules either in the Orders in which they were adopted or in reconsiderations of those Orders.¹⁰³

M. Financial Qualifications

61. In the *Second Report and Order*, the Commission stated that applicants filing short-form applications would be required to certify that they are financially qualified pursuant to Section 308(b) of the Communications Act. The applicants would also be required to certify that they satisfy any financial qualification requirements for the service in question.¹⁰⁴

62. *Petition.* AIDE states that applying competitive bidding and payment requirements in addition to existing financial qualification requirements disadvantages designated entities, who have historically been constrained by difficulties in capital formation and financing. AIDE recommends that short-form applications not require any certification of financial qualification. If an application

⁹² *Second Report and Order* at ¶ 165.

⁹³ See *Third Report and Order*, Appendix at 13; *Fifth Report and Order* at ¶ 62.

⁹⁴ 47 U.S.C. 309(j)(3).

⁹⁵ *Second Report and Order* at ¶ 214.

⁹⁶ *Id.* at ¶ 215.

⁹⁷ See Budget Act, 47 U.S.C. § 309(j)(2).

⁹⁸ *Second Report and Order* at ¶ 215, citing 47 CFR §§ 0.457, 0.459.

⁹⁹ *NPRM* at ¶ 128.

¹⁰⁰ AIDE Petition at 20-21.

¹⁰¹ See *Second Report and Order* at ¶¶ 164-168, *NPRM* at ¶¶ 96-101.

¹⁰² See *Third Report and Order* at ¶ 41, n.18; *Fifth Report and Order* at ¶ 83.

¹⁰³ See *Fifth Report and Order* at ¶ 83.

¹⁰⁴ *Second Report and Order* at ¶ 166.

became mutually exclusive, according to AIDE, the applicant's payment of its winning bid would demonstrate that it was financially qualified. If the application did not become mutually exclusive, then the applicant should have a short period in which to file any required demonstration of financial qualifications by amendment.¹⁰⁵

63. *Discussion.* We believe that, in order to prevent the delay in bringing service to the public that might be occasioned by bankruptcies or by prolonged financial negotiations, it is important to require licensees to have the financial ability to construct and operate a system in addition to being able to purchase the license. Consequently we will continue to require applicants to certify on their short-form applications that they meet any existing financial qualification requirements of the services in which licenses are auctioned. We will not, however, impose additional showings of financial qualification as a part of the auction process.

IV. DESIGNATED ENTITIES

A. Introduction

64. Several provisions of the Budget Act address participation by small businesses, rural telephone companies, and businesses owned by women and minorities (referred to collectively as "designated entities") in the competitive bidding process and in the provision of spectrum-based services. Specifically, Section 309(j)(4)(D) of the Act, provides that, in prescribing competitive bidding regulations, the Commission shall, *inter alia*, ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services, and, for such purposes, consider the use of tax certificates, bidding preferences, and other procedures . . .¹⁰⁶ In addition, section 309(j)(3)(B), provides that in establishing eligibility criteria and bidding methodologies the Commission shall seek to promote the objectives of "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." To promote these objectives, section 309(j)(4)(A) expressly states that the Commission is required "to consider . . . alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, or other schedules or methods."¹⁰⁷

65. In the *Second Report and Order* we adopted a broad menu of provisions that the Commission might employ to implement these statutory provisions. We adopted general

provisions and eligibility rules designed to ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and/or women were afforded the opportunity to participate in both the competitive bidding process and in the provision of spectrum-based services. Specifically, we provided that small businesses (including those owned by women and/or minorities and rural telephone companies) that are winning bidders for certain blocks of spectrum could pay in installments over the term of their licenses. We also indicated that rural telephone companies may be eligible for bidding credits for licenses obtained in their service areas if they make an additional infrastructure build-out commitment beyond any existing performance requirements. We indicated that bidding credits may be available to designated entities on certain frequency blocks. In addition, we retained the option of establishing set-aside spectrum incertain services, in which eligibility to bid may be limited to some or all designated entities. Finally, we stated that we would consider the use of tax certificates as a means of creating incentives both for designated entities to attract capital from non-controlling investors and to encourage licensees to assign licenses to designated entities in post-auction transactions.

66. In the *Second Report and Order* we recognized that the provisions applicable to particular designated entities would vary depending on the nature of each individual service. For example, we retained the discretion to modify our general designated entity provisions for capital intensive services such as broadband PCS. In this regard, we stated that we would evaluate on a service-specific basis the capital requirements and other characteristics of the service to determine the appropriate provisions. We continue to believe that it is essential for the Commission to retain flexibility to select, and if necessary to modify, the general designated entity provisions and eligibility requirements on a service-specific basis depending on the capital requirements and construction costs of the particular service.

B. Rural Telephone Company Definition

67. *Background.* In the *Second Report and Order*, we adopted a definition of "rural telephone company" that includes independently owned and operated local exchange carriers that (1) do not serve communities with more than 10,000 inhabitants in the licensed area, and (2) do not have more than 50,000 access lines, including all affiliates.¹⁰⁸ We stated our belief that a limitation on the size of eligible rural telephone companies was appropriate because Congress did not intend for us to provide special treatment to large LECs that happen to serve small rural communities.¹⁰⁹

68. *Petitions.* Several parties filed petitions for reconsideration of the *Second Report and Order* requesting that we modify our standard definition for rural telephone com-

¹⁰⁵ AIDE Petition at 19-20.

¹⁰⁶ 47 U.S.C. § 309(j)(4)(D).

¹⁰⁷ See also 47 U.S.C. § 309(j)(4)(C)(ii), requiring the Commission, when prescribing area designations and bandwidth assignments, to promote "economic opportunity for a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women"; section 309(j)(3)(A), establishing the objective to promote "the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative

or judicial delays"; section 309(j)(12)(D)(iv), requiring that the Commission's 1997 report to Congress evaluate, *inter alia*, whether and to what extent "small businesses, rural telephone companies, and businesses owned by members of minority groups and women were able to participate successfully in the competitive bidding process."

¹⁰⁸ 47 CFR § 1.2110(b)(3).

¹⁰⁹ See *Second Report and Order* at ¶28.2.

panies. Petitioners' proposals include requests that the Commission amend its definition of "rural telephone company" (1) to expressly include municipal- and government-owned telephone companies within the "rural telephone company" definition in accordance with the earlier Senate version of the Budget Act;¹¹⁰ (2) to define "rural telephone company" as a local exchange carrier with annual revenues of less than \$100 million or serving no more than 100,000 access lines;¹¹¹ and (3) to include within the definition of "independently owned and operated" LECs that either operate 50,000 access lines or less or serve communities of 10,000 or fewer inhabitants.¹¹²

69. In addition, Blooston, Mordkofsky, Jackson & Dickens (Blooston) and South Dakota Networks, Inc. (SDN) request that the Commission eliminate the term "independently owned and operated" from the definition of "rural telephone company." According to Blooston, this restriction is unnecessary to prevent the largest telephone companies from taking advantage of provisions provided for rural telephone companies, since this same purpose is already served by the 50,000 access line limit. Blooston argues the Commission should amend its eligibility rules to indicate that they include the access lines of affiliates. Similarly, SDN indicates that the Commission should include "and affiliates" after "50,000 or fewer access lines" in the current definition. SDN maintains that the current language penalizes holding companies structured to permit telephone companies to offer paging and other nonregulated services.

70. The National Telephone Cooperative Association (NTCA) requests that the Commission amend the definition of rural telephone company to include any local exchange carrier with annual revenues of less than \$100 million or serving no more than 100,000 access lines. NTCA also indicates that the term "independently owned" should not exclude small rural telephone companies that are affiliated with each other and that rural telephone company consortia should be permitted. USIN similarly advocates a "rural telephone company" definition based on annual revenues of less than \$100,000,000 or less than 100,000 access lines. According to USIN a revenue-based test is more accurate than net worth/net profit test.

71. The Rural Cellular Association (RCA), South Dakota Network, Inc. (SDN) and NTCA ask that the Commission amend the definition of rural telephone companies to include any independently owned and operated local exchange carriers ("LECs") that either operate 50,000 access lines or less or serve communities of 10,000 or fewer inhabitants. According to NCTA and RCA, the existing definition needlessly excludes many small independent telephone companies that serve rural areas. SDN alternatively requests that we revise the definition to include carriers with 100,000 or fewer access lines or up to \$100 million in annual revenues.

72. Finally, Anchorage Telephone Utility (ATU) requests that the Commission modify the definition of rural telephone companies to include government-owned telephone companies. According to ATU, such a modification is necessary to achieve congressional intent. ATU notes that the Senate bill included municipally-owned telephone companies in its definition of rural telephone companies. ATU's argues that the Senate Bill mandates special consideration for rural telephone companies and directed the FCC to grant "rural program licenses" to "qualified" common carriers and explicitly said that the category of "qualified" carriers included all state-owned and municipally-owned telephone companies.¹¹³ As evidence Congress' intent to include these provisions in the enacted version of Budget Act, ATU asserts that the Conference Report declares that the Senate's "findings" are incorporated by reference.

73. *Oppositions and Replies.* In its Comment on Petitions for Reconsideration, BET supports retention of the Commission's existing generic rural telephone company definition.¹¹⁴ BET maintains that adoption of RCA's proposal to define rural telephone companies as LECs that have 50,000 access or fewer or serve communities with no more than 10,000 inhabitants will allow large LECs that "happen to serve rural areas" to qualify for designated entity provisions. In response to BET's Comments, RCA asserts that the "independently owned and operated" requirement for rural telephone company eligibility will prevent large LECs from qualifying for rural telephone company provisions. RCA also restates its request for an amendment to the general rural telephone company definition to include LECs that serve 100,000 access lines or fewer.¹¹⁵

74. In light of the Commission's decision in *Fifth Report and Order* in this proceeding, which adopted an alternative rural telephone company definition, NTCA argues that the Commission should abandon its generic rural telephone company definition and instead establish rural telephone company eligibility criteria on a service-specific basis. Alternatively NTCA proposes that we define rural telephone companies to include LECs that have annual revenues not in excess of \$125 million or that serve no more than 100,000 access lines.¹¹⁶ Tri-County Telephone Company, Inc. (Tri-County) supports SDN's proposed rural telephone company definition (50,000 access lines or serves no community with more than 10,000 inhabitants or alternatively 100,000 access lines or less).¹¹⁷

75. *Discussion.* We are persuaded by petitioner's arguments that the current generic "rural telephone company" definition is overly restrictive and effectively excludes many independently owned telephone companies that serve rural areas.¹¹⁸ In the *Fifth Report and Order* we departed from our generic definition of rural telephone companies in the context of broadband PCS by adopting a definition that includes any local exchange carrier having 100,000 or fewer access lines, including all affiliates.¹¹⁹ In adopting this definition of a "rural telephone company," we sought to

¹¹⁰ See Anchorage Telephone Utility (ATU) Petition.

¹¹¹ See Petitions of The National Telephone Cooperative Association (NTCA), South Dakota Network, Inc. (SDN) and U.S. Intelco Networks, Inc. (USIN).

¹¹² See Petitions of the Rural Cellular Association (RCA) and SDN.

¹¹³ See ATU Petition at 2-3.

¹¹⁴ BET Comments at 2.

¹¹⁵ RCA Reply at 2.

¹¹⁶ NTCA Reply Comments at 4.

¹¹⁷ Tri-County Reply at 3.

¹¹⁸ See RCA Petition at 4-5; USIN Petition at 10; NTCA Petition at 2.

¹¹⁹ See *Fifth Report and Order* at ¶ 198.

achieve the congressional goal of promoting the rapid deployment of service in rural areas by targeting only those telephone companies whose service territories are predominantly rural in nature, and who are thus likely to use their wireline telephone networks to build infrastructures to serve rural America.¹²⁰ For purposes of our rules governing broadband PCS licenses, we indicated our belief that this goal could best be achieved if we defined "rural telephone companies" as those local exchange carriers having 100,000 or fewer access lines, including all affiliates. We concluded that this definition included virtually all telephone companies whose service areas are predominantly rural.

76. For the foregoing reasons, we also believe that using the 100,000 access line definition as our standard rural telephone company definition will better serve our goals of encouraging the provision of service to rural areas than the definition previously adopted in the *Second Report and Order*. Accordingly, we will amend our standard definition of "rural telephone company" to include all local exchange carriers with 100,000 access lines or fewer, including affiliates. In general, we believe that this definition will more precisely capture those carriers that are truly rural in nature, while excluding the largest telephone carriers that do not face similar capital formation problems. We believe that this definition will also better achieve Congress' goal of fostering the development and rapid deployment of new technologies and services to rural areas by making special measures available to legitimate rural telephone companies that require such provisions in order to meaningfully participate in the provision of service to rural areas without giving such benefits to large companies that do not require such assistance. Rural telephone companies that satisfy this definition thus will be eligible for rural telephone company provisions in each service where such provisions are established.¹²¹

77. As indicated above, Blooston, SDN and NTCA request that we eliminate the phrase "independently owned and operated" from the definition of "rural telephone company." These petitioners assert that the "independently owned and operated" restriction in the rural telephone company definition was intended to prevent large telephone companies from taking advantage of rural telephone company benefits, but that this purpose is served by the access line limit. In this regard, SDN argues that such language unduly penalizes holding companies of nonregulated services and entities created by groups of telephone companies to provide equal access, SS7, and other services.

78. We agree. The new 100,000 access line rural telephone company definition adopted above, includes the access lines of affiliates. Under the affiliation rules established in the context of broadband PCS, and adopted below as our generic affiliation rules, the access lines of holding companies, parent companies or affiliates of rural telephone companies that are not independently owned will be attributed for purposes of determining eligibility. This definition

will capture most of the independently owned rural telephone companies, while excluding carriers affiliated with the largest LECs. In addition, we are concerned that the requirement that a rural telephone company must be independently owned would unnecessarily exclude rural telephone companies that are part of a holding company structure. Therefore we will delete the "independently owned and operated" requirement from our standard rural telephone company definition.

79. With respect to ATU's request that we amend our definition of rural telephone company to include municipal and government owned telephone companies that are owned by governmental authorities, we do not believe that such a change is warranted. ATU contends that Congress meant to mandate special consideration not only for telephone carriers serving rural areas but also for all municipally-owned telephone companies, even those with wholly or predominantly urban service areas.¹²² This argument is based on ATU's interpretation of the Senate bill which preceded the enacted Budget Act. ATU argues that the Senate bill containing the prototype of a mandate for special consideration for rural telephone companies directed the FCC to grant "rural program licenses" to "qualified" common carriers and explicitly said that the category of "qualified" carriers included all state-owned and municipally-owned telephone companies. ATU further states that the report of the conference committee that drafted the Budget Act declares that the Senate's "findings" are incorporated by reference.¹²³ ATU also asserts that without the aid of special assistance it and most other state-owned and municipal telephone companies will not be able to purchase spectrum licenses at auction because it is politically infeasible for them to generate and retain enough surplus revenue to fund such investments, due to popular aversion to increases in taxes or telephone rates.¹²⁴

80. As we indicated in the *Fifth Report and Order*, we are not persuaded by ATU's arguments.¹²⁵ We can find no specific evidence that Congress intended the term "rural telephone companies" to include all state or municipally-owned telephone companies. In fact, the preceding bill contained an explicit mandate for preferential treatment of government-owned telephone companies that was deleted from the enacted bill. To the contrary, the fact that an antecedent bill contained an explicit mandate for preferential treatment of government-owned telephone companies that was deleted from the enacted bill could just as easily be interpreted as an indication that Congress rejected such a rule. We also disagree that state and municipal governments are without the means to participate successfully in auctions. As we noted in *Fifth Report and Order* such governments have substantial capabilities to raise funds through private financing, bond offerings and taxation.¹²⁶

C. Rural Telephone Company Consortia

¹²⁰ We also note that the unique technological requirements and the capital intensive nature of broadband PCS dictated that we adopt this definition of "rural telephone company."

¹²¹ Such companies also will be eligible for special treatment under our cellular attribution rules for broadband PCS. See 47 CFR § 24.204(d)(2)(ii).

¹²² ATU Petition at 2-3.

¹²³ *Id.*

¹²⁴ *Id.* at 4-5.

¹²⁵ See *Fifth Report and Order* at ¶203.

¹²⁶ See *Fifth Report and Order* at ¶ 200. In any event, most state and municipally owned telephone systems (although not ATU) will be captured by our new 100,000 access line rural telephone company definition.

81. *Petitions.* Telephone and Data Systems, Inc. (TDS) requests that the Commission relax the eligibility requirements for rural telephone company bidding consortia by (1) eliminating the 50,000 access line limit for rural telephone company consortium applicants; (2) allowing companies with more than 50,000 access lines, directly or through affiliates, to participate in rural telephone company consortia by demonstrating that more than 50 percent of their access lines company-wide (including affiliates) and over 50 percent of those in the proposed service area serve only communities with 10,000 or fewer inhabitants and (3) providing that all rural telephone companies in consortia with 50,000 access lines or less have the right to hold up to 60 percent of the equity in the consortium. SDN and NTCA also argue that the Commission should allow rural telephone companies to form consortia, since combining telephone companies would not alter their rural nature, so long as the rural telephone company retains at least 50.1 percent equity and control.

82. USIN similarly requests that small businesses, including rural telephone companies, be allowed to qualify for special provisions if they pool their resources into consortia, provided such consortia are controlled by designated entities. According to USIN, if such consortia are not permitted, rural telephone companies and other small businesses may be foreclosed from participation in the auction process and in the provision of auctionable services. USIN also indicates that efficiencies and economies of scale are created by aggregation and thus special measures should be provided to these entities who may be able to provide service most efficiently.

83. *Discussion.* We deny the requests of TDS, SDN,¹²⁷ and NTCA that we modify the standard definition of rural telephone company to eliminate or relax the access line limit for rural telephone company consortia. In the *Second Report and Order* as a general matter, we declined to provide exceptions to our designated entity eligibility criteria for applicants that are consortia of various individual entities, which in combination fail to qualify as designated entities.¹²⁸ We found that such combinations, if they deviate from our standard definitions of designated entities, should not be eligible for provisions expressly designed for designated entities. This conclusion was based on our desire to provide economic opportunity to those entities designated in the statute and to ensure such entities the opportunity to provide spectrum-based services. We concluded that establishing exceptions to our definitions for consortia (even those wholly comprised of otherwise qualified designated entities) would undermine this objective by diluting the economic opportunity for individual qualified designated entities. We also found that allowing applicants to be formed from a combination of eligible and ineligible entities would invite attempts to abuse the designated entity provisions by those not entitled to them.

84. However, in the *Second Report and Order* we noted that we may determine on a service-specific basis to allow a designated entity consortium to receive other benefits based on equity and operational participation in the consortium by one or more designated entities. We retained the flexibility to enable designated entity consortia to qualify for

special provisions particularly where the capital costs of a particular service are high and the formation of consortia is thus essential to foster investment in designated entity ventures and to enable such entities to compete in the provision of such service. In this regard, in the *Fifth Report and Order* we allowed consortia comprised of small businesses to qualify for all of the measures applicable to individual small businesses provided each member of the consortium individually satisfies the definition of a small business. We found that given the "exceptionally large capital requirements" associated with broadband PCS, allowing small businesses to pool their resources in this manner was necessary to help them overcome capital formation problems and thereby ensure their opportunity to participate in auctions and to become strong broadband PCS competitors.

85. As a general matter, we will continue to determine whether to permit designated entities to receive benefits based on their participation in consortia on a service-specific basis, depending on the capital requirements and other characteristics of the particular service. We modify the *Second Report and Order*, however, to provide that consortia may be permitted to qualify for any designated entity provisions (where each member individually meets the eligibility requirements) on a service-specific basis, where the capital requirements of the service are high. Where, as in broadband PCS, we find that the capital requirements necessitate allowing designated entities to pool their resources to help them overcome capital formation problems and thereby ensure their opportunity to participate in auctions and in the provision of service, we may adopt rules allowing such consortia to qualify for designated entity provisions.

D. Affiliation Rules

86. *Petitions.* Blooston and NTCA request that the Commission clarify the meaning of "affiliate" for purposes of access line aggregation. According to Blooston, passive investments by a rural telephone holding company in other telephone companies should not preclude eligibility for rural telephone company status, so long as there is no common control between the rural telephone company and the other carrier. Blooston reasons that the common control definition is used in the auction rules for small businesses' affiliates, has been used by the Commission when defining connecting carriers, and is generally used by the financial community and the Securities and Exchange Commission. Finally, Blooston requests that the Commission amend its designated entity provisions to allow rural telephone companies to combine into consortia and partner with investors without losing designated entity status so long as the majority equity control resides with members who are rural telephone companies. NTCA similarly requests that the term "affiliates" be clarified to indicate what organizational structures are permitted.

87. *Discussion.* In response to the requests of NTCA and Blooston that we clarify the meaning of the term affiliate to indicate the types of organizational structures that will be included, we amend the *Second Report and Order* to establish as our standard affiliation rules the same affiliation

¹²⁷ SDN argues that the Commission should allow rural telephone companies to form consortia among themselves, since combining telephone companies does not alter their rural na-

ture. SDN also argues that consortia with investors should be permitted so long as the rural telephone company retains at least 50.1 percent equity and control. SDN Petition at ¶¶ 20-23.

¹²⁸ See *Second Report and Order* at ¶ 286.

rules adopted by the Commission in the *Fifth Report and Order*.¹²⁹ Blooston specifically requests that we clarify the meaning of "affiliate" so that passive investments by a rural telephone company in other rural telephone companies do not preclude designated entity status if there is no common control. As described more fully below, under our affiliation rules a passive interest in another telephone company, which does not constitute control of that company would not be considered an affiliation for purposes of access line aggregation.

88. In the *Second Report and Order*, we referenced the SBA's affiliation rules for purposes of defining generally whether an entity qualifies as a small business and gave examples of how the affiliation rules would be applied. In the *Fifth Report and Order* we expanded on the SBA's affiliation rules in establishing detailed affiliation standards for broadband PCS to be used in the context of determining designated entity eligibility where our criteria are based on the size of the entity seeking special treatment and require applicants to include "affiliates" when calculating their eligibility. These affiliation requirements are intended to prevent entities that do not meet these size standards from receiving benefits targeted to smaller entities.¹³⁰ We believe that these rules are appropriate for determining affiliations generally, and therefore we will incorporate these standards into our generic auction rules for purposes of determining all size-based eligibility requirements. We summarize these standards below.

89. Where we adopt sized-based eligibility rules and provide that such eligibility determinations shall include the applicant and all its "affiliates," the following rules shall govern determinations regarding affiliation. Apart from determining affiliation between the applicant itself and outside entities, the need to determine affiliation arises where an investor has an attributable interest in a designated entity.¹³¹ In this context it is necessary for the Commission to examine whether such investor has a relationship with other persons or outside entities that rise to the level of an affiliation with the applicant, and if so, whether the affiliate's assets, revenues, net worth, number of access lines, or other applicable financial thresholds, when aggregated with the applicant's, exceed the Commission's size eligibility thresholds.

90. *General Principles of Affiliation.* An affiliation under the SBA rules would arise, first, from "control" of an entity or the "power to control it." Thus, under the SBA rules, entities are affiliates of each other when either directly or indirectly (i) one concern controls or has the power to control the other, or (ii) a third party or parties controls or has the power to control both.¹³² In determining control, the SBA's rules provide generally that every business concern is considered to have one or more parties who directly or indirectly control or have the power to control it. The rules, in addition, provide specific examples

of where control resides under various scenarios, such as through stock ownership or occupancy of director, officer or management positions. The rules also articulate general principles of control, and note, for example, that control may be affirmative or negative and that it is immaterial whether control is exercised so long as the power to control exists.¹³³ Second, an affiliation, under SBA rules, may also arise out of an "identity of interest" between or among parties.¹³⁴ We adopted these same general provisions as our affiliation rules for broadband PCS and will also incorporate them into our general affiliation rules.

91. In adopting these affiliation rules, we emphasize that these rules will not be applied in a manner that defeats the objectives of our service specific attribution rules. For example, in the context of broadband PCS, our attribution rules expressly permit applicants to disregard the gross revenues, total assets and net worth of certain passive investors, provided that an eligible control group has *de facto* and *de jure* control of the applicant.¹³⁵ Our attribution rules are designed to preserve control of the applicant by eligible entities, yet allow investment in the applicant by entities that do not meet the size restrictions in our rules. Therefore, so long as the requirements of our attribution rules are met, the affiliation rules will not be used to defeat the underlying policy objectives of allowing such passive investors. More specifically, if a control group has *de facto* and *de jure* control of the applicant, we shall not construe the affiliation rules in a manner that causes the interests of passive investors to be attributed to the applicant.

92. Applying these SBA affiliation rules, an affiliation would arise, for example, where an entity with an attributable interest in an applicant is under the control of another entity. An affiliation would also arise where an entity with an attributable interest in an applicant controls, or has the power to control, another entity. For example, if an attributable investor in an applicant is also a shareholder in a large Corporation X, when should Corporation X be deemed an affiliate of the applicant as a result of the shareholder's ownership interest in both entities? Under the SBA rules and the rules we adopt here, Corporation X would be deemed an affiliate of the applicant if the shareholder controlled or had the power to control Corporation X, in which case, Corporation X's gross revenues must be included in determining the applicant's gross revenues.¹³⁶

93. For purposes of determining control, ownership interests will be calculated on a fully-diluted basis. Thus, for example, stock options, convertible debentures, and agreements to merge (including agreements in principle) will generally be considered to have a present effect on the power to control or own an interest in either an outside entity or the PCS applicant or licensee. We will treat such options, debentures, and agreements generally as though the rights held thereunder had been exercised.¹³⁷ However,

¹²⁹ See *Fifth Report and Order* at ¶¶ 201-217.

¹³⁰ See, e.g., *Second Report and Order* at ¶ 272.

¹³¹ In the context of broadband PCS, we stated that, generally, investors owning more than 25 percent of the applicant's passive equity would be considered to have "attributable" interests. See *Fifth Report and Order* at ¶ 158. With regard to IVDS, we used the SBA standard to determine attributable interests, i.e., control.

¹³² 13 CFR § 121.401(a)(2)(i), (ii).

¹³³ *Id.* § 121.401(c)(1).

¹³⁴ *Id.* § 121.401(a)(2)(iii), (d).

¹³⁵ See *Fifth Report and Order* at ¶ 205.

¹³⁶ See *Fifth Report and Order* at ¶ 206.

¹³⁷ See 13 C.F.R. § 121.401(f). SBA's rules provide the following examples to guide the application of this provision:

Example 1. If company "A" holds an option to purchase a controlling interest in company "B," the situation is treated as though company "A" had exercised its rights and had become

an affiliate cannot use such options and debentures to appear to terminate its control over or relationship with another concern before it actually does so.¹³⁸

94. *Voting and Other Trusts.* In a similar vein, we also borrow from the SBA's rules and our own rules in other services to find affiliation under certain voting trusts in order to prevent a circumvention of eligibility rules. The SBA's rules provide that a voting trust, or similar agreement, cannot be used to separate voting power from beneficial ownership of voting stock for the purpose of shifting control of or the power to control an outside concern, if the primary purpose of the trust is to meet size eligibility rules.¹³⁹ Similarly, under the Commission's broadcast multiple ownership rules, stock interests held in trust may be attributed to any person who holds or shares the power to vote such stock, has the sole power to sell such stock, has the right to revoke the trust at will or to replace the trustee at will.¹⁴⁰ Also, under the broadcast rules, if a trustee has a familial, personal or extra-trust business relationship to the grantor or the beneficiary of a trust, the stock interests held in trust will be considered assets of the grantor or beneficiary, as appropriate.¹⁴¹ Because we believe the broadcast rules provide more definitive guidance in this particular area, we shall use them as a model for the general affiliation rules adopted here. Thus, for example, if an investor with an attributable interest in an applicant holds a beneficial interest in stock of another firm that amounts to a controlling interest in that other firm, depending on the identity of the trustee, the other firm may be considered an affiliate and its assets and gross revenues may be attributed to the applicant.

95. *Officers, Directors and Key Employees.* Under the SBA's affiliation rules, which we adopt as our generic approach, affiliations also generally arise where persons serve as the officers, directors or key employees of another concern and they represent a majority or controlling element of that other concern's board of directors and/or management of the outside entity.¹⁴² Thus, if a person with an attributable interest in an applicant, through his or her other key employment positions or positions on the board of another firm, controls that other firm, then the other firm will be considered an affiliate of the applicant. Such affiliations may or may not result in the applicant's exceeding our size limitations. As this rule reflects, for purposes of attributing the financial position of an outside entity in

this context, officers and directors of an outside concern are not foreclosed entirely from holding attributable or non-attributable interests in an applicant. Whether or not such persons control the outside entity, we also do not want to prohibit these persons, who may be experienced in the telecommunications, finance, or communications and equipment industries, from assisting start-up companies by serving as officers or directors of the applicant. Thus, if such persons serving as officers or directors of the applicant do not control the applicant or otherwise have an attributable interest in the applicant, their outside affiliations (even if controlling) will not be considered at all for purposes of determining the applicant's eligibility under our rules.¹⁴³

96. *Affiliation Through Identity of Interest: Family and Spousal Relationships.* Consistent with the SBA's rules, an affiliation may arise not only through control, but out of an "identity of interest" between or among parties.¹⁴⁴ For example, affiliation can arise between or among members of the same family or persons with common investments in more than one concern. In determining who controls or has the power to control an entity, persons with an identity of interest may be treated as though they were one person.¹⁴⁵ For example, if two shareholders in Corporation X are both attributable shareholders in an applicant, to the extent that together they have the power to control Corporation X, Corporation X may be deemed an affiliate of the applicant.

97. Similarly, as under the SBA rules, we will consider spousal and other family relationships in determining whether an affiliation exists. Under the SBA rules for determining small business status, for example, members of the same family may be treated as though they were one person because they have an "identity of interest."¹⁴⁶ Likewise, in order to determine whether individuals are economically disadvantaged, the SBA rules governing eligibility for participation in the government's "section 8(a)" program for socially and economically disadvantaged small businesses have special provisions for attributing spousal interests. The latter rules provide generally that half of the jointly-owned interests of an applicant and his or her spouse must be attributed to the applicant for purposes of determining the applicant's net worth.¹⁴⁷

owner of a controlling interest in company "B." The [annual revenues] of both concerns must be taken into account in determining size. Example 2. 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. [A and B are affiliates of each other].

¹³⁸ *Id.* SBA's rules provide this example:

If large company "A" holds 70 percent (70 of 100 outstanding shares) of the voting stock of company "B" and gives a third party an option to purchase 66 of the 70 shares owned by A, company "B" will be deemed to be an affiliate of company "A" until the third party actually exercises its option to purchase such shares. In order to prevent large company "A" from circumventing the intent of the regulation which [gives] present effect to stock options, the option is not considered to have present effect in this case.

¹³⁹ 13 CFR § 121.401(g).

¹⁴⁰ See 47 CFR § 73.3555 note 2(e).

¹⁴¹ *Id.*

¹⁴² See 13 CFR § 121.401(h). 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. 13 CFR § 121.405.

¹⁴³ SBA's size standard affiliation rules also provide that affiliations can arise in a variety of other scenarios, such as where one concern is dependent upon another for contracts and business, where firms share joint facilities, or have joint venture or franchise license agreements. To the extent we believe these rules may have general applicability we shall codify them in our affiliate rules. We caution parties that issues relating to *de facto* control of the applicant (or parties with attributable interests in the applicant) could also arise under arrangements not expressly codified in the rules.

¹⁴⁴ See 13 CFR § 121.401(a)(2)(iii).

¹⁴⁵ *Id.* at § 121.401(d).

¹⁴⁶ 13 CFR § 121.401(d).

¹⁴⁷ See 13 CFR § 124.106(a)(2)(i)(A)(1).

98. In the context of auction size-based eligibility standards at issue here, we begin by clarifying that our reason for considering spousal and kinship relationships is not to determine whether the spouse or other kin of a woman-owned applicant actually is controlling the applicant, thereby violating our eligibility rules for woman-owned businesses. Our rules do not embody any presumptions concerning spousal control in that context. Rather, our objective here is to ensure both that entities are actually in need of the assistance provided by our rules and that entities otherwise ineligible under applicable size criteria do not circumvent the rules by funding family members that purport to be eligible applicants.

99. In formulating these rules, we need to consider also that, as a practical matter, it will not be possible for us prior to the auctions to resolve all questions that pertain to the individual circumstances of particular applicants. Furthermore, if we determine subsequent to an auction that a winning bidder in fact was ineligible to bid or to benefit from special provisions, such as bidding credits, because of spousal or kinship relationships, not only will authorization of service be delayed but, as discussed above, disqualified applicants may be subject to substantial penalties. In these circumstances, we think that the public interest requires that we endeavor, insofar as possible, to establish bright-line tests for determining when the financial interests of spouses and other kin should be attributed to the applicant.

100. We have decided that, for purposes of determining whether the financial limitations in our eligibility rules have been met, we will in every instance attribute the financial interests of an applicant's spouse to the applicant. This will resolve any concern that an applicant might transfer his or her assets to a spouse in order to satisfy the financial restrictions that apply to eligible entities. For example, an applicant could not transfer stock or other assets to his or her spouse and thereby dispose of interests that, if held by the applicant, would render the applicant ineligible. Just as importantly, this approach will resolve any concern that an applicant might participate in bidding by using the personal assets of an ineligible spouse, which would defeat entirely the objective of providing special financial measures for designated entities.

101. In adopting this rule, we fully recognize that instances could arise in which, if all factors were considered, attributing a spouse's financial interests to the applicant could lead to harsh results. As a general matter, however, we think it provides a workable bright-line standard that resolves fully our policy concerns and avoids undesirable ambiguity concerning the nature of our requirements. As in the SBA rules, however, one exception is clearly warranted; this affiliation standard would not apply if the applicant and his or her spouse are subject to a legal separation recognized by a court of competent jurisdiction. In calculating their personal net worth, for example, investors in the applicant who are legally separated must, of course, still include their share of interests in community property held with a spouse.

102. As indicated above, circumstances could also arise in which other kinship relationships are used as a means to evade our eligibility requirements. Because we believe kinship relationships in many cases do not present the same potential for abuse that exists with spousal relationships, particularly in terms of the "identity of interests" that are likely to exist between the persons involved, we shall adopt a more relaxed standard for determining when kinship interests must be attributed to applicants. In this area, we shall follow the same standard that is applied by the SBA when interpreting its "identity of interest" rule described above. Specifically, an identity of interests between family members and applicants will be presumed to exist, but the presumption can be rebutted by showing that the family members are estranged, or that their family ties are remote, or that the family members are not closely related in business matters.¹⁴⁸ For purposes of determining who is a family member under this rule, we shall use a definition that is identical to the definition of "immediate family member" in the SBA's rules, 13 CFR § 124.100.

103. In appropriate cases, an applicant should be able to rebut the presumption regarding kinship affiliations with relative ease, simply by demonstrating that the applicant has no close relationship in business matters with the relevant family members. Of course, should such business relationships arise with a winning applicant after the auction, we might need to consider whether the applicant intended to circumvent the requirements of our eligibility rules.

104. The affiliation requirement is intended to prevent entities that, for all practical purposes, do not meet the size standard required for eligibility from receiving benefits targeted to smaller entities.¹⁴⁹ We believe that the affiliation rules described above will accomplish this objective.

E. Rural Telephone Company Bidding Credits.

105. *Petitions.* NCTA, USIN and SDN argue that the FCC should retain the rural telephone company bidding credit provision adopted in the *Second Report and Order* but delete the accelerated build-out requirement as a condition for receipt of bidding credits. USIN asserts that bidding credits will not help attract capital when tied to such an expanded build-out requirement. According to USIN, making bidding credits contingent on an accelerated build-out effectively nullifies the provision because the commitment of additional capital for network build-out will reduce the amount available to finance the license price by enough to offset any benefit conferred by the availability of the credit.¹⁵⁰ SDN agrees that additional build-out should not be required as a prerequisite for rural telephone company bidding credits, but states that a rural telephone company should receive additional bidding credits if it substantially covers its certified rural service area during its license term.¹⁵¹ NTCA argues that the accelerated build-out requirement for bidding credits should be eliminated since this requirement is unrelated to the statutory purpose of promoting investment in and rapid deployment of new technologies and services in rural areas.¹⁵²

¹⁴⁸ See generally *Texas-Capital Contractors, Inc. v. Abdnor*, 933 F.2d 261 (5th Cir. 1990).

¹⁴⁹ See, e.g., *Second Report and Order* at ¶ 272.

¹⁵⁰ USIN Petition at 12.

¹⁵¹ SDN Petition at 14.

¹⁵² See 47 U.S.C. § 309(j)(3)(A).

106. SDN also contends that the risk of forfeiting the bidding credit (plus interest) for failure to meet the expanded build-out commitment will have a chilling effect because of the difficulty of anticipating potential problems that may be encountered in attempting to extend service rapidly to remote areas. Further, SDN maintains that an accelerated build-out requirement could engender a perverse incentive for a rural telephone company that would otherwise concentrate primarily on providing PCS service in the rural portions of a BTA or MTA (which, according to SDN might be a commercially-attractive strategy because of steeper competition in urban areas), forcing it to concentrate instead on extending its network in densely-populated areas.¹⁵³

107. Finally, SDN and USIN contend that it is inequitable to provide rural telephone companies with a less favorable bidding credit provision than other designated entities. In this regard, USIN argues that the *Second Report and Order* fails to explain why rural telephone company bidding credits should contain more restrictive terms than other designated entity bidding credits. On the contrary, SDN contends that rural telephone companies should receive a greater bidding credit than other entities, because they face higher service and construction costs. Accordingly, SDN maintains that if accelerated build-out is to be included in the rural telephone company provision, an incentive should be provided in the form of bonus credit over and above the standard bidding credit available to other designated entities.

108. *Discussion.* In the *Second Report and Order* we adopted a system of bidding credits for rural telephone companies designed to further promote the investment in and rapid deployment of new technologies and services in rural areas.¹⁵⁴ We generally concluded that any special measures adopted for rural telephone companies, including bidding credits, should be limited to bidding for licenses in their rural service areas. We found that this limitation satisfied Congress's objectives without unduly favoring rural telephone companies in markets where there was no compelling reason to do so. Specifically, we concluded that Congress was primarily concerned with assuring rural consumers the benefits of new technologies and providing opportunities for participation by rural telephone companies in the provision of wireless services that supplement or replace their landline facilities.¹⁵⁵ Accordingly, we provided that rural telephone companies would be eligible for bidding credits for specified licenses only in their service areas.

109. However, unlike bidding credits available to women and minority-owned firms, we linked the amount of the bidding credit for rural telephone companies to their commitment to achieve certain expanded infrastructure build-out requirements in their rural service areas. We provided that the amount of the bidding credit would be proportionately linked to the amount by which the rural telephone company agreed to expand its build-out commitment. In this regard, we indicated that failure to meet the expanded build-out commitment would result in liability for a penalty in the amount of the bidding credit, plus interest at the rate applicable to installment payments. We further provided that grant of the licenses to rural telephone com-

panies utilizing bidding credits would be conditioned upon payment of this penalty, if and when it becomes applicable. We concluded that this added construction requirement would fulfill the congressional objective of developing and rapidly deploying new services to those residing in rural areas.

110. On reconsideration of this issue, we no longer believe the provision in the *Second Report and Order*, which links the availability of bidding credits for rural telephone companies to their agreement to satisfy an expanded construction requirement, is necessary or appropriate to promote the statutory objectives. We agree with petitioners' assertions that the expanded build-out requirement may have adverse consequences contrary to the purpose of bidding credit provision. We are also concerned that the expanded construction requirement may be unduly burdensome both to rural telephone company licensees and the Commission. In this regard, we are concerned that the accelerated build-out requirement may not be economically feasible in some rural areas and thus may result in frequent forfeitures of the bidding credit amount by rural telephone companies. As discussed more fully below, we now believe that Congress' objectives of promoting investment in and rapid deployment of new technologies and services to rural areas will best be achieved through the use of other provisions such as installment payments, bidding credits (without an expanded build out requirement), and service area partitioning. Thus, we amend our rules to retain flexibility to adopt any of these or other provisions for rural telephone companies on a service-specific basis after considering the characteristics and capital requirements of the particular service.

F. Rural Telephone Company Eligibility for Installment Payments

111. *Petitions.* SDN, USIN, and NCTA all request that installment payments be extended to rural telephone companies regardless of their status as small businesses. AIDE and Cook Inlet argue that all designated entities should be permitted to pay for their licenses in installment payments irrespective of their size. These parties all object to the decision to limit eligibility for installment payments to small businesses as defined in §1.2110(b)(1), (*i.e.*, companies with net worth including that of affiliates of \$6 million or less and no more than \$2 million of annual after-federal-tax profit for the last two years). USIN argues that there is no statutory support in the provisions cited by the Commission as authority for adopting different provisions for one designated entity group as opposed to another.

112. Citing the legislative history to the Budget Act and H.R. Report No. 103-111 in particular, USIN also maintains that the statutory purpose of requiring special provisions for designated entities was to promote entry by firms with difficulty in obtaining access to capital. Petitioners maintain that the \$6million net worth/\$2 million net revenue standard for installment payment eligibility is too strict and will prevent rural telephone companies from qualifying for the installment payment option although they face significant difficulty in obtaining access to capital. USIN asserts that as a practical matter rural telephone

¹⁵³ SDN Petition at 14-15.

¹⁵⁴ See 47 U.S.C. § 309(j)(3)(A).

¹⁵⁵ *Second Report and Order* at ¶ 243.

companies may have high levels of non-amortized assets and yet have less capital available for investment than many businesses that meet the small business definition. SDN maintains that rural telephone companies should be eligible for installment payments regardless of whether they qualify as small businesses because they will generally incur higher build out costs with lower revenue streams than other designated entities. According to USIN, a rural telephone company bidding for a license in a capital-intensive service should be eligible for installment payments if its annual revenue are under \$100 million USIN asserts that without installment payments such telephone companies will be unable to bid for broad-coverage licenses as traditional rural telephone company lenders have indicated unwillingness to finance auction bids.

113. AIDE objects to the determination in the *Second Report and Order* that limits the installment payment option to small businesses bidding on licenses for "those smaller spectrum blocks that are most likely to match the business objectives of *bona fide* small businesses."¹⁵⁶ According to AIDE, such the installment payment option should be available to all designated entities bidding on all licenses. AIDE maintains that Congress did not intend to give the FCC discretion to offer special provisions to some designated entities in some auctions but not in others. AIDE argues, moreover, that these limitations on the availability of installment payments are not justified by the Commission's desire to prevent abuse of its designated entity provisions since there are other safeguards designed specifically for that purpose, such as the rules for disclosure of real parties in interest, the definitional requirements including the assets of affiliates and the financial qualification rules.

114. *Discussion.* For the reasons set forth below, we deny petitioners' requests to expand the installment payment option to other designated entities irrespective of their economic status. However, we will retain the flexibility to expand or modify the installment payment option on a service-specific basis for other appropriately-sized entities where the spectrum costs and capital infrastructure requirements necessitate their application to other entities. For example, in the *Fifth Report and Order* we recognized that the substantial expected capital required to acquire and construct broadband PCS licenses warranted expansion of the installment payment option to most entities acquiring licenses in the entrepreneurs' blocks.¹⁵⁷ Under the broadband PCS rules, installment payments are available to smaller entities that do not technically qualify as small businesses and an enhanced installment payment option is available to eligible small businesses and businesses owned by women and/or minorities.

115. In the *Second Report and Order*, we concluded that for some auctions, small businesses would be eligible for installment payments. We noted that by allowing payment in installments, the government would be extending credit to an eligible winning bidder, thus reducing the amount of private financing needed in advance of the auction by a prospective licensee. We noted that this will assist small

entities who are likely to have difficulty obtaining adequate private financing. As a result, we concluded that installment payments would be an effective way to promote efficiently the participation of small businesses in the provision of spectrum-based telecommunications service and an effective tool for efficiently distributing licenses and services among geographic areas.¹⁵⁸ Thus, we limited application of installment payments to small entities, including such entities that are owned by minorities and/or women. We found that this approach best served the intent of Congress in enacting section 309(j)(4)(A), to avoid a competitive bidding program that has the effect of favoring incumbents, with established revenue streams, over new companies or start-ups.¹⁵⁹

116. Consistent with Congress's concern that auctions not operate to exclude small businesses, the provisions relating to installment payments for minorities and/or women also were intended to assist only minorities and women who are small businesses. The House Report states that these related provisions were drafted to "ensure that *all small businesses* will be covered by the Commission's regulations, *including those owned by members of minority groups and women.*"¹⁶⁰ (emphasis added). It also states that the provisions in section 309(j)(4)(A) relating to installment payments were intended to promote economic opportunity by ensuring that competitive bidding does not inadvertently favor incumbents with "deep pockets" "over new companies or start-ups."¹⁶¹ Because the Congressional objective here was to assist "new companies or start-ups," we therefore concluded that the Commission should use installment payments only for smaller sized entities. As indicated by the legislative history, large entities with established revenue streams were not intended to be beneficiaries of this particular means of financial assistance. We concluded that the statutory language, when read in conjunction with the legislative history, does not indicate that Congress's purpose was to accord special financial assistance measures under section 309(j)(4)(A) to entities other than those with small economic status.¹⁶² In this regard, we reject petitioner's proposals to allow installment payments for rural telephone companies or other designated entities irrespective of their size. We will continue to determine on a service-specific basis the appropriate economic eligibility criteria for installment payments. And we may, as we did in the context of broadband PCS, establish different installment payment options for entities who face different economic barriers.

117. In addition, and consistent with our decision to limit installment payments to small entities, we decline to make installment payments available for all licenses in all auctions. Rather, in order to match the provisions with eligible recipients, we will continue to make installment payments available only for certain licenses that do not involve the largest spectrum blocks and service areas. In this regard, in the context of narrowband PCS, we adopted installment payments only for the regional, MTA and BTA licenses. Similarly, for broadband PCS, we limited eligibility for installment payments to the BTA licenses contained

¹⁵⁶ See *Second Report and Order* at ¶ 237.

¹⁵⁷ See *Fifth Report and Order* at ¶ ¶ 136-140.

¹⁵⁸ See *Second Report and Order* at ¶ ¶ 233-240.

¹⁵⁹ See H.R. Rep. No. 103-111 at 255.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² Under authority of Section 309(j)(4)(D), we have, however, afforded other types of financial assistance measures, such as bidding credits, to other designated entities. See e.g., *Third Report and Order*, in PP Docket No. 92-253, 59 FR 26741 (May 24, 1994), at ¶ ¶ 72-81 (which provides bidding credits to businesses owned by minorities and/or women).

in the entrepreneurs' blocks. We continue to believe that where large, valuable blocks of spectrum are being auctioned we should not give ineligible entities the incentive to create small business "fronts," thereby enabling large businesses to become eligible for low-cost government financing. Nor do we desire to delay service to the public by encouraging under-capitalized firms to receive licenses for facilities which they may lack the resources adequately to finance.¹⁶³ Accordingly, we will continue to allow installment payments only for licenses in those smaller spectrum blocks and service areas that are most likely to match the business objectives of *bona fide* small entities in the context of a particular service. The particular spectrum block sizes that will be eligible for installment payments will be decided in the context of each particular service taking into account the cost of acquiring the spectrum and constructing the system.

G. Rural Telephone Company Partitioning

118. *Petitions.* SDN requests that rural telephone companies be allowed to partition their rural service areas either pursuant to an agreement with the BTA or MTA licensee, or by licensing a separate PCS service area using a system similar to the cellular unserved area application process.¹⁶⁴

119. Several commenters responding to the NPRM in this proceeding suggested that the Commission allow partitioning of PCS licenses so as to permit rural telephone companies to hold licenses to provide service only in their service areas.¹⁶⁵ In the *Second Report and Order* we recognized that partitioning may be an effective means to achieve Congress's goal of ensuring that advanced services are provided in rural areas.¹⁶⁶ In the context of broadband PCS, we adopted a system of geographic partitioning, for rural telephone companies which allows rural telephone companies to acquire partitioned broadband PCS licenses in one of two ways: (1) they may form bidding consortia to participate in auctions, and then partition the licenses won among consortia participants, or (2) they may acquire partitioned broadband PCS licenses from other licensees through private negotiation and agreement either before or after the auction (provided the partitioned area is reasonably related to the size of the rural telephone company's rural service area).¹⁶⁷ We require that partitioned areas conform to established geopolitical boundaries and that each area include the wireline service area of the rural telephone company applicant. We believe that this system of partitioning of rural service areas will provide a significant opportunity for many of these designated entities who desire to offer PCS to their customers as a complement to their local telephone services. Therefore, we will retain the flexibility in the generic auction rules to adopt a system of partitioning on a service-specific basis where the capital requirements and construction costs are such that a system

is necessary to assist rural telephone companies who cannot afford or do not desire to bid for or construct systems for an entire service area.¹⁶⁸

H. Unjust Enrichment Provisions

120. *Petitions.* AIDE requests that when the Commission recaptures the benefits accruing to a designated entity pursuant to the unjust enrichment provisions, the unjust enrichment penalty should credit the licensee's pre-sale investments in the license and should be based on the portion of the licensee's taxable gain on the sale allocated to the license, with appropriate adjustments. BET similarly requests that the Commission revise the unjust enrichment provisions to credit the designated entity for its pre-transfer expenditures on the license including construction costs.

121. *Discussion.* We deny the requests of AIDE and BET. In the *Second Report and Order* the Commission crafted unjust enrichment provisions designed to prevent designated entities from profiting by the rapid sale of licenses acquired through the benefit of provisions and policies meant to encourage their participation in the provision of spectrum-based services. These rules were intended to deter designated entities from prematurely transferring licenses obtained through the benefit of provisions designed to create opportunities for such designated entities in the provision of spectrum-based services. We sought through our unjust enrichment provisions to discourage designated entities who do not intend to provide service to the public from abusing our provisions by obtaining a license at a lower cost than other licensees and then selling the license after a short time to a non-designated entity at a profit. In addition, the unjust enrichment rules were intended to recapture for the government a portion of the value of the bidding credit or other special provision if such a designated entity prematurely transfers its licenses to an ineligible entity, thereby frustrating the government's efforts to encourage the inclusion of designated entities in the provision of new spectrum-based services.

122. We recognize that over time, a designated licensee may have made substantial investments in a license prior to transfer. In order to reward efficiency and encourage such investments in infrastructure development, we provided that we will generally reduce the amount of the recapture penalty as time passes or construction benchmarks are met.¹⁶⁹ We further provided that our recapture provisions would not apply to the transfer or assignment of a license that has been held for more than five years.¹⁷⁰ In addition, where a recapture penalty is assessed, we stated that the penalty will not prevent the transferring designated entity from recovering the depreciated value of its capital investment. Moreover, we indicated that in appropriate circumstances, we might waive recapture "if the licensee has incurred substantial start-up costs or made significant capital investments with the intention of starting service, but due to circumstances beyond its control, was unable to provide service."¹⁷¹

¹⁶³ See 47 U.S.C. § 309(j)(3)(A).

¹⁶⁴ See SDN Petition at 7.

¹⁶⁵ See, e.g., comments of GVNW at 2-4, and NTCA at 13.

¹⁶⁶ See *Second Report and Order* at ¶ 243 n.186.

¹⁶⁷ See *Fifth Report and Order* at ¶ 15 2.

¹⁶⁸ In a Further Notice of Proposed Rulemaking in this docket, the Commission will also explore the merits of allowing

businesses owned by minorities and/or women to acquire partitioned PCS licenses, as well as partitioned licenses in other services.

¹⁶⁹ See *Second Report and Order* at ¶ 262.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at n.205.

123. We believe that these measures adequately account for a designated entity's pre-transfer investments in a license, including construction expenses. Therefore, we decline to adopt AIDE's proposal that we credit the licensee's pre-sale investments in the license and base the recapture amount on the portion of the licensee's taxable gain on the sale allocated to the license, because such provisions would require the government to undertake lengthy and complex accounting and allocation proceedings to determine the amount of the penalty. Similarly, we deny BET's request that we credit designated entities for their pre-transfer expenditures on a license because we believe that our recapture provisions adequately account for these expenditures by reducing the amount of the penalty over time. Moreover, the unjust enrichment provisions were designed to act as a penalty to deter premature license transfers by designated entities. Therefore we decline to modify the recapture provisions adopted in the *Second Report and Order*. We note, however, that because license terms and construction requirements vary by service, and because we may adopt different designated entity provisions for different services, we will set forth the specific recapture provisions in the service-specific competitive bidding rules of each auctionable service. Moreover, we modify our general recapture provisions to provide flexibility on a service-specific basis to extend the duration of the recapture provisions beyond five years.

I. Upfront Payment Amount

124. *Petitions*. AIDE requests that the Commission reduce the amount of the upfront payment for designated entities. AIDE asserts that a reduced upfront payment would help ensure that capital constrained designated entities have the opportunity to participate in the competitive bidding process. According to AIDE, a reduced upfront payment is necessary to create opportunities for designated entities to participate in competitive bidding and will allow such entities to preserve their limited resources for post-auction infrastructure development.

125. *Discussion*. The Commission adopted an upfront payment requirement in order to ensure that only serious, qualified bidders participate in our auctions. We reasoned that an upfront payment requirement would ensure the validity of the information generated during auctions and increase the likelihood that licenses will be awarded to the qualified bidders who value them the most, thus promoting the rapid deployment of new technology. Upfront payments will also provide the Commission with a source of available funds in the event a bid withdrawal penalty must be assessed. By requiring a substantial upfront payment amount, the Commission seeks to deter speculative and frivolous bidding by all bidders, including designated entities. Moreover, the standard upfront payment formula (\$.02 per MHz per pop for the maximum MHz-pops a bidder intends to bid on in any single round of bidding), is based on the amount of spectrum and population coverage on which a bidder seeks to bid and therefore is directly linked to the expected value of the license and anticipated construction costs a licensee will incur.

126. Nevertheless, in the *Second Report and Order* we retained the flexibility to cap, reduce or modify the upfront payment amount for designated entities.¹⁷² We indicated that such decisions would be made in the service-specific competitive bidding rules for individual services. In the *Fifth Report and Order*, recognizing that the standard upfront payment formula may create a barrier for smaller entities wishing to participate in auctions, we reduced by 25 percent the upfront payment amount required for designated entities bidding in the entrepreneur's blocks.¹⁷³ Given the varied spectrum costs of different services, we will continue to consider such reduced upfront payments for designated entities on a service-specific basis. Generally, we will only reduce the upfront payment amounts for designated entities in capital intensive services, such as broadband PCS, where the spectrum bandwidth will result in upfront payment amounts that may be prohibitive for some smaller entities.

J. Installment Payments

127. In the *Second Report and Order*, we stated that, for some auctions, winning bidders that are small businesses would be eligible to use installment payments in paying for licenses.¹⁷⁴ We provided that for these winning bidders, a down payment of 10 percent would be due within five business days of the close of the auction, and that an additional 10 percent would be due within five days of grant of the license.¹⁷⁵ We stated that we would impose interest on installment payments at a rate equal to the rate for U.S. Treasury obligations of maturity equal to the license term. We stated that the schedule of installment payments would begin with interest-only payments for the first two years, and that thereafter principal and interest would be amortized over the remaining term of the license.¹⁷⁶

128. Upon reconsideration, we have decided that we may need to tailor installment payment provisions more precisely to needs of various groups of designated entities and the characteristics of particular services. In the *Fifth Report and Order* we provided installment payments for minorities and women in some blocks, and provided different installment provisions for small businesses of different sizes.¹⁷⁷ We will continue to establish different installment payment provisions on a service-specific basis. We may offer installment payments to minorities and women, in some circumstances, and may offer installment payments having differing terms to different classes of designated entities. We may vary the interest rate and the payment schedule for installment payments, including the amount and timing of the down payment and the schedule for amortization of principal and interest. Installment payment provisions for each service will be specified in Orders establishing auction rules for that service. We believe that this additional flexibility will allow us to take account of differences in capital requirements across services and license blocks, and to provide access to capital in ways that will give various groups of designated entities a realistic chance to participate in offering service.

¹⁷² See *Second Report and Order* at ¶ 178 n.37.

¹⁷³ See *Fifth Report and Order* at ¶ 156.

¹⁷⁴ *Id.* at ¶ 233.

¹⁷⁵ *Id.* at ¶ 238.

¹⁷⁶ *Id.* at ¶ 239.

¹⁷⁷ *Fifth Report and Order* at ¶¶ 137-139.

K. Eligibility Issues

129. *Petitions.* Black Entertainment Television Holdings, Inc. (BET) requests that the FCC reconsider the public company restriction on the availability of provisions for minority and women-owned companies in broadband PCS. BET argues that given the costs of acquiring spectrum and the construction expense, such a limitation would defeat realistic opportunities for a wide range of minority-owned firms. BET also requests that we clarify that provisions for minority and women-owned firms are separate and distinct from provisions for small businesses. Finally, BET argues that rights, privileges, options or other forms of ownership that do not affect the ability of a designated entity to control a company, or diminish a designated entity financial stake in a venture, should not be considered in the definitional analysis for purposes of determining eligibility.

130. *Discussion.* In the *Second Report and Order*, we stated that publicly traded minority and women-owned companies would not be eligible for provisions applicable to these designated entities. In the *Fifth Report and Order*, however, we deviated from this restriction to allow publicly traded minority and women-owned companies to qualify to bid in the entrepreneurs' block, and under certain circumstances to qualify for bidding credits.¹⁷⁸ We will continue to consider exceptions to our restriction on publicly traded company eligibility for minority and women-owned businesses on a service-specific basis, in each case considering the capital requirements and the expected build-out cost of the service. We agree with BET that in services with high entry costs, precluding publicly traded companies from receiving measures intended for minority and women-owned businesses may undermine our objective of ensuring the opportunity for these designated entities to participate in the provision of spectrum-based services.

131. As requested by BET, we clarify that the provisions for businesses owned by women and minorities are separate and distinct from the provisions for small businesses. Thus, women and minority-owned businesses may qualify for measures adopted for these entities irrespective of their size, and small businesses may qualify for small business provisions regardless of their ownership by minorities and women. And small businesses that are owned by members of minorities and/or women may qualify for provisions applicable to both groups.

132. Finally, in the general auction rules, we indicated that in determining designated entity eligibility we would consider all rights, warrants and options on a fully diluted basis, *i.e.*, they will be treated as if already exercised.¹⁷⁹ We intend to maintain the existing rule of calculating these ownership interests on a fully diluted basis, since we expect that such ownership interests will almost always have the potential either to impact the ability of a designated entity to control a company or to diminish a designated entity's financial stake in the venture. However, in the rare circumstance where such ownership interests have no effect on a designated entity's ability to control a firm or to diminish the designated entity's financial stake, we will consider requests for waivers.¹⁸⁰ We note, however, that we expect such instances to be rare, and petitioners will be required to make an affirmative showing sufficient to over-

come the presumption that such ownership interests should be calculated as if exercised for purposes of determining eligibility issues.

133. *Petitions.* AIDE and Cook Inlet propose stricter eligibility and anti-sham measures to avoid designated entity shams. Specifically, Cook Inlet proposes requiring that a designated entity maintain clear structural control of an entity in order to be eligible for designated entity provisions. In this regard, Cook Inlet argues that in limited partnerships, the general partner should be required to be a designated entity and restrictions should be imposed on the ability of other general partners to exercise management control. Cook Inlet also proposes that the Commission require designated entities to document their eligibility by attaching documentation to their long form application.

134. We agree with AIDE that in some instances stricter eligibility requirements are appropriate to ensure that only legitimate designated entities are the beneficiaries of the special provisions established under our rules. In particular, we clarify that, when an applicant or a licensee is a partnership, because each general partner generally has the ability to act on behalf of the partnership, all general partners in the license applicant must be designated entities in order to qualify for designated entity status. We believe that this clarification is consistent with the Commission's long-standing practice of attributing control in the context of partnerships to the general partners. This clarification will ensure that designated entities in partnerships retain *de facto* as well as *de jure* control.

135. In addition, we agree with AIDE that documentation of designated entity status should be submitted along with the applicants' long-form applications in order to enable the Commission to verify designated entity eligibility. Accordingly, we will require designated entities to substantiate their eligibility by describing on their long-form application how they satisfy the requirements for eligibility. We will also require designated entity applicants to list on their long-form application all agreements that effect designated entity status, such as all partnership agreements, shareholder agreements, management agreements and other agreements, including oral agreements, which establish that the designated entity will have both *de facto* and *de jure* control of the entity. In addition, we will require that such information be maintained at the licensee's facilities, or by its designated agent, for the term of the license, and that the information be made available to Commission staff upon request in order to enable the Commission to audit designated entity eligibility on an ongoing basis.

136. In addition, if an applicant for designated entity status proves unqualified, and the Commission determines that the application for designated entity status involved willful misrepresentation or other serious misconduct, the Commission will impose severe penalties. These may include monetary forfeitures, revocation of licenses, and prohibition of participation in future auctions.

137. With respect to AIDE's proposal that clear structural control should be required to establish designated entity eligibility, we believe that as a general rule, our strict requirement that women and minority principals control the applicant and maintain a 50.1 percent voting interest (in a corporate applicant) and a 50.1 percent eq-

¹⁷⁸ See *Fifth Report and Order* at ¶¶ 163-164.

¹⁷⁹ 47 CFR Sec. 1.2110 (b)(2).

¹⁸⁰ See 47 CFR Sec. 1.2110.

uity stake in the entity is sufficient to prevent "fronts" and to ensure that our provisions are only made available to legitimate qualified designated entities. However, we reserve the flexibility on a service-specific basis, taking into account the nature of the specific provisions applicable in that service, to adopt additional or different requirements for designated entity eligibility.¹⁸¹

138. While we conclude that our requirement that control and substantial equity rest with minorities and/or women will generally be adequate to ensure that parties do not attempt to evade the statutory requirement to provide economic opportunities and ensure participation by businesses owned by these groups, we also reaffirm our commitment to investigate all allegations of fronts, shams or other methods used to try to evade our eligibility rules. In this regard, we remind parties that we will conduct random pre and post-auction audits to ensure that applicants receiving designated entity benefits are *bona fide* designated entities.

L. Small Businesses

139. *Petitions.* NTCA and USIN request that we amend the small business definition so that it can be flexibly modified in the context of a particular service. NTCA and USIN advocate that such flexibility is appropriate because the existing \$6 million net worth/\$2 million net income test is too low to reflect the capital-intensive nature of the broadband PCS business. NTCA asserts that most rural telephone companies are unable to meet this test even though they have few subscribers and very few employees. USIN states that the current definition discriminates against small rural telephone companies, and that the proper measure for small businesses in capital-intensive services is those with annual revenues of less than \$100 million.

140. *Discussion.* We agree with NTCA. In the *Second Report and Order* we relied on the Small Business Administration's (SBA) standard definition. The SBA definition permits an applicant to qualify for financial assistance based on a net worth not in excess of \$6 million with average net income after Federal income taxes for the two preceding years not in excess of \$2 million.¹⁸² The record in this proceeding reflected broad disagreement about the appropriate definition of small businesses. Many commenters, including the Chief Counsel for Advocacy of the SBA, argued that the SBA net worth/revenue definition was too restrictive and would exclude businesses of sufficient size to survive, much less succeed, in the competitive wireless communications marketplace. The SBA's Chief Counsel for Advocacy and Suite 12 Group advocated adoption of a revenue test, arguing that a net worth test could be misleading as some very large companies have low net worth. The SBA's Chief Counsel recommended that the revenue standard be raised to include firms that (together with affiliates) have less than \$40 million in revenue. The

SBA Chief Counsel suggested that the Commission consider a higher revenue ceiling or adopt different size standards for different telecommunications markets.¹⁸³

141. Other parties indicated that the definition used by the Commission might impede the ability of small businesses to raise capital in anticipation of auctions. They noted that many small firms are soliciting investors to enable these firms to compete better in auctions, and argued that their designated entity status should not be jeopardized as a result. Thus, these commenters suggested, if the FCC adopts the SBA's net worth standard, the net worth valuation should relate back to the date of the PCS Final Report and Order (September 23, 1993).

142. In contrast, several commenters argue that the small business definition must be made more restrictive in order to prevent large firms from spinning off companies to compete as designated entities. In this regard, some parties recommend limiting provisions to those small businesses that were in existence for the previous two years.

143. In the *Second Report and Order*, we adopted the existing SBA net worth/net income size standard as the generic threshold for small businesses to qualify as designated entities because at that time we were unable to conclude that the other proposals suggested by commenters were superior to this established standard. However we acknowledged that for certain telecommunications industry sectors this standard may not be high enough to encompass those entities that require the benefits, but also have the financial wherewithal to construct and operate the systems. Accordingly, we indicated that this "threshold could be adjusted upward on a service-by-service basis to accommodate such situations." We also noted that we may modify the small business definition if the SBA changed its definition or the Commission determined that an alternative definition was more appropriate for capital intensive services.

144. In this regard, in the *Fifth Report and Order* we revised the definition of a small business set forth in the *Second Report and Order* to include entities with up to \$40 million in gross revenues, and we provided that these small businesses would be permitted to pool their resources and form consortia to bid in the entrepreneurs' blocks or to receive other small business benefits. We also adopted rules that allow small businesses and businesses owned by women and/or minorities to raise capital by selling passive ownership interests in their companies. Thus, for example, under certain conditions, businesses owned by women and minorities have the option of taking on one large passive partner (holding up to 49.9 percent of the enterprise) or selling a greater portion of their companies' equity (up to 75 percent of the equity) to passive investors in smaller increments. Either of these structures should enhance the

¹⁸¹ For example, in the *Fifth Report and Order* we allowed minority or women-owned broadband PCS applicants to sell up to 75 percent of the company's equity to passive investors so long as the control groups retained control and 25 percent of the equity and each other investor owned less than 25 percent of the passive equity. We also established control group tests for small businesses and entities that wished to bid in certain blocks.

¹⁸² 13 CFR 121.802.

¹⁸³ Some parties recommend using the SBA's 1500 employee standard. See, e.g., comments of SBA Associate Administrator for Procurement Assistance at 2, CFW Communications at 2,

and Iowa Network at 17. A number of other commenters argue, however, that adoption of this alternative SBA definition would open up a huge loophole in the designated entity eligibility criteria. Specifically, they contend that telecommunications is a capital, rather than labor, intensive industry, and that an entity with 1,500 employees is likely to be extremely well capitalized and have no need for the special treatment outlined by Congress in the Budget Act. See, e.g., comments of LuxCel Group, Inc. at 4, Suite 12 Group at 10-11.

ability of these entities to obtain the necessary funding to meet long-term construction, operation and expansion goals.¹⁸⁴

145. Given the diversity of services that may be subject to competitive bidding and the varied spectrum costs and build-out requirements associated with each, we conclude that it is more appropriate to define the eligibility requirements for small businesses on a service-specific basis, taking into account the capital requirements of each particular service in establishing the appropriate threshold. Therefore we will amend our generic auction rules to replace the small business definition with a provision enabling the Commission to establish a small businesses definition in the context of each particular service.

V. FINAL REGULATORY FLEXIBILITY ANALYSIS

146. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. § 604, the Commission's final analysis is as follows:

A. Need for, and Purpose of, this Action

147. 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, within the *Notice of Proposed Rule Making* in this proceeding, and published a Final Regulatory Flexibility Analysis within the *Second Report and Order* (at ¶¶ 299-302). 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.

B. Summary of the Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis

148. No comments were submitted in response to our Initial Regulatory Flexibility Analysis.

C. Significant Alternatives Considered

149. Although, as described in (B) above, no comments were received pertaining to our Initial Regulatory Flexibility Analysis, the *Second Report and Order* addressed at length the general policy considerations raised as a result of the Commission's new auction authority.

VI. PROCEDURAL MATTERS AND ORDERING CLAUSES

150. Accordingly, IT IS ORDERED, that the petitions for reconsideration ARE GRANTED to the extent described above and DENIED in all other respects, and that the petition of William E. Zimsky IS DISMISSED as moot.

151. IT IS FURTHER ORDERED, that Part 1 of the Commission's Rules IS AMENDED as set forth in Appendix B, attached. IT IS ORDERED that the rule changes made herein WILL BECOME EFFECTIVE 30 days after their 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).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

FILINGS IN RESPONSE TO THE SECOND REPORT AND ORDER

Petitions

Anchorage Telephone Utility (ATU, Anchorage)
John G. Andrikopoulos, et al. (Andrikopoulos)
The Association of Independent Designated Entities (AIDE)
Black Entertainment Television Holdings, Inc. (BET)
Dennis C. Brown and Robert H. Schwaninger, Jr. (Brown & Schwaninger)
Blooston, Mordkofsky, Jackson & Dickens (Blooston)
Cable and Wireless, Inc. (CWI)
Cook Inlet Region, Inc. (CIRI, Cook Inlet)
GTE Service Corporation and Affiliates (GTE)
Houston, Dallas, Oxnard and Huntington Cellular Settlement Groups (Cellular Settlement Groups)
MCI Telecom. Corp. (MCI)
Millin Publications, Inc. (Millin)
The National Assoc. of Business and Educational Radio (NABER)
The National Telephone Cooperative Association (NTCA)
The Rural Cellular Association (RCA)
South Dakota Network, Inc. (SDN)
Southwestern Bell Corporation (SBC)
Telephone and Data Systems, Inc. (TDS)
Thumb Cellular Limited Partnership (Thumb Cellular)
U.S. Intelco Networks, Inc. (USIN)
William E. Zimsky (Zimsky)

Oppositions and Comments

Black Entertainment Television Holdings, Inc. (BET)
Quentin L. Breen (Breen)
GTE Service Corp. and Affiliates (GTE)

¹⁸⁴ See *Fifth Report and Order* at ¶185.

MCI Telecom. Corp. (MCI)
 Pacific Bell and Nevada Bell (Pacific Bell)
 Telephone and Data Systems, Inc. (TDS)
 Tri-County Telephone Company, Inc. (Tri-County)
 The United States Telephone Association (USTA)

Replies

Anchorage Telephone Utility (ATU, Anchorage)
 The Association of Independent Designated Entities (AIDE)
 Houston, Dallas, Oxnard and Huntington Cellular Settlement Groups (Cellular Settlement Groups)
 The National Telephone Cooperative Association (NTCA)
 The Rural Cellular Association (RCA)

APPENDIX B

FINAL RULES

Part 1 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

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

AUTHORITY: Secs. 1, 4(i), 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. §§ 151, 154, and 303, unless otherwise noted.

2. Subpart Q of Part 1 is amended to read as follows:

Subpart Q - Competitive Bidding Proceedings

AUTHORITY: 47 U.S.C. 309(j).

GENERAL PROCEDURES

§ 1.2101 Purpose

The provisions of this subpart implement Section 309(j) of the Communications Act of 1934, as added by the Omnibus Budget Reconciliation Act of 1993 (P.L. 103-66), authorizing the Commission to employ competitive bidding procedures to choose from among two or more mutually exclusive applications for certain initial licenses.

§ 1.2102 Eligibility of Applications for Competitive Bidding

(a) Mutually exclusive initial applications in the following services or classes of services are subject to competitive bidding:

- (1) Interactive Video Data Service (*see* 47 CFR Part 95, Subpart F). This subsection does not apply to applications which were filed prior to July 26, 1993;
- (2) Marine Public Coast Stations (*see* 47 CFR Part 80, Subpart J);
- (3) Multipoint Distribution Service and Multichannel Multipoint Distribution Service (*see* 47 CFR Part 21, Subpart K). This subsection does not apply to applications which were filed prior to July 26, 1993;

(4) Exclusive Private Carrier Paging above 900 MHz (see 47 CFR Part 90, Subpart P and the Private Carrier Paging Exclusivity Report and Order, 8 FCC Rcd 8318, 58 FR 62289 (Nov 26, 1993));

(5) Public Mobile Services (see 47 CFR Part 22), except in the 800 MHz Air-Ground Radiotelephone Service, and in the Rural Radio Service. This subsection does not apply to applications in the cellular radio service, such as cellular unserved area applications, that were filed prior to July 26, 1993;

(6) Specialized Mobile Radio Service (SMR) (see 47 CFR Part 90, Subpart S) including applications based on finder's preferences for frequencies allocated to the SMR service (see 47 CFR Section 90.173);

(7) Personal Communications Services (PCS) (see 47 CFR Part 24); and

NOTE: To determine the rules that apply to competitive bidding in the foregoing services, specific service rules should also be consulted.

(b) The following types of license applications are not subject to competitive bidding procedures:

(1) Applications for renewal of licenses;

(2) Applications for modification of license; provided, however, that the Commission may determine that applications for modification that are mutually exclusive with other applications should be subject to competitive bidding;

(3) Applications for subsidiary communications services. A "subsidiary communications service" is a class of service where the signal for that service is indivisible from that of the main channel signal and that main channel signal is exempt from competitive bidding under other provisions of these rules. See, e.g., § 1.2102(c) (exempting broadcast services). Examples of such subsidiary communications services are those transmitted on subcarriers within the FM baseband signal (see 47 CFR § 73.295), and signals transmitted within the Vertical Blanking Interval of a broadcast television signal; and

(4) Applications for frequencies used as an intermediate link or links in the provision of a continuous, end-to-end service where no service is provided directly to subscribers over the frequencies. Examples of such intermediate links are (a) point-to-point microwave facilities used to connect a cellular radio telephone base station with a cellular radio telephone mobile telephone switching office and (b) point-to-point microwave facilities used as part of the service offering in the provision of telephone exchange or interexchange service.

(c) Applications in the following services or classes of services are not subject to competitive bidding:

(1) Alaska-Private Fixed Stations (see 47 CFR Part 80, Subpart O);

(2) Broadcast radio (AM and FM) and broadcast television (VHF, UHF, LPTV) under 47 CFR Part 73;

(3) Broadcast Auxiliary and Cable Television Relay Services (see 47 CFR Part 74, Subparts D, E, F, G, H and L and Part 78, Subpart B);

(4) Instructional Television Fixed Service (see 47 CFR Part 74, Subpart I);

(5) Maritime Support Stations (see 47 CFR Part 80, Subpart N);

(6) Marine Operational Fixed Stations (see 47 CFR Part 80, Subpart L);

(7) Marine Radiodetermination Stations (see 47 CFR Part 80, Subpart M);

(8) Personal Radio Services (see 47 CFR Part 95), except applications filed after July 26, 1993, in the Interactive Video Data Service (see 47 CFR Part 95, Subpart F);

(9) Public Safety, Industrial/Land Transportation, General and Business Radio categories above 800 MHz, including finder's preference requests for frequencies not allocated to the SMR service (see 47 CFR Section 90.173), and including, until further notice of the Commission, the Automated Vehicle Monitoring Service (see 47 CFR § 90.239);

(10) Private Land Mobile Radio Services between 470-512 MHz (see 47 CFR Part 90, Subparts B-F), including those based on finder's preferences, see 47 CFR Section 90.173;

(11) Private Land Mobile Radio Services below 470 MHz (see 47 CFR Part 90, Subparts B-F) except in the 220 MHz band (see 47 CFR Part 90, Subpart T), including those based on finder's preferences (see 47 CFR Section 90.173); and

(12) Private Operational Fixed Services (see 47 CFR Part 94).

§ 1.2103 Competitive Bidding Design Options

(a) The Commission will select the competitive bidding design(s) to be used in auctioning particular licenses or classes of licenses on a service-specific basis. The choice of competitive bidding design will generally be made pursuant to the criteria set forth in the Second Report and Order in PP Docket No. 93-253, FCC 94-61, 59 FR 22980 (May 4, 1994), adopted March 8, 1994, but the Commission may design and test alternative methodologies. The Commission will choose from one or more of the following types of auction designs for services or classes of services subject to competitive bidding:

(1) Single round sealed bid auctions (either sequential or simultaneous)

(2) Sequential oral auctions

(3) Simultaneous multiple round auctions

(b) The Commission may use combinatorial bidding, which would allow bidders to submit all or nothing bids on combinations of licenses, in addition to bids on individual licenses. The Commission may require that to be declared the high bid, a combinatorial bid must exceed the sum of the individual bids by a specified amount. Combinatorial bidding may be used with any type of auction.

(c) The Commission may use single combined auctions, which combine bidding for two or more substitutable licenses and award licenses to the highest bidders until the available licenses are exhausted. This technique may be used in conjunction with any type of auction.

§ 1.2104 Competitive Bidding Mechanisms

(a) *Sequencing.* The Commission will establish the sequence in which multiple licenses will be auctioned.

(b) *Grouping.* In the event the Commission uses either a simultaneous multiple round competitive bidding design or combinatorial bidding, the Commission will determine which licenses will be auctioned simultaneously or in combination.

(c) *Reservation Price.* The Commission may establish a reservation price, either disclosed or undisclosed, below which a license subject to auction will not be awarded.

(d) *Minimum Bid Increments.* The Commission may, by announcement before or during an auction, require minimum bid increments in dollar or percentage terms. The Commission may also establish suggested minimum opening bids on a service-specific basis.

(e) *Stopping Rules.* The Commission may establish stopping rules before or during multiple round auctions in order to terminate the auctions within a reasonable time.

(f) *Activity Rules.* The Commission may establish activity rules which require a minimum amount of bidding activity.

(g) *Withdrawal, Default and Disqualification Penalties.* As specified below, when the Commission conducts a simultaneous multiple round auction pursuant to § 1.2103, the Commission will impose penalties on bidders who withdraw high bids during the course of an auction, or who default on payments due after an auction closes or who are disqualified.

(1) Bid withdrawal prior to close of auction. A bidder who withdraws a high bid during the course of an auction will be subject to a penalty equal to the difference between the amount bid and the amount of the winning bid the next time the license is offered by the Commission. No withdrawal penalty would be assessed if the subsequent winning bid exceeds the withdrawn bid. This penalty amount will be deducted from any upfront payments or down payments that the withdrawing bidder has deposited with the Commission.

(2) Default or disqualification after close of auction. If a high bidder defaults or is disqualified after the close of such an auction, the defaulting bidder will be subject to the penalty in subsection (1) plus an additional penalty equal to 3 percent of the subsequent winning bid. If the subsequent winning bid exceeds the defaulting bidder's bid amount, the 3 percent penalty will be calculated based on the defaulting bidder's bid amount. These amounts will be deducted from any upfront payments or down payments that the defaulting or disqualified bidder has deposited with the Commission.

When the Commission conducts single round sealed bid auctions or sequential oral auctions, the Commission may modify the penalties to be paid in the event of bid withdrawal, default or disqualification; provided, however, that such penalties shall not exceed the penalties specified above.

(h) The Commission will generally release information concerning the identities of bidders before each auction but may choose, on an auction-by-auction basis, to withhold the identity of the bidders associated with bidder identification numbers.

(i) The Commission may delay, suspend, or cancel an auction in the event of a natural disaster, technical obstacle, evidence of security breach, unlawful bidding activity, administrative necessity, or for any other reason that affects the fair and efficient conduct of the competitive bidding. The Commission also has the authority, at its sole discretion, to resume the competitive bidding starting from the beginning of the current or some previous round or cancel the competitive bidding in its entirety.

§ 1.2105 Bidding Application and Certification Procedures; Prohibition of Collusion

(a) *Submission of Short Form Application (FCC Form 175).* In order to be eligible to bid, an applicant must timely submit a short-form application (FCC Form 175), together with any appropriate filing fee set forth by Public Notice. Unless otherwise provided by Public Notice, the Form 175 need not be accompanied by an upfront payment (see Section 1.2106 of this part).

(1) All Form 175s will be due:

(i) on the date(s) specified by Public Notice; or

(ii) in the case of application filing dates which occur automatically by operation of law (see, e.g., 47 CFR Section 22.902), on a date specified by Public Notice after the Commission has reviewed the applications that have been filed on those dates and determined that mutual exclusivity exists.

(2) The Form 175 must contain the following information:

(i) Identification of each license on which the applicant wishes to bid;

(ii) The applicant's name, if the applicant is an individual. If the applicant is a corporation, then the short-form application will require the name and address of the corporate office and the name and title of an officer or director. If the applicant is a partnership, then the application will require the name, citizenship and address of all partners, and, if a partner is not a natural person, then the name and title of a responsible person should be included as well. If the applicant is a trust, then the name and address of the trustee will be required. If the applicant is none of the above, then it must identify and describe itself and its principals or other responsible persons;

(iii) The identity of the person(s) authorized to make or withdraw a bid;

(iv) If the applicant applies as a designated entity pursuant to § 1.2110 of these rules, a statement to that effect and a declaration, under penalty of perjury, that the applicant is qualified as a designated entity under § 1.2110 of the Commission's Rules;

(v) Certification that the applicant is legally, technically, financially and otherwise qualified pursuant to Section 308(b) of the Communications Act of 1934, as amended. The Commission will accept applications certifying that a request for waiver or other relief from the requirements of Section 310 is pending;

(vi) Certification that the applicant is in compliance with the foreign ownership provisions of Section 310 of the Communications Act of 1934, as amended;

(vii) Certification that the applicant is and will, during the pendency of its application(s), remain in compliance with any service-specific qualifications applicable to the licenses on which the applicant intends to bid including, but not limited to, financial qualifications. The Commission may require certification in certain services that the applicant will, following grant of a license, come into compliance with certain service-specific rules, including, but not limited to, ownership eligibility limitations;

(viii) An exhibit, certified as truthful under penalty of perjury, identifying all parties with whom the applicant has entered into partnerships, joint ventures, consortia or other agreements, arrangements or understandings of any kind relating to the licenses being auctioned, including any such agreements relating to the post-auction market structure.

(ix) Certification under penalty of perjury that it has not entered and will not enter into any explicit or implicit agreements, arrangements or understandings of any kind with any parties other than those identified pursuant to subsection (viii) regarding the amount of their bids, bidding strategies or the particular licenses on which they will or will not bid;

NOTE: The Commission may also request applicants to submit additional information for informational purposes to aid in its preparation of required reports to Congress.

(b) *Modification and Dismissal of Form 175.*

(1) Any Form 175 that is not signed or otherwise does not contain all of the certifications required pursuant to this section is unacceptable for filing and cannot be corrected subsequent to any applicable filing deadline. The application will be dismissed with prejudice and the upfront payment, if paid, will be returned.

(2) The Commission will provide bidders a limited opportunity to cure defects specified herein (except for failure to sign the application and to make certifications) and to resubmit a corrected application. Form 175 may be amended or modified to make minor changes or correct minor errors in the application (such as typographical errors). The Commission will classify all amendments as major or minor, pursuant to rules applicable to specific services. An application will be considered to be a newly filed application if it is amended by a major amendment and may not be resubmitted after applicable filing deadlines.

(3) Applicants who fail to correct defects in their applications in a timely manner as specified by Public Notice will have their applications dismissed with no opportunity for resubmission.

(c) *Prohibition of Collusion.*

(1) Except as provided in paragraphs (c)(2) and (c)(3) of this subsection, after the filing of short-form applications, all bidders are prohibited from cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies, or discussing or negotiating settlement agreements, with other bidders until after the high bidder makes the required down payment, unless such bidders are members of a bidding consortium or other joint bidding arrangement identified on the bidder's short-form application pursuant to Section 1.2105(a)(2)(viii).

(2) Applicants may modify their short-form applications to reflect formation of consortia or changes in ownership at any time before or during an auction, provided such changes do not result in a change in control of the applicant, and provided that the parties forming consortia or entering into ownership agreements have not applied for licenses in any of the same geographic license areas. Such changes will not be considered major modifications of the application.

(3) After the filing of short-form applications, applicants may make agreements to bid jointly for licenses, provided the parties to the agreement have not applied for licenses in any of the same geographic license areas.

§ 1.2106 Submission of Upfront Payments

(a) The Commission may require applicants for licenses subject to competitive bidding to submit an upfront payment. In that event, the amount of the upfront payment and the procedures for submitting it will be set forth in a Public Notice. No interest will be paid on upfront payments.

(b) Upfront payments must be made either by wire transfer or by cashier's check drawn in U.S. dollars from a financial institution whose deposits are insured by the Federal Deposit Insurance Corporation and must be made payable to the Federal Communications Commission.

(c) If an upfront payment is not in compliance with the Commission's Rules, or if insufficient funds are tendered to constitute a valid upfront payment, the applicant shall have a limited opportunity to correct its submission to bring it up to the minimum valid upfront payment prior to the auction. If the applicant does not submit at least the minimum upfront payment, it will be ineligible to bid, its application will be dismissed and any upfront payment it has made will be returned.

(d) The upfront payment(s) of a bidder will be credited toward any down payment required for licenses on which the bidder is the high bidder. Where the upfront payment amount exceeds the required deposit of a winning bidder, the Commission may refund the excess amount after determining that no bid withdrawal penalties are owed by that bidder.

(e) In accordance with the provisions of subsection (d), in the event a penalty is assessed pursuant to § 1.2104 for bid withdrawal or default, upfront payments or down payments on deposit with the Commission will be used to satisfy the bid withdrawal or default penalty before being applied toward any additional payment obligations that the high bidder may have.

§ 1.2107 Submission of Down Payment and Filing of Long-Form Applications

(a) After bidding has ended, the Commission will identify and notify the high bidder and declare the bidding closed.

(b) Within five (5) business days after being notified that it is a high bidder on a particular license(s), a high bidder must submit to the Commission's lockbox bank such additional funds (the "down payment") as are necessary to bring its total deposits (not including upfront payments applied to satisfy penalties) up to twenty (20) percent of its high bid(s). (In single round sealed bid auctions conducted under § 1.2103, however, bidders may be required to submit their down payments with their bids.) This down payment must be made by wire transfer or cashier's check drawn in U.S. dollars from a financial institution whose deposits are insured by the Federal Deposit Insurance Corporation and must be made payable to the Federal Communications Commission. Winning bidders who are qualified designated entities eligible for installment payments under § 1.2110(d) are only required to bring their total deposits up to ten (10) percent of their winning bid(s). Such designated entities must pay the remainder of the twenty (20) percent down payment within five (5) business days of grant of their application. See § 1.2110(e)(1) and (2) of this subpart. Down payments will be held by the Commission until the high bidder has been awarded the license and has paid the remaining balance due on the license, in which case it will not be returned, or until the winning bidder is found unqualified to be a licensee or has defaulted, in which case it will be returned, less applicable penalties. No interest will be paid on any down payment.

(c) A high bidder that meets its down payment obligations in a timely manner must, within ten (10) business days after being notified that it is a high bidder, submit an additional application (the "long-form application") pursuant to the rules governing the service in which the applicant is the high bidder (unless it has already submitted such an application, as contemplated by § 1.2105(a)(1)(b)). For example, if the applicant is a high bidder for a license in the Interactive Video Data Service (see 47 CFR Part 95, Subpart F), the long form application will be submitted on FCC Form 574 in accordance with Section 95.815 of the Rules. Notwithstanding any other provision in Title 47 of the Code of Federal Regulations to the contrary, high bidders need not submit an additional application filing fee with their long-form applications. Notwithstanding any other provision in Title 47 of the Code of Federal Regulations to the contrary, the high bidder's long-form application must be mailed or otherwise delivered to:

Office of the Secretary
Federal Communications Commission
Attention: Auction Application Processing Section
1919 M Street, N.W., Room 222
Washington, D.C. 20554

An applicant that fails to submit the required long-form application as required under this subsection, and fails to establish good cause for any late-filed submission, shall be deemed to have defaulted and will be subject to the penalties set forth in § 1.2104 of the Commission's Rules.

(d) As an exhibit to its long-form application, the applicant must provide a detailed explanation of the terms and conditions and parties involved in any bidding consortia, joint venture, partnership or other agreement or arrangement it had entered into relating to the competitive bidding process prior to the time bidding was completed. Such agreements must have been entered into prior to the filing of short-form applications pursuant to § 1.2105.

§ 1.2108 Procedures for Filing Petitions To Deny Against Long-Form Applications

(a) Where petitions to deny are otherwise provided for under the Act or the Commission's Rules, and unless other service-specific procedures for the filing of such petitions are provided for elsewhere in the Commission's Rules, the procedures in this section shall apply to the filing of petitions to deny the long-form applications of winning bidders.

(b) Within thirty (30) days after the Commission gives public notice that a long-form application has been accepted for filing, petitions to deny that application may be filed. Any such petitions must contain allegations of fact supported by affidavit of a person or persons with personal knowledge thereof.

(c) An applicant may file an opposition to any petition to deny, and the petitioner a reply to such opposition. Allegations of fact or denials thereof must be supported by affidavit of a person or persons with personal knowledge thereof. The times for filing such opposition and replies will be those provided in § 1.45 of these Rules.

(d) If the Commission determines that:

(1) an applicant is qualified and there is no substantial and material issue of fact concerning that determination, it will grant the application.

(2) an applicant is not qualified and that there is no substantial issue of fact concerning that determination, the Commission need not hold an evidentiary hearing and will deny the application.

(3) substantial and material issues of fact require a hearing, it will conduct a hearing. The Commission may permit all or part of the evidence to be submitted in written form and may permit employees other than administrative law judges to preside at the taking of written evidence. Such hearing will be conducted on an expedited basis.

§ 1.2109 License Grant, Denial, Default, and Disqualification

(a) Unless otherwise specified in these rules, auction winners are required to pay the balance of their winning bids in a lump sum within five (5) business days following award of the license. Grant of the license will be conditioned on full and timely payment of the winning bid.

(b) If a winning bidder withdraws its bid after the Commission has declared competitive bidding closed or fails to remit the required down payment within five (5) business days after the Commission has declared competitive bidding closed, the bidder will be deemed to have defaulted, its application will be dismissed, and it will be liable for the default penalty specified in § 1.2104(g)(2). In such event, the Commission may either re-auction the license to existing or new applicants or offer it to the other highest bidders (in descending order) at their final bids. The down payment obligations set forth in § 1.2107(b) will apply.

(c) A winning bidder who is found unqualified to be a licensee, fails to remit the balance of its winning bid in a timely manner, or defaults or is disqualified for any reason after having made the required down payment, will be deemed to have defaulted and will be liable for the penalty set forth in § 1.2104(g)(2). In such event, the Commission will conduct another auction for the license, affording new parties an opportunity to file applications for the license.

(d) Bidders who are found to have violated the antitrust laws or the Commission's rules in connection with their participation in the competitive bidding process may be subject, in addition to any other applicable sanctions, to forfeiture of their upfront payment, down payment or full bid amount, and may be prohibited from participating in future auctions.

§ 1.2110 Designated Entities

(a) Designated entities are small businesses, businesses owned by members of minority groups and/or women, and rural telephone companies.

(b) Definitions.

(1) Small businesses. The Commission will establish the definition of a small business on a service-specific basis, taking into consideration the characteristics and capital requirements of the particular service.

(2) Businesses owned by members of minority groups and/or women. Unless otherwise provided in rules governing specific services, a business owned by members of minority groups and/or women is one in which minorities and/or women who are U.S. citizens control the applicant, have at least 50.1 percent equity ownership and, in the case of a corporate applicant, a 50.1 percent voting interest. For applicants that are partnerships, every general partner either must be a minority and/or woman (or minorities and/or women) who are U.S. citizens and who individually or together own at least 50.1 percent of the partnership equity, or an entity that is 100 percent owned and controlled by minorities and/or women who are U.S. citizens. The interests of minorities and women are to be calculated on a fully-diluted basis; agreements such as stock options and convertible debentures shall be considered to have a present effect on the power to control an entity and shall be treated as if the rights thereunder already have been fully exercised. However, upon a demonstration that options or conversion rights held by non-controlling principals will not deprive the minority and female principals of

a substantial financial stake in the venture or impair their rights to control the designated entity, a designated entity may seek a waiver of the requirement that the equity of the minority and female principals must be calculated on a fully-diluted basis. The term minority includes individuals of African American, Hispanic-surnamed, American Eskimo, Aleut, American Indian and Asian American extraction.

(3) Rural telephone companies. A rural telephone company is any local exchange carrier, including affiliates (as defined in 1.2110 (b)(4)), with 100,000 access lines or fewer.

(4) Affiliate. (1) An individual or entity is an *affiliate* of (a) an applicant or (b) a person holding an attributable interest in an applicant under § 24.709 (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 pow-

er 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 has the power to control a concern, persons with an identity of interest will be treated as though they were one person.

Example. 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.

(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. In calculating their net worth, investors who are legally separated must include their share of interests in property held jointly with a spouse.

(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-in-law, mother-in-law, son- or daughter-in-law, brother-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 ag-

gregate 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 are generally treated as though the rights held thereunder had been exercised. However, an affiliate cannot 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.

(c) The Commission may set aside specific licenses for which only eligible designated entities, as specified by the Commission, may bid.

(d) The Commission may permit partitioning of service areas in particular services for eligible designated entities.

(e) The Commission may permit small businesses (including small businesses owned by women, minorities, or rural telephone companies that qualify as small businesses) and other entities determined to be eligible on a service-specific basis, which are high bidders for licenses specified by the Commission, to pay the full amount of their high bids in installments over the term of their licenses pursuant to the following:

(1) Unless otherwise specified, each eligible applicant paying Wfor its license(s) on an installment basis must deposit by wire transfer or cashier's check in the manner specified in § 1.2107(b) sufficient additional funds as are necessary to bring its total deposits to ten (10) percent of its winning bid(s) within five (5) business days after the Commission has declared it the winning bidder and closed

the bidding. Failure to remit the required payment will make the bidder liable to pay penalties pursuant to § 1.2104(g)(2).

(2) Within five (5) business days of the grant of the license application of a winning bidder eligible for installment payments, the licensee shall pay another ten (10) percent of the high bid, thereby commencing the eligible licensee's installment payment plan. Failure to remit the required payment will make the bidder liable to pay penalties pursuant to § 1.2104(g)(2).

(3) Upon grant of the license, the Commission will notify each eligible licensee of the terms of its installment payment plan. Unless other terms are specified in the rules of particular services, such plans will:

(i) impose interest based on the rate of U.S. Treasury obligations (with maturities closest to the duration of the license term) at the time of licensing;

(ii) allow installment payments for the full license term;

(iii) begin with interest-only payments for the first two years; and

(iv) amortize principal and interest over the remaining term of the license.

(4) A license granted to an eligible entity that elects installment payments shall be conditioned upon the full and timely performance of the licensee's payment obligations under the installment plan.

(i) If an eligible entity making installment payments is more than ninety (90) days delinquent in any payment, it shall be in default.

(ii) Upon default or in anticipation of default of one or more installment payments, a licensee may request that the Commission permit a three to six month grace period, during which no installment payments need be made. In considering whether to grant a request for a grace period, the Commission may consider, among other things, the licensee's payment history, including whether the licensee has defaulted before, how far into the license term the default occurs, the reasons for default, whether the licensee has met construction build-out requirements, the licensee's financial condition, and whether the licensee is seeking a buyer under an authorized distress sale policy. If the Commission grants a request for a grace period, or otherwise approves a restructured payment schedule, interest will continue to accrue and will be amortized over the remaining term of the license.

(iii) Following expiration of any grace period without successful resumption of payment or upon denial of a grace period request, or upon default with no such request submitted, the license will automatically cancel and the Commission will initiate debt collection procedures pursuant to Part 1, Subpart O of the Commission's Rules.

(e) The Commission may award bidding credits (*i.e.*, payment discounts) to eligible designated entities. Competitive bidding rules applicable to individual services will

specify the designated entities eligible for bidding credits, the licenses for which bidding credits are available, the amounts of bidding credits and other procedures.

(f) The Commission may establish different upfront payment requirements for categories of designated entities in competitive bidding rules of particular auctionable services.

(g) The Commission may offer designated entities a combination of the available preferences or additional preferences.

(h) Designated entities must describe on their long-form applications how they satisfy the requirements for eligibility for designated entity status, and must list and summarize on their long-form applications all agreements that effect designated entity status, such as partnership agreements, shareholder agreements, management agreements and other agreements, including oral agreements, which establish that the designated entity will have both *de facto* and *de jure* control of the entity. Such information must be maintained at the licensees' facilities or by their designated agents for the term of the license in order to enable the Commission to audit designated entity eligibility on an ongoing basis.

(i) The Commission may, on a service-specific basis, permit consortia, each member of which individually meets the eligibility requirements, to qualify for any designated entity provisions.

(j) The Commission may, on a service-specific basis, permit publicly-traded companies that are owned by members of minority groups or women to qualify for any designated entity provisions.

§ 1.2111 Assignment or transfer of control: unjust enrichment

(a) *Reporting requirement.* An applicant seeking approval for a transfer of control or assignment (otherwise permitted under the Commission's Rules) of a license within three years of receiving a new license through a competitive bidding procedure must, together with its application for transfer of control or assignment, file with the Commission a statement indicating that its license was obtained through competitive bidding. Such applicant must also file with the Commission the associated contracts for sale, option agreements, management agreements, or other documents disclosing the total consideration that the applicant would receive in return for the transfer or assignment of its license. This information should include not only a monetary purchase price, but also any future, contingent, in-kind, or other consideration (e.g., management or consulting contracts either with or without an option to purchase; below market financing).

(b) *Unjust enrichment payment: set-asides.* As specified in this subsection, an applicant seeking approval for a transfer of control or assignment (otherwise permitted under the Commission's Rules) of a license acquired by the transferor or assignor pursuant to a set-aside for eligible designated entities under § 1.2110(c) of the Commission's Rules, or who proposes to take any other action relating to ownership or control that will result in loss of status as an eligible designated entity, must seek Commission approval and may be required to make an unjust enrichment payment (Payment) to the Commission by cashier's check or wire transfer before consent will be granted. The Payment will be based upon a schedule that will take account of the term of the license, any applicable construction bench-

marks, and the estimated value of the set-aside benefit, which will be calculated as the difference between the amount paid by the designated entity for the license and the value of a comparable non-set-aside license in the free market at the time of the auction. The Commission will establish the amount of the Payment and the burden will be on the applicants to disprove this amount. No Payment will be required if:

(1) the license is transferred or assigned more than five years after its initial issuance, unless otherwise specified; or

(2) the proposed transferee or assignee is an eligible designated entity under § 1.2110(c) of the Commission's Rules or the service-specific competitive bidding rules of the particular service, and so certifies.

(c) *Unjust enrichment payment: installment financing.* An applicant seeking approval for a transfer of control or assignment (otherwise permitted under the Commission's Rules) of a license acquired by the transferor or assignor through a competitive bidding procedure utilizing installment financing available to designated entities under § 1.2110(d) of the Rules will be required to pay the full amount of the remaining principal balance as a condition of the license transfer. No payment will be required if the proposed transferee or assignee assumes the installment payment obligations of the transferor or assignor, and if the proposed transferee or assignee is itself qualified to obtain installment financing under § 1.2110(d) of the Rules or the service-specific competitive bidding rules of the particular service, and so certifies.

(d) *Unjust enrichment payment: bidding credits.* An applicant seeking approval for a transfer of control or assignment (otherwise permitted under the Commission's Rules) of a license acquired by the transferor or assignor through a competitive bidding procedure utilizing bidding credits available to eligible designated entities under § 1.2110(e) of the Rules, or who proposes to take any other action relating to ownership or control that will result in loss of status as an eligible designated entity, must seek Commission approval and will be required to make an unjust enrichment payment (Payment) to the government by wire transfer or cashier's check before consent will be granted. The Payment will be the sum of the amount of the bidding credit plus interest at the rate applicable for installment financing in effect at the time the license was awarded. See § 1.2110(e). No payment will be required if the proposed transferee or assignee is an eligible designated entity under § 1.2110(e) of the Commission's Rules or the service-specific competitive bidding rules of the particular service, and so certifies.