

184. We shall therefore allow women and minority-owned firms the following options. First, they may satisfy the general definition set forth in the Second Report and Order, which requires the minority and/or female principals to control the applicant, own at least 50.1 percent of its equity and, in the case of corporate applicants, hold at least 50.1 percent of the voting stock. Under this option, other investors may own as much as a 49.9 percent passive equity interest. As noted above regarding eligibility to bid in the entrepreneurs' blocks, passive equity in the corporate context means only non-voting stock may be held, or stock that includes no more than five percent of the voting interests.¹⁵⁸ For partnerships, the term means limited partnership interests that do not have the power to exercise control of the entity. In addition, as required in the Second Report and Order, all investor interests will be calculated on a fully-diluted basis, meaning that agreements such as stock options, warrants and convertible debentures generally will be considered to have a present effect and will be treated as if the rights thereunder already have been fully exercised.¹⁵⁹ We recognize that the requirement that other investors own only passive interests is a departure from the definition of a minority or women-owned business adopted in the Second Report and Order, but because of the very significant financial contribution that may be made by such other investors in designated entities, we believe that the passive equity requirement is appropriate as an additional safeguard to ensure that minorities and/or women retain control of the applicant.

185. As a second option, women and minority-owned firms may sell up to 75 percent of the company's equity, provided that no single investor may hold 25 percent or more of the firm's passive equity, which is defined in the same manner as above. For example, a corporation with 100 shares of voting stock and 100 shares of non-voting stock, with the 200 shares representing the total outstanding shares of the company, could qualify as a minority or women-owned business under the following circumstances. The minority or women principals would have to own at least 51 shares of voting stock, which satisfies the requirement that they have voting control and, in this case, also meets the requirement that

¹⁵⁸ For example, under this option, a corporate applicant with two classes of issued and outstanding stock, 100 shares of voting stock and 100 shares of non-voting stock, could sell to a single non-eligible entity 49.9 percent of the applicant's equity, consisting of 5 shares of the corporation's voting stock and 94 shares of its non-voting stock. Under this scenario, eligible minorities or women, in order to retain at least 50.1 percent of the value of all outstanding shares of the corporation's stock, must own all of the corporation's remaining shares of stock; that is, 95 shares of voting stock and six shares of non-voting stock.

¹⁵⁹ As also noted in the Second Report and Order, we will consider departing from the requirement that the equity of investors in minority and women-owned businesses must be calculated on a fully-diluted basis only upon a demonstration, in individual cases, that options or conversion rights held by non-controlling principals will not deprive the minority and women principals of a substantial financial stake in the venture or impair their rights to control the designated entity. See Second Report and Order at ¶ 277.

they hold at least 25 percent of the equity. Two other investors could each own 44 shares of non-voting stock and five shares of voting stock, which represents 24.5 percent of the company's equity for each of the shareholders. A third investor could own the remaining 12 shares of non-voting stock and five shares of the voting stock, or 8.5 percent of the equity. The remaining 34 shares of voting stock may be sold to other investors provided that no single investor owns more than five shares.

186. Whichever option is chosen, we will require establishment of a "control group" in much the same way we did for purposes of eligibility to bid in the entrepreneurs' blocks. Specifically, winning bidders, transferees or assignees must identify on their long-form applications a control group (consisting entirely of minorities and/or women or entities 100 percent owned and controlled by minorities and women) that has de jure and de facto control of the applicant and holds either at least 50.1 or 25 percent of the applicant's equity, depending upon which option is elected.

187. We believe that a modification of our 50.1 percent equity requirement will best achieve Congress' objective of providing effective and long-term economic opportunities for women and minority-owned firms in broadband PCS. At the same time, we shall maintain strict enforcement of the requirement that actual control reside with the qualified designated entities. Thus, to establish their eligibility for tax certificates, enhanced installment payments, bidding credits and relaxed cellular attribution rules, women and minority-owned applicants electing to use the 25 percent equity option may not in any instance allow an individual investor who is not in the control group to own more than a 25 percent passive equity interest. This restriction will apply even in circumstances in which allowing an investor to exceed these limitations would not result in the applicant's exceeding the gross revenues and other financial standards that apply to other bidders in the entrepreneurs' blocks and other situations involving financial caps. These structural safeguards, as well as the general requirement that other investors hold only passive interests in women and minority-owned applicants, will help to ensure that control truly remains with the women and minority designated entities.

188. For example, a women or minority-owned firm electing to use the 25 percent option may have a non-eligible investor with more than a 25 percent passive stake and still qualify to bid in the entrepreneurs' blocks or for benefits that apply to small businesses, as long as the attributable revenues of the investor do not cause the applicant to exceed the gross revenues/total assets caps. In these contexts, no additional restrictions are necessary, because women and minority-owned applicants, like other applicants, are eligible to bid in these blocks and to qualify as small businesses so long as they comply with the same restrictions on financial eligibility that apply to other applicants. Since the attribution rule itself operates to ensure compliance with size limitations, it is not necessary to impose additional restrictions on the size of interests held by investors with attributable interests. This firm will not qualify, however, for special measures applicable only to women and minority-owned businesses, such as "enhanced" installment payments or the 15 or 25 percent bidding credits, because it has a single non-eligible investor with more than a 25 percent passive interest. In

circumstances in which women and minorities are required to retain only 25 percent of the firm's equity, this additional structural restriction is appropriate because the objective in this context is to ensure not merely financial eligibility, but that women and minorities retain control of the license.

189. We set forth previously rules defining more explicitly the term "control" for purposes of determining whether a "control group" maintains de facto as well as de jure control of an applicant.¹⁶⁰ Those rules apply equally to the minority and women principals of minority and women-owned applicants. Consistent with our general policies with regard to women-owned applicants for purposes of our multiple ownership and cross-ownership rules in this broadcast context, we shall not adopt, at this time, any special rules or presumptions to determine whether women-owned applicants exercise independent control of their firms. See In the Matter of Clarification of Commission Policies Regarding Spousal Attribution, 7 FCC Rcd. 1920 (1992)

190. Our requirement that control rest with minorities and/or women and the clarifications above 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 reaffirm our commitment to investigate all allegations of fronts, shams or other methods used by those who try to obtain a benefit to which they are not lawfully entitled. In this vein, we again admonish parties that we will conduct random pre and post-auction audits to ensure that applicants receiving these benefits are bona fide designated entities.

191. We also note here that we are departing from the provision in the Second Report and Order that bars publicly traded companies from qualifying as minority and woman-owned businesses for purposes of participating in auctions. Most of the steps taken to assist these designated entities in this Order (e.g., bidding credits and installment payments) are confined to winning bidders in the entrepreneurs' blocks, where there is a financial limit on the size of participants. Because of the expected large capital entry costs of broadband PCS, we believe that even publicly traded companies owned by women and minorities that qualify to bid in blocks C and F require additional measures, such as bidding credits and installment payments, to be able to participate successfully. We emphasize, however, that the exception to the attribution rules for publicly traded companies to be eligible to bid in the entrepreneurs' blocks does not apply here.¹⁶¹ To qualify for measures targeted exclusively to women and minority-owned businesses, a company must satisfy the definition set forth in this section.

¹⁶⁰ See supra ¶ 164.

¹⁶¹ With regard to qualifying to bid in the entrepreneurs' blocks, we stated that we would not attribute the revenues or assets of an investor that owns up to 15 percent of a publicly traded applicant's voting stock. For privately held companies, the voting stock threshold is five percent. See supra ¶¶ 158, 163.

192. As noted above, applicants owned by women and minorities must meet the limitations on gross revenues, total assets and personal net worth to qualify for entry into the entrepreneurs' blocks. The size limitations do not apply, however, to all measures designed to assist applicants owned by minorities and/or women. The tax certificate policy applies to all broadband PCS licenses and is not limited to licenses in the entrepreneurs' blocks. Therefore, businesses owned by minorities and women need not meet the gross revenue and other financial restrictions to qualify for tax certificates. Similarly, the relaxed cellular attribution threshold for minority and woman-owned firms adopted in the Broadband PCS Reconsideration Order is not limited to the entrepreneurs' blocks. Thus, minority and women-owned firms that do not meet the gross revenues, total assets and net worth restrictions may nevertheless qualify for the 40 percent cellular attribution rule. But minority and women-owned firms must satisfy the Commission's structural ownership requirements to receive the benefits of tax certificates and the relaxed cellular attribution rule; that is, they are subject to the limitation that interests held by investors who are not women and minorities must be passive.

4. Definition of Rural Telephone Company

193. As discussed above, we have adopted several measures to assist rural telephone companies in the broadband PCS service. We decide here the definition of rural telephone companies who are eligible for those benefits. As explained below, for this service, we shall depart from the definition adopted in the Second Report and Order and define rural telephone companies as local exchange carriers having 100,000 or fewer access lines, including all affiliates.

194. As we pointed out in the Second Report and Order,¹⁶² most of those responding to our tentative conclusion in the Notice concerning the definition of a rural telephone company contended that the proposed definition, which was based on the standard contained in Section 63.58 of the Commission's Rules, was too restrictive. A variety of more inclusive definitions were recommended.¹⁶³ Some commenters advocated a definition in which a company would qualify if it satisfied either of two alternative criteria based on population of communities served or number of access lines.¹⁶⁴ Others advocated adoption of a definition

¹⁶² Second Report and Order at ¶¶ 279-282.

¹⁶³ See, e.g., comments of Saco River, Telephone Electronics, and Iowa Network (advocating amending the proposed definition merely by raising the population threshold to 10,000), and comments of Chickasaw (advocating definition including companies that predominantly, but not exclusively, serve customers in communities of less than 10,000 in non-urbanized areas).

¹⁶⁴ See, e.g., comments of Telocator, TDS, NYNEX, NOTA, NTCA and Saco River (recommending a definition including companies that either provide service only within communities of 10,000 or less in non-urbanized areas or provide 10,000 or fewer access lines

focusing simply on the number of access lines provided.¹⁶⁵ One commenter advocated a definition focusing exclusively on revenues rather than access lines, with the standard for rural telephone company status at annual revenues under \$100 million.¹⁶⁶ In addition, some advocated a somewhat more restrictive definition.¹⁶⁷

195. Many commenters suggested limiting rural telephone eligibility to carriers serving communities with no more than 10,000 inhabitants, asserting that such a standard better comports with common notions about which telephone companies are "rural."¹⁶⁸ A number of other commenters supported a definition of rural telephone company that would include a limitation on the size of the company. OPASTCO, for example, asserted that such a limitation would comport with the statutory mandate to ensure opportunity for rural telephone companies because "the problem such companies face in the competitive bidding arena" is as much a function of their size as of the rural character of their service areas."¹⁶⁹ NTCA similarly contended that small companies have shown the interest and commitment needed to fulfill the explicit statutory goal of "rapid deployment of new . . . services for . . . those residing in rural areas," citing as support a report on the deployment of digital switching by small LECs.¹⁷⁰ Other parties suggested that we look to the unenacted antecedent of the Budget Act, S.1134, in which a rural telephone company was defined as an entity that either (a) "provides telephone exchange service by wire in a rural area" (i.e., a non-urbanized area

(and no more than 150,000 in conjunction with affiliates)); comments of OPASTCO (recommending defining rural telephone companies as those that either provide exchange service only within communities of 10,000 or less in non-urbanized areas or that provide 50,000 or fewer access lines; and comments of SBA Chief Counsel for Advocacy (recommending a definition including companies serving communities of 20,000 or less in non-urbanized areas or providing 50,000 or fewer access lines (including lines provided by affiliates)).

¹⁶⁵ See, e.g., comments of STCL, MEBTEL, CFW, Minnesota Equal Access Network, Rural Cellular Assn., Rural Cellular Corp., Rochester Tel. Corp, McCaw, DialPage, APC, TDS and Gulf Telephone Co. (suggesting caps between 25,000 and 150,000 access lines).

¹⁶⁶ Comments of PMN.

¹⁶⁷ See, e.g., comments of GTE (definition would apply only to companies that exclusively serve customers in communities of 10,000 or less in non-urbanized areas and that provide wireline exchange service to 10,000 or fewer customers).

¹⁶⁸ See, e.g., comments of OPASTCO, Iowa Network, Saco River and Telephone Electronics.

¹⁶⁹ Comments of OPASTCO at 5.

¹⁷⁰ Comments of NTCA at 7-8.

containing no incorporated place with more than 10,000 inhabitants), (b) "provides telephone exchange service by wire to less than 10,000 subscribers," or (c) "is a telephone utility whose income accrues to a State or political subdivision thereof."

196. 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. 47 C.F.R. § 1.2110(b)(3). We stated our belief that a limitation on the size of eligible rural telephone companies is appropriate because Congress did not intend for us to give special treatment to large LECs that happen to serve small rural communities. See Second Report and Order at ¶ 282.

197. Several parties who filed petitions for reconsideration of the Second Report and Order argue that the definition adopted for rural telephone companies may be too restrictive given the capital intensive nature of broadband PCS.¹⁷¹ We also note that NTCA argued in its comments in this proceeding that it is neither necessary nor appropriate to use the same criteria to define rural telephone companies in rules pertaining to different services, technologies, and industries.¹⁷² Likewise, in an ex parte letter, OPASTCO states that by defining rural telephone company for purposes of broadband PCS as a local exchange carrier with less than \$100 million in revenue, the Commission will properly capture in the defined class locally-owned telephone companies who are truly interested in providing services to rural areas.¹⁷³ OPASTCO notes that the "same universe of companies" that would fall under such a revenue threshold would be captured by a definition that includes all telephone companies having 100,000 or fewer access lines.¹⁷⁴

198. Our challenge in establishing a definition of a rural telephone company for broadband PCS is to achieve the congressional goal of promoting the rapid deployment of this new service in rural areas by targeting only those telephone companies whose service territories are predominantly rural in nature, and who are thus likely to be able to use on their existing wireline telephone networks to build broadband PCS infrastructures to serve rural America. For purposes of our rules governing broadband PCS licenses, we believe that this goal can best be achieved if we define rural telephone companies as those local exchange carriers having 100,000 or fewer access lines, including all affiliates. We agree with

¹⁷¹ See, e.g., petitions of South Dakota Network (SDN), U.S. Intelco, NTCA, Rural Cellular Association and TDS. We note that similar arguments have been made with respect to other services.

¹⁷² See comments of NTCA at 4.

¹⁷³ Ex parte filing of filing of OPASTCO, June 2, 1994, at 2; see also comments of PMN at 7-8.

¹⁷⁴ Id.

OPASTCO that such a definition will include virtually all of the telephone companies who genuinely are interested in providing services to rural areas. This definition will encourage participation by legitimate rural telephone companies without providing special treatment to large LECs. Therefore, we will better achieve the congressional goal of providing service rapidly to rural areas without giving benefits to large companies that do not require such assistance. Rural telephone companies that satisfy this definition thus will be eligible for rural partitioning, as discussed above.¹⁷⁵

199. Anchorage Telephone Company argues in a petition for reconsideration of the Second Report and Order that our definition of a rural telephone company should include telephone companies that are owned by governmental authorities. Anchorage contends that Congress meant to mandate special consideration not only for telephone carriers serving rural areas but also for all municipally-owned telcos, even those with wholly or predominantly urban service areas.¹⁷⁶ This argument is based on its interpretation of the Senate bill that was antecedent to the enacted Budget Act. Anchorage 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. Anchorage further states that the report of the conference committee that drafted the Budget Act declares that the Senate's "findings" are incorporated by reference.¹⁷⁷ Anchorage also asserts that without the aid of special assistance it and most other state-owned and municipal telcos won't 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.¹⁷⁸

200. We find no merit in Anchorage's arguments. There is no specific evidence that Congress intended the term "rural telephone companies" to include all state or municipally-owned telephone companies. 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. Further, we disagree that state and municipal governments lack the means to participate successfully in auctions. Such governments have substantial capabilities to raise funds through private financing, bond offerings and taxation. Therefore, our definition of a rural telephone company will not encompass telephone companies that are owned by government authorities.

¹⁷⁵ Such companies also will be eligible for special treatment under our cellular attribution rules for broadband PCS. See 47 C.F.R. § 24.204(d)(2)(ii).

¹⁷⁶ Anchorage Petition at 2-3.

¹⁷⁷ Id.

¹⁷⁸ Id. at 4-5.

5. Definition of an Affiliate

201. Many of the eligibility criteria set forth above are based on the size of the entity applying for a broadband PCS license and/or seeking special treatment under our designated entity policies. Each of these size standards (\$125 million gross revenues/\$500 million total assets/\$100 million personal net worth, \$40 million gross revenues/\$40 million personal net worth, and 100,000 access lines) requires applicants to include, among other parties, "affiliates" when calculating their attributable gross revenues, total assets, net worth or access lines. This affiliation requirement is intended to prevent entities that, for all practical purposes, do not meet these size standards from receiving benefits targeted to smaller entities.¹⁷⁹ We adopt specific affiliation rules for purposes of applying these eligibility criteria based in part on the Small Business Administration's affiliation rules.¹⁸⁰

202. 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. We continue to believe that the SBA's affiliation rules provide a solid foundation on which to build our own affiliation rules for purposes of the small business definition for broadband PCS and for the other size standards adopted in this order.¹⁸¹ Accordingly, for purposes of these eligibility restrictions, we will again borrow from the SBA's rules for outside affiliations. In addition, to ensure that applicants have clear guidance concerning these matters, we shall include in our rules more detailed information concerning the circumstances in which an entity will be deemed an affiliate of the applicant.

203. Like the eligibility rules we have adopted here governing size limitations for broadband PCS, the SBA's rules provide that size determinations shall include the applicant and all of its "affiliates."¹⁸² At the outset, before considering in more detail all the types of affiliations that might exist when guided by the SBA rules, we review briefly our own rules described above, concerning attributable interests. Those rules provide that, so long as a control group is established, the gross revenues, assets or net worth of an investor in a PCS applicant or licensee will be attributed to the applicant or licensee only if the investor holds more than 25 percent of the applicant's passive equity or is part of a control group that

¹⁷⁹ See, e.g., Second Report and Order at ¶ 272.

¹⁸⁰ See 13 C.F.R. § 121.401 (1993) (formerly at 13 C.F.R. § 121.3 (1989)).

¹⁸¹ SBA's affiliation rules were promulgated under the authority in Section 3 of the Small Business Act of 1953, as amended, 15 U.S.C. § 632, which provides that, to be eligible for benefits provided by SBA and other agencies, a "small-business concern" must be "independently owned and operated." See Small Business Size Standards, 54 Fed. Reg. 52634 (December 21, 1989).

¹⁸² See 13 C.F.R. § 121.401(a).

controls the applicant. Therefore, only where an investor has such attributable interests in the broadband PCS applicant or licensee do we need to examine whether the investor has a relationship with other persons or outside entities that rises to the level of an affiliation with the PCS applicant, and if so, whether the affiliate's revenues or net worth, when aggregated with the applicant's, exceed our size eligibility thresholds.

204. General Principles of Affiliation. When such an attributable interest exists, 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. 13 C.F.R. § 121.401(a)(2)(i), (ii). 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. *Id.* § 121.401(c)(1). Second, an affiliation, under SBA rules, may also arise out of an "identity of interest" between or among parties. *Id.* § 121.401(a)(2)(iii), (d). We shall adopt these same general provisions in our affiliation rules for broadband PCS.

205. In adopting these affiliation rules, we emphasize that these rules will not be applied in a manner that defeats the objectives of our attribution rules. Our attribution rules expressly permit applicants to disregard the gross revenues, total assets and net worth of passive investors, provided that an eligible control group has de facto and de jure control of the applicant. 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.

206. Applying these SBA affiliation rules, an affiliation would arise, for example, where an entity with an attributable interest in a broadband PCS applicant is under the control of another entity. An affiliation would also arise where an entity with an attributable interest in a broadband PCS applicant controls, or has the power to control, another entity. For example, if a 10 percent voting shareholder of a PCS applicant is also a shareholder in a large Corporation X, when should Corporation X be deemed an affiliate of the PCS 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.

207. 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.¹⁸³ We will treat such options, debentures, and agreements generally as though the rights held thereunder had been exercised.¹⁸⁴ However, 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.¹⁸⁵

208. 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,

¹⁸³ We recognize that we have adopted a different rule for purposes of our broadband PCS-cellular ownership rules. See 47 C.F.R § 24.204(d)(2)(v). In that context, however, our purpose was not to establish the financial position, or potential financial position, of applicants bidding in auctions.

¹⁸⁴ 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 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].

¹⁸⁵ Id. SBA's rules provide this example:

If large company "A" holds 70% (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.

if the primary purpose of the trust is to meet size eligibility rules.¹⁸⁶ 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.¹⁸⁷ 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.¹⁸⁸ Because we believe the broadcast rules provide more definitive guidance in this particular area, we shall use them as a model for the affiliation rules adopted here. Thus, for example, if an investor with an attributable interest in a PCS 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 PCS applicant.

209. Officers, Directors and Key Employees. Under the SBA's affiliation rules, 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.¹⁸⁹ We shall adopt an identical rule. Thus, if a person with an attributable interest in a broadband PCS 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 a PCS 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 in PCS by serving as officers or directors of the applicant. Thus, under our general attribution rule, 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

¹⁸⁶ 13 C.F.R. § 121.401(g).

¹⁸⁷ See 47 C.F.R. § 73.3555 note 2(e).

¹⁸⁸ Id.

¹⁸⁹ See 13 C.F.R. § 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 C.F.R. § 121.405.

purposes of determining the applicant's eligibility under our rules.¹⁹⁰

210. Affiliation Through Identity of Interest: Family and Spousal Relationships. As expressed in the SBA's rules, an affiliation may arise not only through control, but out of an "identity of interest" between or among parties. See 13 C.F.R. § 121.401(a)(2)(iii). 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. *Id.* at § 121.401(d). For example, if two shareholders in Corporation X are both attributable shareholders in the PCS applicant, to the extent that together they have the power to control Corporation X, Corporation X may be deemed an affiliate of the applicant.

211. Similarly, as under the SBA rules, we must 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." 13 C.F.R. § 121.401(d). 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. See 13 C.F.R. § 124.106(a)(2)(i)(A)(1).

212. In the context of the auction eligibility rules 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. As discussed above, our rules do not embody any presumptions concerning spousal control in that context.¹⁹¹ Rather, our objective here is to ensure both that entities permitted to bid in the entrepreneurs' blocks are actually in need of special financial assistance and that otherwise ineligible entities do not circumvent the rules prohibiting entry by funding family members that purport to be eligible

¹⁹⁰ 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 in the context of our policies for broadband PCS, 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.

¹⁹¹ See supra ¶ 189.

applicants.

213. 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 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.

214. 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 personal net worth or control 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 in the entrepreneurs' blocks by using the personal assets of an ineligible spouse, which would defeat entirely the objective of excluding very large entities from bidding in these blocks.

215. 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, investors in the applicant who are legally separated must, of course, still include their share of interests in community property held with a spouse.

216. 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. See generally Texas-Capital Contractors, Inc. v. Abdnor, 933 F.2d

261 (5th Cir. 1990). 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 C.F.R. § 124.100.

217. 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. Our holding period rule, which, as discussed above, requires that winning bidders in the entrepreneurs' blocks maintain an ownership structure meeting our eligibility requirements for five years, will serve as an additional safeguard against possible abuses arising from kinship relationships.

VIII. CONCLUSION, PROCEDURAL MATTERS AND ORDERING CLAUSES

A. Conclusion

218. In fashioning rules for competitive bidding for broadband PCS licenses, we seek to promote the public policy goals set forth for us by Congress. We believe that the rules adopted in this Fifth Report and Order satisfy this objective. These rules should facilitate the rapid implementation of new broadband communications services through advanced technologies and efficient spectrum use, thus advancing the public interest by providing consumers with competitive and innovative wireless voice and data services and also fostering economic growth. The rules will allow for the public to recover a portion of the value of the public spectrum, and will promote access to broadband PCS services by consumers, producers and new entrants by ensuring that small businesses, rural telephone companies and businesses owned by minorities and women will have genuine opportunities to participate in the auctions and in the provision of service. We expect that the advent of PCS will benefit consumers by raising the overall level of competition in many already competitive segments of the telecommunications industry and providing competition in others for the first time, promote job creation in the communications and information sector of the domestic economy, and enhance productivity and efficiency in industry as a whole.

B. Final Regulatory Flexibility Analysis

219. Pursuant to the Regulatory Flexibility Act of 1980, an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rule Making in PP Docket No. 93-253. Written comments on the IRFA were requested. The Commission's final analysis is as follows:

220. Need for and purpose of the action. This rule making proceeding was initiated to implement Section 309(j) of the Communications Act, as amended. The rules adopted

herein will carry out Congress's intent to establish a system of competitive bidding for broadband PCS licenses. The rules adopted herein also will carry out Congress's intent to ensure that small businesses, rural telephone companies, and businesses owned by women and minorities are afforded an opportunity to participate in the provision of spectrum-based services.

221. Issues raised in response to the IRFA. The IRFA noted that the proposals under consideration in the NPRM included the possibility of new reporting and recordkeeping requirements for a number of small business entities. No commenters responded specifically to the issues raised in the IRFA. We have made some modifications to the proposed requirements as appropriate.

222. Significant alternatives considered and rejected. All significant alternatives have been addressed in the Fifth Report and Order.

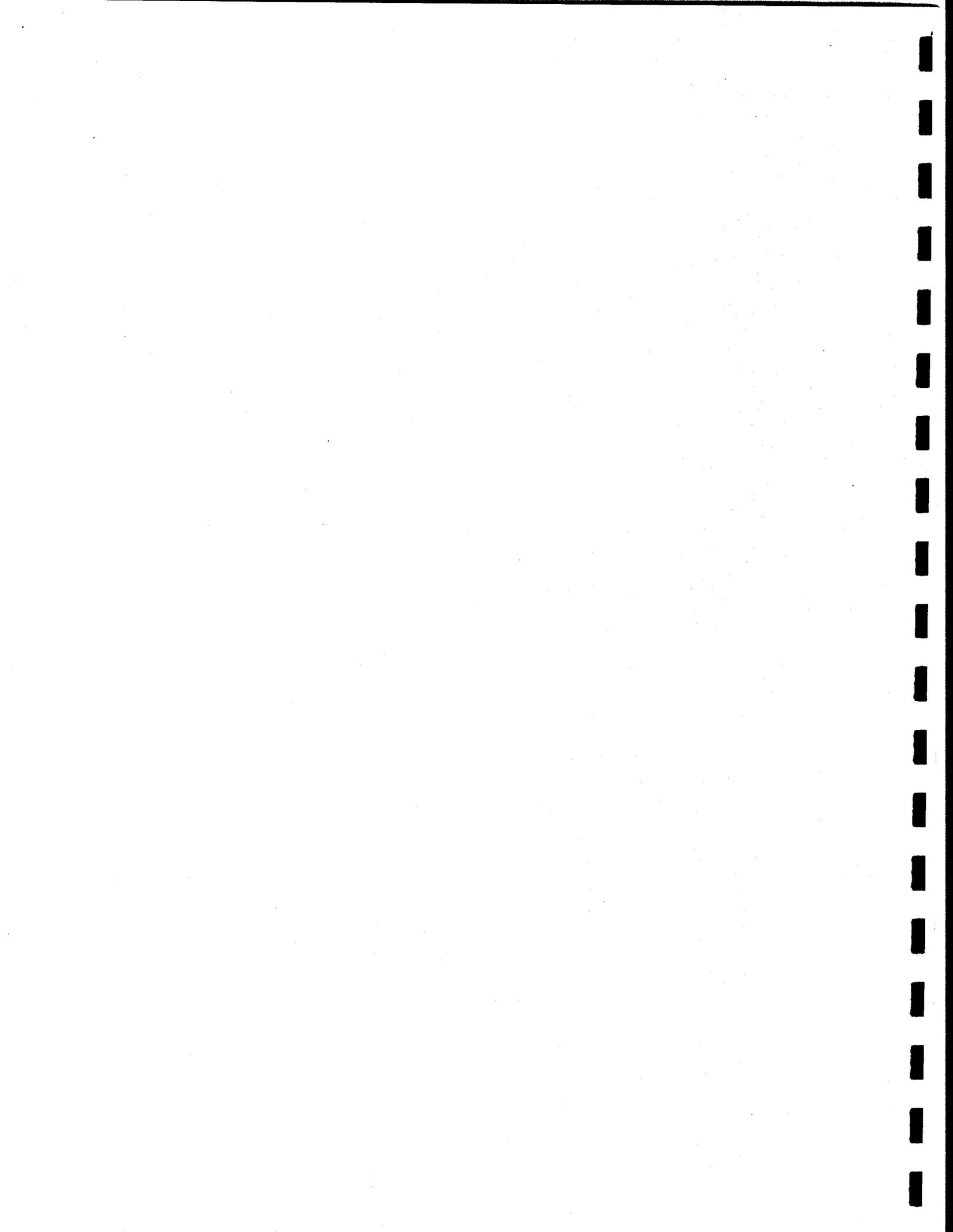
C. Ordering Clauses

223. Accordingly, IT IS ORDERED that Part 24 of the Commission's Rules is amended as set forth in the attached Appendix B.

224. IT IS FURTHER ORDERED that the rules 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

COMMENTS AND REPLY COMMENTS FILED IN PP DOCKET NO. 93-253

Comments

- 1 Advanced Mobilcomm Technologies, Inc., and Digital Spread Spectrum Technologies, Inc.
- 2 James Aidala
- 3 Oye Ajayi-Obe
- 4 Alcatel Network Systems, Inc. (Alcatel)
- 5 AllCity Paging, Inc. (AllCity)
- 6 Alliance for Fairness and Viable Opportunity (Alliance for Fairness)
- 7 Alliance of Rural Area Telephone & Cellular Service Providers (ARAT)
- 8 Alliance Telecom, Inc.
- 9 Alpine Electronics and Communication (Alpine)
- 10 American Automobile Association (AAA)
- 11 American Mobile Satellite Corp. (AMSC)
- 12 American Mobile Telecommunications Association (AMTA)
- 13 American Personal Communications (APC)
- 14 The American Petroleum Institute (API)
- 15 American Wireless Communication Corporation (AWCC or American Wireless)
- 16 American Women in Radio and Television, Inc. (AWRT)
- 17 Ameritech
- 18 AMSC Subsidiary Corporation
- 19 Anchorage Telephone Utility (Anchorage)
- 20 Charles N. Andreae/Andreae & Associates, Inc.
- 21 John G. Andrikopoulos, et al.
- 22 Arch Communications Group, Inc. (Arch Communications)
- 23 Association for Maximum Service Telecasters & National Association of Broadcasters (MSTV/NAB)
- 24 Association of American Railroads (AAR)
- 25 Association of America's Public Television Stations (APTS)
- 26 Association of Independent Designated Entities (AIDE)
- 27 Association of Public-Safety Communications Officials International, Inc. (APCO)
- 28 AT&T
- 29 Baraff, Koerner, Olender & Hochberg, P.C.
- 30 Bechtel & Cole
- 31 Bell Atlantic Personal Communications, Inc. (Bell Atlantic)
- 32 BellSouth Corp., BellSouth Telecommunications, Inc., BellSouth Cellular Corp., and
Mobile Communications Corporation of America (BellSouth)
- 33 Jeffrey T. Bergner
- 34 Art Boroughs
- 35 Van R. Boyette
- 36 D.B. Branch
- 37 Quentin L. Breen
- 38 Dennis C. Brown and Robert H. Schwaninger (Brown and Schwaninger)
- 39 Cablevision Industries, Comcast Corp., Cox Cable Communications, and Jones Intercable, Inc.
- 40 Calcell Wireless, Inc. (Calcell)
- 41 California Microwave, Inc. (California Microwave)
- 42 California Public Utilities Commission (CPUC)
- 43 Call-Her, L.L.C. (Call-Her)
- 44 Capitol Hill Management

- 45 Catapult Communications (Catapult)
- 46 Cellular Communications, Inc. (CCI)
- 47 Cellular Service, Inc. (CSI)
- 48 Cellular Settlement Groups
- 49 Cellular Telecommunications Industry Association (CTIA)
- 50 Cencall Communications Corp. (Cencall)
- 51 Century Communications Corp. (Century)
- 52 CFW Communications Corp., Denver and Ephrata Tel. and Tel. Co., and Lexington Tel. Co.
- 53 Chase Communications Corp. (Chase)
- 54 The Chase McNulty Group, Inc. (Chase McNulty)
- 55 Chickasaw Telephone Company (Chickasaw)
- 56 Citizens Utility Company (Citizens)
- 57 Coalition for Equity in Licensing
- 58 Cole, Raywid & Braverman
- 59 Wendy C. Coleman d/b/a WCC Cellular (WCC Cellular)
- 60 Comcast Corporation (Comcast)
- 61 Comsat Corporation (Comsat)
- 62 ComTech Associates, Inc. (Comtech)
- 63 Converging Industries
- 64 Cook Inlet Region, Inc. (Cook Inlet)
- 65 Corporate Technology Partners (CTP)
- 66 Council of 100
- 67 Cox Enterprises, Inc. (Cox)
- 68 Thomas Crema
- 69 Data Link Communications (Data Link)
- 70 Devsha Corporation
- 71 Dial Page, Inc.
- 72 Steven L. Dickerson
- 73 Abby Dilley
- 74 Diversified Cellular Communications (Diversified)
- 75 Domestic Automation Company (Domestic Automation)
- 76 Laura G. Dooley
- 77 John Dudinsky
- 78 Mark H. Duesenberg
- 79 John R. Duesenberg
- 80 Duncan, Weinberg, Miller & Pembroke, P.C.
- 81 Economics and Technology, Inc.
- 82 FiberSouth, Inc. (FiberSouth)
- 83 First Cellular of Maryland
- 84 Firstcom, Inc.
- 85 Fisher, Wayland, Cooper and Leader (Fisher Wayland)
- 86 David F. Gencarelli, Esq.
- 87 Janet B. Gencarelli
- 88 General Communications, Inc. (GCI or General Communications)
- 89 GEOTEK Industries, Inc. (GEOTEK)
- 90 Debra Gervasini
- 91 Martin Charles Gleyier
- 92 GTE Services Corp. (GTE)
- 93 GVNW, Inc./Management (GVNW)
- 94 John G. Heard
- 95 Hughes Communications Galaxy, Inc. & DirecTv, Inc. (DirecTv)
- 96 Hughes Transportation Management Systems (Hughes)
- 97 Independent Cellular Consultants

- 98 Independent Cellular Network, Inc.
- 99 Industrial Telecommunications Association, Inc.
- 100 Intelligent Vehicle-Highway Society of America
- 101 Interdigital Communications Corporation (Interdigital)
- 102 Iowa Network Services, Inc. (Iowa Network)
- 103 IVHS America
- 104 JAJ Cellular
- 105 Thomas J. Jasien
- 106 JBS & Associates/Shrader Real Estate
- 107 JMP Telecom Systems, Inc.
- 108 Andrea J. Johnson
- 109 Edward M. Johnson
- 110 E.F. Johnson Company
- 111 Jeff Johnston
- 112 Clair Joyce
- 113 Abraham Kye, et al.
- 114 Ward Leber & Eroca Daniel
- 115 Michael Lewis
- 116 Liberty Cellular, Inc. d/b/a Kansas Cellular (Liberty Cellular)
- 117 Lightcom International, Inc. (Lightcom)
- 118 Daniel R. Lindemann
- 119 Loral Qualcomm Satellite Services, Inc. (Loral)
- 120 Robert Lutz, et al.
- 121 Walter Lowman
- 122 LuxCel Group, Inc. (LuxCel)
- 123 John J. Mandler
- 124 McCaw Cellular Communications, Inc. (McCaw)
- 125 MCI Telecommunications Corporation (MCI)
- 126 MEBTEL, Inc.
- 127 Mercury Communications, L.C. (Mercury)
- 128 Millin Publications, Inc. (Millin)
- 129 Minnesota Equal Access Network Services, Inc. (Minnesota Equal Access)
- 130 Minority Business Enterprise Legal Defense and Education Fund, Inc. (MBELDEF)
- 131 Minority PCS Coalition (Transworld Telecommunications Inc., Progressive Communications, Inc.,
Carl and Gail Davis and John Washington)
- 132 Motorola, Inc. (Motorola)
- 133 Motorola Satellite Communications, Inc. (Motorola Satcom)
- 134 George E. Murray
- 135 MW TV, Inc.
- 136 Law Offices of Richard S. Myers (Richard S. Myers)
- 137 National Association of Black-Owned Broadcasters, Inc. (NABOB)
- 138 National Association of Business and Educational Radio, Inc. (NABER)
- 139 National Association of Minority Telecommunications Executives and Companies (NAMTEC)
- 140 National Rural Telecom Association (NRTA)
- 141 National Telecommunications and Information Administration of the U.S. Department of Commerce (NTIA)
- 142 National Telephone Cooperative Association (NTCA)
- 143 Nextel Communications, Inc. (Nextel)
- 144 NYNEX Corporation (NYNEX)
- 145 M. Kathleen O'Conner
- 146 Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO)
- 147 Pacific Bell and Nevada Bell (PacBell)
- 148 Pacific Telecom Cellular, Inc. (Pacific Telecom Cellular)
- 149 PacTel Corporation (PacTel)

150 PacTel Paging and MidContinent Media (Joint Comments) (PacTel Paging)
151 PageMart, Inc. (PageMart)
152 Paging Network, Inc. (PageNet)
153 Palmer Communications, Inc. (Palmer)
154 Michael Pernecke
155 Raegene Pernecke
156 Personal Communications Network Services of New York
157 Jeffrey Peterson
158 Phase One Communications, Inc. (Phase One)
159 David Pines
160 PMN, Inc. (PMN)
161 PNC Cellular, Inc.
162 Point Communications Company (Point)
163 Primosphere Limited Partnership (Primosphere)
164 Quick Call Group (Quick Call)
165 Radio Telecom and Technology, Inc. (RTT)
166 RAM Mobile Data USA Limited Partnership (RAM)
167 RAY Communications, Inc.
168 Michael R. Rickman
169 Roamer One, Inc. (Roamer One)
170 Rochester Telephone Corp.
171 Rocky Mountain Telecommunications Association and Western Rural Telephone Association
172 Rural Cellular Association
173 Rural Cellular Corp.
174 Rural Electrification Administration, U.S. Department of Agriculture (REA)
175 Rural Telephone Company
176 Thomas Salmon
177 Santarelli, Smith & Carroccio
178 Michael Sauls
179 Securicor PMR Systems, Ltd. (Securicor)
180 Stephan C. Sloan
181 Small Business PCS Association
182 Small RSA Operators
183 Small Telephone Companies of Louisiana
184 Laquita Smallwood
185 Southwestern Bell Corporation (Southwestern Bell)
186 Sprint Corporation (Sprint)
187 Henry J. Staudinger
188 James F. Stern
189 Arlene F. Strege
190 Suite 12 Group
191 Systems Engineering, Inc.
192 Taxpayers Assets Project
193 Telephone and Data Systems, Inc. (TDS)
194 Telephone Association of Michigan (TAM)
195 Telephone Electronics Corp. (Telephone Electronics)
196 Telepoint Personal Communications, Inc (Telepoint).
197 The Telmarc Group and Telmarc Telecommunications, Inc. (Telmarc)
198 Telocator – The Personal Communications Industry Association (Telocator)
199 Thumb Cellular Limited Partnership (Thumb)
200 Time Warner Telecommunications (Time Warner)
201 Tri-State Radio Company (Tri-State)
202 TRW, Inc. (TRW)

203 Unique Communications Concepts (Unique)
204 United Native American Telecommunications, Inc.
205 U.S. Intelco Networks, Inc. (U.S. Intelco)
206 U.S. Small Business Administration -- Chief Counsel for Advocacy (SBA)
207 U.S. Small Business Administration -- Associate Administrator for Procurement Assistance
208 U.S. Telephone Association (USTA)
209 Utilities Telecommunications Council (UTC)
210 Valley Management, Inc.
211 L. Brennan Van Dyke
212 Vanguard Cellular Systems, Inc. (Vanguard)
213 Richard L. Vega Group (Vega)
214 Venus Wireless, Inc. (Venus)
215 Leslie R. Walls
216 Western Wireless, Inc.
217 Windsong Communications, Inc. (Windsong)
218 Wireless Cable Association International, Inc.
219 Wireless Services Corporation (Wireless)
220 Wisconsin Wireless Communications Corporation (Wisconsin Wireless)
221 Ann Bradshaw Woods
222 William E. Zimsky

Reply Comments

1 Marlene Abe
2 Robert B. Adams (Commissioner, Office of General Services, State of New York)
3 Alcatel Network Systems, Inc.
4 AllCity Paging, Inc.
5 American Paging, Inc.
6 American Personal Communications
7 American Wireless Communication Corporation, Inc.
8 American 52 East
9 AMTECH Corporation (AMTECH)
10 John G. Andrikopoulos, Bent Elbow Corporation, et al.
11 Apex Welding, Inc. (Apex)
12 Arch Communications, Inc.
13 The Association of American Railroads
14 Association of Independent Designated Entities
15 AT&T
16 Bob Atkison
17 Bell Atlantic Personal Communications, Inc.
18 BellSouth Corporation
19 John L. Bergin
20 Kenneth B. Blair, Robert B. Blow, et al.
21 Town of Bridgewater, MA
22 Hayo Broeis
23 Cable & Wireless, Inc.
24 R. Jeffrey Cale
25 Robert R. Cale
26 Call-Her, L.L.C.
27 Capp Systems (TVDS) Inc.
28 Cellular Service, Inc.
29 Cellular Settlement Groups (Joint Comments)

- 30 Cellular Telecommunications Industry Association
- 31 CFW Communications Co., Denver and Ephrata Tel. and Tel. Co., and Lexington Tel. Co.
- 32 The Chillicothe Telephone Company
- 33 Citizens Utility Company
- 34 Edward Cline
- 35 Coalition for Equity in Licensing
- 36 Columbia Cellular Corporation
- 37 Comcast Corporation
- 38 Community Service Telephone Company
- 39 Cook Inlet Region, Inc.
- 40 DeKalb Telephone Cooperative, Inc.
- 41 Dell Telephone Cooperative, Inc.
- 42 Vernon L. Dennis
- 43 Dial Page, Inc.
- 44 Diversified Cellular Communications, Inc.
- 45 Michael J. Dowling
- 46 Ellipsat Corporation (Ellipsat)
- 47 Enakee Partnership
- 48 Marie S. Essex
- 49 Clemente S. Estrera, Jr.
- 50 Euro-Tech Enterprises, Inc.
- 51 Federal IVD
- 52 Fisher, Wayland, Cooper and Leader
- 53 Four Color Imports, Ltd. (Four Color)
- 54 Orren W. Fricke
- 55 Marguerite Geckler
- 56 General Communications, Inc. (GCI)
- 57 Genesis Investments
- 58 George Gower
- 59 GTE Service Corp.
- 60 Gulf Telephone Company
- 61 Mark D. Hafermann
- 62 Timothy Hartley
- 63 Dr. Renee Harwick
- 64 John G. Herd
- 65 Nathan D. Hodges
- 66 Troy Hodges
- 67 Home Box Office (HBO)
- 68 Adrian Hubbell
- 69 Hughes Communications Galaxy, Inc. and DirecTv, Inc.
- 70 Hughes Transportation Management Systems
- 71 Icon Communications Services
- 72 Independent Cellular Consultants (ICC)
- 73 Industrial Containers, Inc.
- 74 Industrial Telecommunications Association, Inc.
- 75 The Institute for Public Representation, Georgetown University Law Center, and Office of
Communication of the United Church of Christ (Joint Comments) (UCC)
- 76 The Interagency Group
- 77 Interior Telephone Co.
- 78 International Small Satellite Organization
- 79 Iowa Network Services, Inc.
- 80 Cecil W. King
- 81 Kingswood Associates

82 Bernd K. L. Klopfer
83 J. Koyasako
84 Kuruvilla M. Kurien
85 Mani A. Kurien
86 Sosa Kurien
87 J. Bruce Llwellyn
88 Local Area Telecommunications, Inc.
89 Long Lines, Ltd.
90 Loral Qualcomm Satellite Services, Inc.
91 Manti Telephone Company
92 McCaw Cellular Communications, Inc.
93 McElroy Electronics Corporation
94 MCI Telecommunications Corporation
95 Metricom, Inc.
96 Marshall L. Morgan
97 William G. Morgan
98 Motorola, Inc.
99 Motorola Satellite Communications, Inc.
100 Mountain Home Publishing
101 Mukluk Telephone Co.
102 George E. Murray
103 National Association of Business and Educational Radio, Inc.
104 National Cable Television Association, Inc.
105 National Public Radio
106 National Rural Telephone Association
107 National Telephone Cooperative Association
108 Nextel Communications, Inc.
109 North American Interactive Partners I-IV
110 NYNEX Corporation
111 J.W. Oakes
112 Omnipoint Communications, Inc. (Omnipoint)
113 Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO)
114 Joseph A. Orlando
115 P & P Investments
116 Pacific Bell and Nevada Bell
117 Pacific Traders Group
118 PacTel Corporation
119 PacTel Paging and Midcontinent Media
120 PageMart, Inc.
121 Paging Network, Inc.
122 Palmer Communications, Inc.
123 PAN, Inc.
124 William W. Perry
125 Personal Network Services Corporation
126 Sidney E. Pinkston
127 Emma M. Pinkston
128 Pinpoint Communications, Inc.
129 PN Cellular, Inc. and its affiliates
130 PNM, Inc.
131 Price Communications Cellular
132 Denis A. Radefeld
133 Radiofone, Inc.
134 RAM Mobile Data USA Limited Partnership

- 135 Recourse Spectrum
- 136 Roamer One, Inc.
- 137 Roberts County Telephone Cooperative Association
- 138 Rochester Telephone Corporation
- 139 Rural Cellular Association
- 140 Ryberg Properties
- 141 Saco River Telegraph and Telephone Company
- 142 James J. Schneider
- 143 H.M. Schwartz
- 144 John Sheppard
- 145 Crystal Smith
- 146 Southwestern Bell
- 147 Spacedrive, Inc.
- 148 Sprint Corporation
- 149 David G. Stanley
- 150 Harry Stevens, Jr.
- 151 Sonia Stuart
- 152 Suite 12 Group
- 153 David F. Swain & Co.
- 154 Telephone and Data Systems, Inc.
- 155 Telephone Electronics Corporation
- 156 Telocator - The Personal Communications Industry Association
- 157 William W. Thorton
- 158 Randy A. Toyoshima
- 159 TRW, Inc. (TRW)
- 160 Unique Communications Concepts
- 161 U.S. Intelco Networks, Inc.
- 162 United States Telephone Association
- 163 US West
- 164 The University of Texas System
- 165 Utilities Telecommunications Council
- 166 WCC Cellular
- 167 Bob Weber
- 168 Greg Winters
- 169 Wunschel Law Firm

STATEMENT OF
COMMISSIONER JAMES H. QUELLO

RE: BROADBAND PCS AUCTION PROCEDURES
PP DOCKET NO. 93-253

Today the Commission puts in place the procedures that will govern perhaps our most eagerly-awaited new spectrum auctions: the auctions for broadband PCS frequencies.

This Report and Order embodies our best collective effort to meet our Congressionally-imposed objectives in a responsible and fair way consistent with the record before us. In this process we have been particularly sensitive to the need to provide increased opportunity to small businesses, minorities, women, and rural telephone companies commensurate with the varying degrees of difficulty each faces in attracting capital. In the building of broadband PCS systems there is not only room for, but *need* for, players large and small, with different outlooks, different strategies, and different strengths. Our action today attempts to make that room and to meet that need.

Is every piece and part of this Report and Order perfect? No - but then, nothing is. Might each of us have drawn somewhat different lines had each been the sole author? Of course. But, not unlike the benefits we envision flowing from the policy of entrepreneurial inclusion in licensing PCS, I believe this Report and Order is sounder for having drawn from my colleagues' distinctive strengths and outlooks. And if the decisions we make today require further refinement, I am completely open to the presentation of facts and arguments in favor of any such changes. In the meantime, I support this Report and Order as the penultimate administrative precursor to moving broadband PCS from the drawing board to the launch pad.

SEPARATE STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

RE: IMPLEMENTATION OF SECTION 309(j) of the Communications Act--
Competitive Bidding (PP Docket no. 93-253)

Today, we adopt the auction rules for broadband Personal Communications Services (PCS). The impact of this decision cannot be overstated. It is significant and historic. In this Order, we address several important statutory goals established by Section 309(j) of the 1993 Omnibus Budget Reconciliation Act [OBRA]. My decision-making process in this docket was governed by several policy goals: 1. Develop auction rules that will permit efficient aggregation schemes for spectrum or geographic PCS service blocks; 2. Ensure that our auction rules provide sufficient flexibility to enhance the probability of participation by minorities, women, rural telephone companies, and small businesses [Designated Entities] in the provision of PCS services; 3. Develop an auction framework that will allow various business plans to be executed, thus promoting viable opportunities to serve a variety of market demand, from wide-area mobile telephony to niche data, voice or video applications; 4. Ensure that the capital markets can clearly evaluate the incentives created for investment in businesses owned by minority, women and small business PCS applicants; and 5. Develop an auction framework that addresses universal service goals through a competitive, private investment framework.

The decision today balances the various goals of Section 309(j) and my policy goals for this auction docket.¹ It reflects an effort to address the strong views of various competing interests for broadband PCS services. The decision is narrowly tailored to address the challenges of disseminating PCS licenses among a wide variety of businesses in order to achieve a robust, competitive wireless marketplace. The Order reflects a philosophy that the PCS market should not be governed by a few

¹ PCS services throughout the U.S. could provide a competitive solution to several goals emphasized by current National Information Infrastructure initiatives [NII]. Specifically, a wide dissemination of PCS licenses among businesses, large and small, minority, women-owned and rural, could support the NII goals of: 1. universal service; 2. private investment in infrastructure; 3. new competition; and 4. open access. The auction rules today create the possibility that PCS could become a significant market solution to universal access and affordable pricing throughout the U.S. and its territories.

large entities; rather, the market should provide sufficient opportunities to "democratize" the ownership of our PCS infrastructure among a wide variety of businesses, large and small, new entrants and existing players, minorities or women and rural companies.

There has been significant interest in this proceeding expressed to us by existing industry players, the Administration, Congress, minorities, women, rural telephone companies, small businesses, and the financial community. The decision today reflects a thorough effort to balance the various positions reflected in the record by each of these interests. Based on the requirements of Section 309(j) and my policy goals, I am generally satisfied that we have achieved a narrowly tailored resolution to the competing interests for PCS licenses. To understand the tailoring accomplished within this framework, interested parties must review the entire "package" of policy tools utilized to support the goal of disseminating licenses among a wide variety of competing businesses.²

While shaping the policy framework to implement PCS auction rules the following factors were important for me in assessing the effectiveness of the this Order today: a. The historical capital formation barriers for minority and women-owned businesses; b. The under-representation of minority and women-owned firms in the telecommunications industry; c. The relative economic leverage of existing telecommunications providers in terms of cost of capital, investment in infrastructure, existing revenue, cashflow, earnings and market value, economies of scale, market penetration, vendor relationships, customer and billing relationships, and access to subsidized funding or market price formulas; d. Potential costs of PCS licenses in the auction; e. Potential buildout costs of PCS licenses; and f. Potential costs of competing against existing communications service providers who have a significant headstart. The decision today addresses these factors in a balanced manner.

Simultaneous, multiple round bidding will permit entities to aggregate licenses across markets or within markets. In addition, the entrepreneurial blocks, block C [30 Mhz BTA] and block F [10 Mhz BTA], support Section 309(j) license dissemination requirements by limiting the relative economic power of the competitors for PCS licenses within these auctions. Without eligibility restrictions on blocks C and F, the largest

² Upon release of this Order, I believe the Commission must actively provide briefings to the public regarding the basic requirements of these auction rules. I look forward to hearing from the public regarding the effectiveness of future auction seminars that highlight the requirements imposed by these PCS rules.

telecommunications providers collectively representing \$195.5 billion in revenues, \$61.9 billion in earnings, and \$86.7 billion in cumulative book value, could dominate all PCS license auctions. In addition, interexchange carriers pay approximately \$25 billion in cumulative local access charges on an annual basis. Cellular carriers represent another \$10-12 billion in cumulative revenues, and a similar figure for capital investment. Thus, the combined impact of such market leverage and the incentive to reduce billions of dollars in fixed costs would likely eliminate smaller companies and new entrants from successful bids for PCS licenses. I believe further market intervention is needed to address these factors. Utilizing bidding credits only, without other policy tools in a package, is not likely to support Section 309(j) goals for disseminating PCS licenses among small, minority and women-owned businesses, unless the bidding credits were in the extreme range of 60-70%. Thus, the entrepreneurial blocks are likely to create a wider dissemination of licenses among a greater variety of businesses and potential new entrants.

Our eligibility and attribution rules for entrepreneur block licenses also are likely to further the ownership dissemination of PCS licenses. Incentives for partnering between larger telecommunications providers and small companies, or between large companies and minorities or women, are enhanced by a variety of bidding credits, installment payments, or tax certificate incentives. Due to the capital-intensive nature of PCS, our definition of entrepreneur [\$125 million] and small business [\$40 million] are sufficiently flexible to encompass a vast majority of businesses, including Tier II and Tier III local exchange carriers, various cellular operators, paging companies, cable companies, Specialized Mobile Radio operators, rural telephone companies, broadcast companies, and various other service providers within the communications industry. In addition, new entrants, with ongoing businesses in other industries or those creating start-ups, are likely to have a better opportunity to attract capital, joint venture, or form consortia to participate in PCS. License ownership caps, spousal attribution rules, and corporate or individual net worth limits also are designed to enhance our goal of disseminating PCS licenses among various businesses. Our decision to permit partitioning of PCS licenses to promote service by rural telephone companies also supports the statutory goals of Section 309(j). In addition, we will issue a Further Notice concurrent with the release of this Order that proposes to extend partitioning of PCS licenses to minority and women-owned businesses as well; this additional licensing flexibility is likely to promote service to the public and enhance our efforts to achieve the statutory goals of Section 309(j).

I believe the combined effect of our prior June 9 PCS decision this auction decision is a pro-competitive PCS license structure. The Commission's prior decision in cellular, where the FCC set-aside one license per market for local exchange carriers, and provided one license per market for new entrants, did not result in the most efficient market structure for fully competitive wireless services. The cumulative effect of our PCS license and auction decisions is more likely to create incentives for a competitive, robust PCS marketplace. Under our auction framework, a variety of competing business interests will have a more reasonable opportunity to bid for PCS licenses and compete in the wireless marketplace. By tailoring our policy tools to support a broader dissemination of PCS licenses, the Commission creates a win-win-win scenario -- the consumer has more choice, our economy creates new business opportunities, and we proceed to support the goals of promoting universal service and access through competitive market solutions. I look forward to receiving the feedback of the financial community, industry and designated entities as we proceed to implement the package of policy tools to effectuate the rapid deployment of PCS services by a wide variety of players.

STATEMENT OF COMMISSIONER SUSAN NESS

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

With today's action, the Commission has charted a clear course towards the broadband PCS auctions. Our deliberations have produced a decision that is narrowly tailored to meet Congress' objectives for competitive bidding.

We have adopted auction rules that will provide meaningful opportunity in this exciting new sector of the telecommunications industry to those who have historically been absent from the table. We have also taken steps to ensure that licenses will be disseminated to a wide variety of applicants. No one is guaranteed a favorable outcome; however, we have made the process as fair as possible. Our auction methodology will promote a robust competition to put each license in the hands of the applicant who values it most. Let us also not lose sight of another result Congress intended: for the first time, the public will recognize substantial revenues from licensing a particularly valuable portion of the spectrum resource.

The record we have factored into our decision-making is substantial. This record includes the views of the many interested parties who have taken the time to meet with me. I am confident that we have achieved a balanced result. We have also incorporated safeguards into our rules to minimize shams.

On a related note, I am concerned lest the auction process attract not only serious players, but also those unscrupulously wishing to take advantage of consumers in the form of "get rich quick" schemes. I caution potential applicants to keep in mind that the cost of acquiring a PCS license is likely to be substantial, and the business risks are high. Broadband PCS is not a place to earn phenomenal returns on your retirement fund. I encourage the Commission staff to get the word out to consumers themselves, as well as the various consumer protection agencies. A concerted effort in this area before the auction begins could save consumers a lot of grief.

I fully support the Commission's efforts to make broadband PCS a reality. The rules and procedures we adopt today will hasten that result.

SEPARATE STATEMENT
OF
COMMISSIONER RACHELLE B. CHONG

*Re: Implementation of Section 309(j) of the Communications Act -- Competitive Bidding
PP Docket No. 93-253*

Just three weeks ago, the Commission finalized rules governing broadband personal communications services, or PCS. Today, consistent with congressional intent, we adopt rules establishing a system of competitive bidding to award PCS licenses. Taken together, these two decisions represent an important milestone in our efforts to bring the benefits of this innovative wireless technology to the American public.

Today's decision is the result of an enormous amount of work by the Commission's staff and all who provided comments in this proceeding. It reflects a balance of the various perspectives presented in this extensive rulemaking record and the goals of Section 309(j) of the Communications Act. There are, of course, differing views of how the competitive bidding rules should be drafted. It is critical, however, to establish the ground rules for PCS in order to facilitate the licensing and rapid deployment of this vital new service. Thus, while every aspect of today's decision may not fully comport with my regulatory philosophy, I support these rules in order to move PCS forward.

The establishment of the two "entrepreneurs'" blocks will increase diversity in the telecommunications industry. It will encourage small businesses, rural telephone companies, and companies owned by women and minorities to participate in the PCS industry, consistent with the goals of Congress. While I support the overall approach reflected in today's decision, two general concerns are worth noting. A fundamental premise of competitive bidding is that the bidder who values a particular license most will submit the highest bid. Presumably, a bidder will devise a bidding strategy based on business judgments and a careful assessment of the economics of providing service in specific markets. I am concerned that some aspects of today's decision may unduly interfere with those judgments. I would rather have market forces shape the bidding process to the greatest extent possible. Moreover, the competitive bidding plan we have crafted is more complicated than I would have preferred, although I fully recognize that we are dealing with novel and complex issues. Despite these reservations, in the final analysis, I believe it is essential that we move forward with a set of rules. This will unleash innovators to build these important new communications systems and provide vigorous competition to existing wireless telephone services.

We are charting new waters here. Today's decision reflects our best predictive judgments based on the administrative record. When it comes to issuing licenses by competitive bidding, practical experience is in short supply and the consequences of our decision are great. I am hopeful that our decision today will result in successful auctioning of these licenses.

**Second Memorandum
Opinion and Order in
PP Docket No. 93-253**

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

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

SECOND MEMORANDUM OPINION AND ORDER

Adopted: August 12, 1994

Released: August 15, 1994

By the Commission:

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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 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

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.

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).

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

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.

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; Groups) assert that the Commission should accept full-market settlements between mutually exclusive applicants for

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.

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 express 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

¹⁸ See Cellular Settlement Groups Petition at 3-7.

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).

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 period 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

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.

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 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

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.

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.

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 1½ 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

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 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.

⁴⁰ Id.

⁴¹ Id. at ¶ 137.

⁴² Id. at ¶ 136.

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

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

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.

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

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 Report 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

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.

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

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.

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 licensing 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

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

⁶⁰ Second Report and Order at ¶ 68.