

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

In the Matter of)
)
Allocation of Spectrum Below)
5 GHz Transferred from) ET Docket No. 94-32
Federal Government Use)
)
4660-4685 MHz)

FOURTH REPORT AND ORDER

Adopted: August 26, 1998

Released: September 24, 1998

By the Commission:

TABLE OF CONTENTS

	<u>Paragraph No.</u>
I. Introduction	1
II. Executive Summary	3
III. Background	4
IV. Competitive Bidding	10
V. Designated Entities	18
VI. Conclusion	28
VII. Ordering Clauses	29

- Appendix A: List of Parties
- Appendix B: Final Regulatory Flexibility Analysis
- Appendix C: Final Rules

I. INTRODUCTION

1. By this action, we replace most of the auction rules adopted in 1995¹ for the General Wireless Communications Service ("GWCS") with the streamlined Part 1 rules.² With regard to auction provisions for designated entities, we simplify the definition of "small business," eliminate installment payments, and increase the bidding credit.

2. Further, consistent with our discussion in Part 1, the Chief, Wireless Telecommunications Bureau ("Bureau"), shall determine the competitive bidding mechanisms, upfront payments, and minimum opening bids that will apply to GWCS.³ The rules we adopt herein will apply to the auction of GWCS and potentially any auction of adjacent spectrum in the 4635-4660 MHz band, after the rulemaking on that band is complete.⁴ We note that the Bureau is currently working on a notice of proposed rulemaking for the 4.6 GHz band, including the adjacent band at 4635-4660 MHz. That item is likely to consider changes in allocations, service rules, and auction rules affecting the entire 50 megahertz of spectrum, such as combining the 4635-4660 MHz and 4660-4685 MHz bands together and adopting common service and auction rules. Upon the completion of this rulemaking proceeding, the Commission may then be in a position to commence an auction of the 50 megahertz of spectrum in the 4635-4685 MHz frequency band as a unit.

II. EXECUTIVE SUMMARY

3. In the Further Notice portion of the *Part 1 Third Report and Order*, we proposed to replace previously-adopted GWCS auction rules with streamlined Part 1 rules. We also proposed to eliminate the use of installment payment financing for GWCS licenses and to raise the bidding credit. Finally, we proposed to truncate the petition to deny period in order to meet the statutory deadline for licensing GWCS. We received no comments and no replies on these proposals. After considering the record in this proceeding, we are adopting our proposals as follows:

- We adopt the Part 1 rules for GWCS. Thus, the Part 1 rules concerning short-form and long-form applications (including the anti-collusion rule), withdrawal and default payments, down payments, full payment, late payment fees, and unjust enrichment will now replace all analogous rules previously

¹ Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, 4660-4685 MHz, ET Docket No. 94-32, *Second Report and Order*, 11 FCC Rcd 624 (1995). ("*Second Report and Order*").

² Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Procedures, Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, 4660-4685 MHz, WT Docket No. 97-82, ET Docket No. 94-32, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374 (1997). ("*Part 1 Third Report and Order*").

³ *Id.* at ¶ 125.

⁴ The Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312 (1993) ("OBRA"), required that the Secretary of Commerce identify at least 200 megahertz then allocated for use by Federal Government agencies to be transferred to private sector use. In February 1995, the Department of Commerce released a Final Report on spectrum allocation, indicating that the 4635-4660 MHz band, adjacent to the 4660-4685 MHz GWCS band, would be transferred to private use, effective January 1, 1997. (Spectrum Reallocation Final Report, U.S. Department of Commerce, NTIA Special Publication 95-32 (February 1995) at iv). The Commission intends to initiate a rulemaking proceeding in the near future to address the allocation of spectrum in the 4635-4660 MHz band and to propose licensing and service rules for carrier operations in that band. The Commission indicated earlier this year that offering a combined 50 megahertz of spectrum (based on combining GWCS spectrum with the recently transferred 4635-4660 MHz band) might generate greater public interest in an auction. (See Letter to W. J. (Billy) Tauzin, Chairman, Subcommittee on Telecommunications, Trade and Consumer Protection, Committee on Commerce, U.S. House of Representative, from Chairman William E. Kennard, Federal Communications Commission, dated April 23, 1998 ("*W. J. Tauzin Letter*").)

adopted for GWCS.⁵ We also will apply to GWCS the Part 1 rule allowing pre-license grant construction of systems.⁶

- We eliminate the reduced bid withdrawal payment rule and associated nationwide bidding procedures for GWCS.
- We direct the Bureau to establish day-to-day auction conduct procedures for the GWCS auction. These procedures include upfront payment determination, activity requirements for each stage of the auction, activity rule waivers, criteria for determining reductions in eligibility, information regarding bid withdrawal and bid removal, stopping rules, and information relating to auction delay, suspension, or cancellation.
- We do not adopt our proposal to truncate the petition to deny period for GWCS licenses to five days.
- While retaining the \$40 million definition of "small business," we will use the Part 1 definitions of gross revenues and affiliate for determining the small business status of GWCS applicants.⁷
- We eliminate the use of installment payments for GWCS and increase the bidding credit available to small businesses, consistent with the Part 1 schedule of bidding credits.
- Although we will not impose specific equity ownership requirements on GWCS applicants, we will require that in order for an applicant to qualify as a small business, qualifying small business principals must maintain control of the applicant.⁸ The term "control" includes both *de facto* and *de jure* control of the applicant.

III. BACKGROUND

4. The Omnibus Budget Reconciliation Act of 1993 ("OBRA") required that the Secretary of Commerce identify at least 200 megahertz of spectrum then allocated for use by Federal Government agencies to be transferred to private sector use.⁹ All of the 200 megahertz of spectrum recommended for reallocation was required to be located below 5 gigahertz, with at least 100 megahertz of this spectrum required to be below 3 gigahertz. OBRA also required the Secretary of Commerce to issue within six months of enactment a Preliminary Report identifying bands of frequencies for potential reallocation and, furthermore, to issue within 18 months a Final Report recommending the spectrum for reallocation. In its report making a preliminary identification of spectrum, the Department of Commerce was required to identify at least 50 megahertz of spectrum for immediate

⁵ That is, all service-specific GWCS application and payment rules are now replaced by their Part 1 rule counterparts: 47 C.F.R. §§ 1.2104, 1.2105, 1.2106, 1.2107, 1.2108, 1.2109, 1.2110, 1.2111, and 1.2112. See Appendix C.

⁶ 47 C.F.R. § 1.2113.

⁷ See 47 C.F.R. §§ 1.2110(b)(4), m.

⁸ While we are adopting the proposed definition of "controlling interest" for GWCS, this decision is not dispositive of the issue as it pertains to all other future auctions. The Part 1 designated entity provisions contained in proposed rules 1.2110(b) and (c) will be addressed separately in the Part 1 proceeding.

⁹ See OBRA, § 6001(a)(3), as codified at 47 U.S.C. § 923.

reallocation, with a significant portion of the spectrum to be reserved until after a ten-year period.¹⁰ The remaining spectrum was required to be made available over a ten-year period.¹¹

5. In accordance with the requirements of OBRA, on February 10, 1994, the Department of Commerce released its Preliminary Report.¹² The frequency bands identified for reallocation in the Preliminary Report are listed in Appendix A of the Preliminary Report. Three of these frequency bands, 2390-2400 MHz, 2402-2417 MHz, and 4660-4685 MHz, were identified for immediate reallocation and are now available for private sector use.¹³ OBRA also required that the Commission allocate and propose regulations for the assignment of the 50 megahertz of spectrum that is immediately available no later than 18 months after enactment (*i.e.*, by February 10, 1995).¹⁴

6. On February 7, 1995, the Commission adopted the *First Report and Order* and *Second Notice of Proposed Rulemaking* in this proceeding. In the *First Report and Order*, the Commission (1) made available the 2390-2400 MHz band for use by unlicensed Personal Communications Services (PCS) devices; (2) provided for continued use of the 2402-2417 MHz band by devices operating in accordance with Part 15 of our Rules; (3) upgraded the allocation of both bands for use by the Amateur Radio Service¹⁵ from secondary to primary; and (4) allocated the 4660-4685 MHz band for use by Fixed and Mobile services. A petition for reconsideration of the Commission's decision was filed by the Joint Petitioners¹⁶ on April 6, 1995.

7. Subsequently, on July 31, 1995, the Commission adopted the *Second Report and Order* in this proceeding. The *Second Report and Order* established GWCS and adopted rules for the licensing of this service in the 4660-4685 MHz band. The Commission found that GWCS should accommodate a wide variety of potential fixed and mobile service uses, such as voice, video and data transmission, private microwave, broadcast auxiliary, and ground-to-air voice and video. The Commission also found that GWCS should facilitate the availability of frequencies for new technologies and services, encourage research and investment to invent, develop, and market new technologies, and spur their deployment to serve customers.¹⁷ Section 309(j)(9) of the

¹⁰ At least one-half of the 50 megahertz identified for immediate reallocation must be below 3 gigahertz and all of it must be identified for exclusive non-Federal use.

¹¹ OBRA, § 6001(a)(3), as codified at 47 U.S.C. § 923(e)(2)(A).

¹² Preliminary Spectrum Reallocation Report, U.S. Department of Commerce, NTIA Special Publication 94-27, Feb. 1994.

¹³ By letter dated October 27, 1994, the President notified the Chairman of the Commission that Federal Government frequency assignments in these bands have been withdrawn and that the National Table of Frequency Allocations has been modified to reflect the reallocation of these bands. *See also* Spectrum Reallocation Final Report, U.S. Department of Commerce, NTIA Special Publication 95-32, Feb. 1995.

¹⁴ OBRA, § 6001(a)(3), as codified at 47 U.S.C. § 925(a).

¹⁵ Part 97 of the Commission's Rules, 47 C.F.R. Part 97.

¹⁶ The Joint Petitioners were the Association for Maximum Service Television, Inc.; Association of America's Public Television Stations; Capital Cities/ABC, Inc.; CBS, Inc.; Fox Television Group of Companies; National Association of Broadcasters; National Broadcasting Company, Inc.; Public Broadcasting Service, Inc.; and the Radio-Television News Directors Association.

¹⁷ *Second Report and Order*, 11 FCC Rcd at 630-31, ¶ 12.

Communications Act requires the licensing of not less than 10 MHz of reassigned government spectrum¹⁸ no later than August 9, 1998.¹⁹ However, the Commission postponed the GWCS auction on April 24, 1998.²⁰

8. In the Part 1 proceeding, we tentatively concluded that the Part 1 rules should apply to the auction of GWCS spectrum and specifically replace the GWCS rules.²¹ In this regard, consistent with our decision in the *Part 1 Third Report and Order*, we proposed to eliminate installment payments as a means of financing small business participation in the GWCS auction, and instead offer a higher bidding credit. Employing Part 1 rules for the GWCS auction furthers our goal of streamlining all competitive bidding rules for future auctions. In addition, we assure that GWCS auction participants, like participants in other future auctions, benefit from the experience we have gained in the 15 spectrum auctions we have conducted to date.

9. Last December, in light of the impending statutory deadline for the licensing of GWCS spectrum, we also tentatively concluded to truncate the petition to deny period for the grant of licenses in the GWCS auction. The Balanced Budget Act of 1997 provides for shortened periods for the filing of petitions to deny and for the grant of licenses.²² We sought comment on this tentative conclusion.

IV. COMPETITIVE BIDDING ISSUES

A. Competitive Bidding Design

10. Background. In the *Second Report and Order*, the Commission elected to employ the simultaneous multiple-round auction methodology for GWCS.²³ One party, In-Flight, had originally expressed an interest in nationwide license aggregations, and thus advocated the use of combinatorial bidding.²⁴ The Commission noted

¹⁸ We note that an additional five megahertz of this spectrum was auctioned as part of the spectrum offered in the WCS auction.

¹⁹ See 47 U.S.C. § 309(j)(9). The auction for this service has been delayed pending resolution of potential interference with U.S. operations. As detailed in a General Accounting Office Report to Congress, the United States Navy believes that commercial use of the GWCS spectrum could adversely affect the Navy's Cooperative Engagement Capability System ("CEC"). (See Report to Congressional Committees, "Defense Communications: Federal Frequency Spectrum Sale Could Impair Military Operations," General Accounting Office, GAO/NSIAD-97-131 (June 1997)). The Chairman of the Commission responded to this report by letter on August 19, 1997 (see Letter to the Honorable Dan Burton, Chairman, Committee on Government Reform and Oversight, from Reed Hundt, Chairman, Federal Communications Commission (rel. August 19, 1997)). The National Telecommunications and Information Administration in turn provided the Commission with information from the Navy illustrating that CEC operations might cause harmful interference to GWCS licensees in certain regions. (See Comment Sought on Reserve Prices or Minimum Opening Bids for the General Wireless Communications Service (GWCS) in the 4660-4685 MHz Band, *Public Notice*, DA 98-162 (rel. January 30, 1998), Attachment A).

²⁰ See Wireless Telecommunications Bureau Announces Postponement of General Wireless Communications Service (GWCS) Auction, *Public Notice*, DA 98-792 (rel. April 24, 1998). ("*GWCS Delay Public Notice*"). On April 23, 1998, the Commission notified Congress of "an apparent lack of current public demand for licenses in the GWCS band." See *W. J. Tauzin Letter*. Following the postponement, House Telecommunications Subcommittee Chairman W. J. Tauzin supported the postponement and suspension of the August 9, 1998, licensing deadline and stated he would send that message to the Budget Committee. See *Kennard Asks to Delay Next Wireless Auction*, COMMUNICATIONS DAILY, April 30, 1998.

²¹ See *Part 1 Third Report and Order* at ¶ 193; 47 C.F.R. §§ 26.1 *et seq.*

²² Section 3008, Balanced Budget Act of 1997, P.L. 105-33, 111 Stat. 251 (1997) ("*Balanced Budget Act of 1997*").

²³ *Second Report and Order* at ¶ 66.

²⁴ *Id.* at ¶ 69.

that it did not have a combinatorial bidding methodology that was practical to administer in terms of cost and complexity. In order to accommodate plans such as In-Flight's, the Commission adopted reduced bid withdrawal payment rules for nationwide bidders, as well as certain auction procedures for nationwide bidders.²⁵ The Commission indicated that the result of such a rule would encourage bidders to seek nationwide aggregations without the fear of unduly large withdrawal payments in the event that financing became problematic. No comments or replies were received on these issues.

11. Discussion. We continue to believe that the simultaneous multiple-round auction methodology will allow bidders to better express the value of the interdependency among licenses than if they are auctioned separately, and thus reaffirm the decision to use this methodology.

12. However, we will eliminate the reduced bid withdrawal payment rule and associated auction conduct procedures largely for administrative reasons.²⁶ The only party to have expressed an interest in nationwide aggregations, In-Flight, did not file any comments in this proceeding. When we adopted the *Second Report and Order*, we observed that the reduced bid withdrawal payment and modified auction activity rules were "somewhat complex" yet still "simpler and easier to administer than combinatorial bidding."²⁷ Since then, we have not yet devised a practical means of implementing combinatorial bidding, although we have sought comment on the issue and secured the services of a private sector consultant to examine theoretical and applied combinatorial bidding approaches.²⁸ The Balanced Budget Act of 1997 requires the Commission, for testing purposes, to design and conduct an auction in which a system of combinatorial bidding is used.²⁹ Rather than implement untested and complex rules in the GWCS auction, especially in light of no apparent public interest in them, we feel that the public interest will benefit from the use of the standard bid withdrawal rule that we adopted in the *Part 1 Third Report and Order*. Bidders who desire nationwide license aggregations may still pursue such a strategy, but reduced bid withdrawal payments will not be available to them in the event of withdrawal.

B. Application, Procedural, and Payment Issues

13. Background. In the *Second Report and Order*, the Commission established rules for the auction application process, payment procedures, and day-to-day auction conduct. These rules included provisions for high bidders to follow when submitting long-form applications. The Commission also established an upfront payment of \$0.02 per MHz per pop.³⁰ We proposed in the *Second Further Notice* to replace all such rules with the streamlined Part 1 rules. We received no comments or replies on this proposal.

14. Discussion. We will adopt the Part 1 rules for GWCS. Thus, the Part 1 rules concerning short-form and long-form applications (including the anti-collusion rule), withdrawal and default payments, down payments,

²⁵ 47 C.F.R. § 26.204 (a)(1); *Second Report and Order*, Appendix E. Appendix E detailed special activity and withdrawal procedures that nationwide bidders would have to follow. It also indicated that bidders intending to seek nationwide aggregations must declare those intentions prior to auction.

²⁶ These procedures were detailed in Appendix E to the *Second Report and Order*.

²⁷ *Second Report and Order* at ¶ 73.

²⁸ *Part 1 Third Report and Order* at ¶ 137.

²⁹ Balanced Budget Act of 1997, § 3002(a)(1)(B)(i); 47 U.S.C. § 309(j)(3)(i).

³⁰ *Second Report and Order* at ¶ 76.

full payment, late payment fees, and unjust enrichment will now replace all analogous rules for GWCS.³¹ We also will apply to GWCS the Part 1 rule allowing pre-license grant construction of systems.³² This decision eliminates the discrepancies between our current Part 1 rules and the older GWCS rules. Streamlining the rules increases the efficiency of the competitive bidding process and will provide more specific guidance to auction participants.

15. As discussed above in Section I, and consistent with the *Part 1 Third Report and Order*, we direct the Bureau to establish day-to-day auction conduct procedures for the GWCS auction. These procedures include upfront payment determination, activity requirements for each stage of the auction, activity rule waivers, criteria for determining reductions in eligibility, information regarding bid withdrawal and bid removal, stopping rules, and information relating to auction delay, suspension, or cancellation. We note that the Bureau recently sought comment on a proposed minimum opening bid for GWCS.³³ The authority we are delegating here is consistent with the authority that the Bureau has for all other auctionable services.³⁴

C. Petitions to Deny

16. Background. We proposed in the *Second Further Notice* to truncate the petition to deny period for GWCS licenses, stating that such action would be necessary in order to issue the licenses by the August 9 deadline. Notwithstanding Section 309(d)(1) of the Communications Act, the Balanced Budget Act provides for shortened periods for the filing of petitions to deny and for the grant of licenses.³⁵ Under this provision, the Commission is permitted to grant any application for authorization assigned under competitive bidding not earlier than seven days following public notice that an application has been accepted for filing, and may specify a period of not less than five days for filing petitions to deny.³⁶ We received no comments or replies on this proposal.

17. Discussion. We will not truncate the petition to deny period for GWCS licenses to five days because the statutory deadline has passed. As noted above, the Commission postponed the GWCS auction on April 24, 1998, until further notice.³⁷ Thus, once the Commission announces the long-form applications that have been accepted for filing, the time period for filing petitions to deny will be specified by Public Notice.³⁸

V. DESIGNATED ENTITIES

A. Small business definition

³¹ See *supra* note 4.

³² 47 C.F.R. § 1.2113.

³³ Comment Sought on Reserve Prices or Minimum Opening Bids for the General Wireless Communications Service (GWCS) in the 4660-4685 MHz Band, *Public Notice*, 13 FCC Rcd 2385 (1998).

³⁴ See *Part 1 Third Report and Order* at ¶¶ 123-124.

³⁵ Section 3008, Balanced Budget Act of 1997, P.L. 105-33, 111 Stat. 251 (1997).

³⁶ *Id.*

³⁷ See *supra* note 20.

³⁸ See 47 C.F.R. § 1.2108(b).

18. Background. In 1995, the Commission determined that the capital requirements of GWCS were similar to broadband PCS, and thus adopted the PCS definition of small business for GWCS. This definition states that a small business is any firm, together with its attributable investors and affiliates, that has average gross revenues over the three preceding years not in excess of \$40 million.³⁹ The Commission chose to apply to GWCS the same affiliation and attribution rules used in PCS for calculating gross revenues.⁴⁰ These rules include the "control group" provisions that the Commission has since decided not to use in other auctions.⁴¹ The PCS rules define an applicant's control group (the gross revenues and total assets of which were to be counted) as a group of qualifying investors holding an equity interest of at least 15 percent.⁴² In the *Part 1 Third Report and Order*, we proposed a "controlling interest" standard, similar to that which we recently adopted in our rules for LMDS,⁴³ as our general attribution rule for all future auctions. Under this standard, determination of eligibility for small business provisions would be made by attributing the gross revenues only of principals of the applicant who exercise both "de jure" and "de facto" control, and their affiliates.⁴⁴ We sought comment on whether to impose a minimum equity requirement that any person or entity identified as "controlling" must hold.⁴⁵ NextWave Telecom Inc. supports the controlling interest standard and advocates no imposition of a specific equity requirement.⁴⁶ The Rural Telecommunications Group ("RTG") supports the de facto/de jure control test, provided that control can be demonstrated by an entity having either de facto or de jure control, but not necessarily both.⁴⁷ Western Wireless urges the Commission to attribute the revenues of affiliates of controlling interest holders, "and not just the affiliates of the applicant."⁴⁸

19. We adopted standard ownership disclosure requirements in the *Part 1 Third Report and Order*. Under this standard, all auction applicants are required to disclose the real party or parties in interest by including as an exhibit to their short-form applications detailed ownership information. Applicants must list controlling

³⁹ *Second Report and Order* at ¶ 95.

⁴⁰ *Id.*

⁴¹ *See, e.g.*, Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems; Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, WT Docket No. 96-18, PP Docket No. 93-253, *Second Report and Order and Further Notice of Proposed Rulemaking*, 12 FCC Rcd 2732 (1997) at ¶ 180; Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-39.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, Petitions for Reconsideration of the Denial of Applications for Waiver of the Commission's Common Carrier Point-to-Point Microwave Radio Service Rules, Suite 12 Group Petition for Pioneer Preference, CC Docket No. 92-297, *Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking*, 12 FCC Rcd 12545 (1997) at ¶ 352 ("*LMDS Second Report and Order*").

⁴² 47 C.F.R. § 24.709(b). *See also* Wireless Telecommunications Bureau Responds to Questions about the Local Multipoint Distribution Service, *Public Notice*, DA 98-37 (rel. January 9, 1998).

⁴³ *See, e.g.*, In the Matter of Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Tenth Report and Order*, 11 FCC Rcd 19974 (1996) at ¶ 15; *LMDS Second Report and Order* at ¶ 352.

⁴⁴ *Part 1 Third Report and Order* at ¶ 185.

⁴⁵ *Id.* at ¶ 186.

⁴⁶ NextWave Telecom Inc. comments at 4-6.

⁴⁷ RTG comments at 18. *See also* Western Wireless Corporation reply comments at 2-3 (concurring). ("Western Wireless").

⁴⁸ Western Wireless reply comments at 3.

interests as well as all parties holding a 10 percent or greater interest in the applicant and any affiliates of these interest holders.⁴⁹ Applicants claiming small business status must disclose on their short-form applications the names of each controlling interest and affiliate, and must provide gross revenues calculations for each.⁵⁰

20. Discussion. We received no comments or replies specifically addressing the small business definition for GWCS. We note that the Small Business Administration recently approved this definition for GWCS.⁵¹ Therefore, we will retain the \$40 million size standard for small businesses, without any tiers. However, we will use the Part 1 definitions of gross revenues and affiliate for determining the small business status of GWCS applicants.⁵²

21. We will simplify the GWCS size attribution rules and still enable small businesses to attract adequate financing. Consistent with our proposal in the *Part 1 Third Report and Order*, rather than an all-inclusive attribution rule with "control group" exceptions as used in broadband and narrowband PCS, we will use a controlling interest threshold to determine whether an entity qualifies to bid as a small business. Thus, in calculating gross revenues for purposes of small business eligibility, applicants will be required to count the gross revenues of the controlling interests of the applicant and its affiliates. The term "controlling interest" will include individuals or entities with both de jure and de facto control of the applicant.⁵³ We believe that this controlling interest threshold will function effectively to ensure that only those entities truly meriting small business status are eligible for small business provisions. In particular, we believe that the de jure and de facto concept of control used to determine controlling interest in an applicant and the application of our affiliation rules will effectively prevent larger firms from seeking status as a small business illegitimately. This approach is consistent with attribution rules we have employed for the recent LMDS and 800 MHz SMR auction proceedings.⁵⁴

22. We will better encourage small business participation in the GWCS auction by adopting rules that provide for the greatest flexibility in business structuring. Therefore, in defining controlling interest, we include

⁴⁹ 47 C.F.R. § 1.2112. See 47 C.F.R. § 1.2110(b)(4) for definition of "affiliate."

⁵⁰ 47 C.F.R. § 1.2112.

⁵¹ See Letter to Daniel B. Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, U.S. Small Business Administration, dated May 19, 1998.

⁵² See 47 C.F.R. §§ 1.2110(b)(4), (m).

⁵³ See *Ellis Thompson Corp.*, 76 Rad. Reg. 2d (P&F) 1125, 1127-28 (1994) ("*Ellis Thompson*") (in which the Commission identified factors used to determine control of a business. Specifically, the Commission identified the following indicia of control:

- (1) use of facilities and equipment;
- (2) control of day-to-day operations;
- (3) control of policy decisions;
- (4) personnel responsibilities;
- (5) control of financial obligations; and
- (6) receipt of monies and profits.

Ellis Thompson, 76 Rad. Reg. 2d (P&F). See also *Intermountain Microwave*, 24 Rad. Reg. (P&F) 983 (1963).

⁵⁴ See *LMDS Second Report and Order*; Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, Implementation of Sections 3(n) and 322 of the Communications Act -- Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, *Memorandum Opinion and Order on Reconsideration*, 12 FCC Rcd 9972 (rel. July 10, 1997).

de facto as well as de jure control of the applicant. De jure control is 50.1 percent of the voting stock of a corporation or, in the case of a partnership, the general partners. De facto control includes the criteria set forth in *Ellis Thompson*.⁵⁵ Thus, once principals or entities with a controlling interest are determined under these standards, only the revenues of those principals or entities and their affiliates will be counted for small business eligibility. When an applicant cannot identify controlling interests under these standards, the revenues of all interest holders in the applicant and their affiliates will be counted. For example, if a company is owned by four entities, each of which has 25 percent voting equity and no shareholders' agreement or voting trust gives any one of them control of the company, the revenues of all four entities must be counted. Treating such a corporation in this way is similar to our treatment of a general partnership -- all general partners are considered to have a controlling interest. The rule that we adopt here, we believe, looks to substance over form in assessing eligibility for small business status.

23. We note that our intent here is to provide flexibility that will enable legitimate small businesses to attract passive financing in a highly competitive and evolving telecommunications marketplace.⁵⁶ We believe that by structuring our standard in this manner we will invite only legitimate small businesses. While this rule will not specify a minimum amount of equity that a small business controlling interest must hold, the absence of equity will raise an issue as to whether de facto control exists. For purposes of calculating equity held in an applicant, we provide for full dilution of certain stock interests, warrants, and convertible debentures.⁵⁷ We also provide a means of determining the level of control that is held through indirect ownership. Ownership interests that are held indirectly by any party through one or more intervening corporations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, except that if the ownership percentage for an interest in any link in the chain exceeds 50 percent or represents actual control, it shall be treated as if it were a 100 percent interest.⁵⁸ Finally, we require detailed reporting of all ownership interests as part of the general application requirement adopted in the *Third Report and Order*,⁵⁹ and under the controlling interest standard we will apply the comprehensive affiliation rule to all investors in a GWCS applicant. Under this standard, all auction applicants will be required to disclose the real party or parties in interest by including as an exhibit to their short-form applications detailed ownership information. Applicants must list controlling interests as well as all parties holding a 10 percent or greater interest in the applicant and any affiliates of these interest holders.⁶⁰ Thus, passive interests that were otherwise non-attributable will be attributed if they are affiliates under this rule. Applicants claiming small business status must disclose on their short-form applications the names of each

⁵⁵ See also Stephen F. Sewell, "Assignments and Transfers of Control of FCC Authorizations Under Section 309(d) of the Communications Act of 1934," Federal Communications Law Journal, Vol. 43, No. 3 (1997).

⁵⁶ We note, however, that in seeking comment on the auction of initial licenses for certain broadcast stations, the Commission has proposed stricter attribution standards and eligibility requirements for applicants seeking to qualify for minority-based provisions. See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, MM Docket No. 97-234, Reexamination of the Policy Statement on Comparative Broadcast Hearings, GC Docket No. 92-52, Proposals to Reform the Commission's Comparative Hearing Process to Expedite Resolution of Cases, GEN Docket No. 90-264, Notice of Proposed Rulemaking, 12 FCC Rcd 22363, 22399-22400 (1997).

⁵⁷ See 47 C.F.R. § 1.2110(b)(4)(v). Compare 47 C.F.R. § 24.709(b)(7).

⁵⁸ See 47 C.F.R. § 26.101(b).

⁵⁹ See 47 C.F.R. § 1.2112. See also Part 1 Third Report and Order at ¶¶ 73-77.

⁶⁰ See 47 C.F.R. § 1.2110(b)(4).

controlling interest and affiliate, as these terms are defined herein, and provide gross revenues calculations for each. On their long-form applications, such applicants will be required to disclose any additional gross revenues calculations, any agreements that support small business status, and any investor protection agreements. We believe that this detailed reporting requirement, in combination with our comprehensive affiliation rules, permits us to determine the "real party or parties in interest"⁶¹ when parties apply to participate in an auction. Finally, the Commission reserves the right to conduct random audits of auction applicants and licensees in order to verify information provided regarding eligibility for small business provisions.⁶²

B. Installment Payments

24. Background. In the *Second Report and Order*, the Commission elected to permit small business licensees to pay for their high bids with an installment payment plan. At the time, the Commission believed that small business' difficulty in accessing capital warranted the use of installment payments. In the *Second Further Notice*, we proposed to eliminate installment payments as a means of financing small business participation in the GWCS auction. We received no comments or replies on this issue.

25. Discussion. We hereby eliminate the use of installment payments for GWCS. After careful review of the comments in response to the Part 1 proceeding, the comments in response to the *Installment Payment Public Notice*,⁶³ and our recent decisions in the broadband PCS C block, LMDS and 800 MHz SMR services, we have determined that installment payments should not be used in the immediate future as a means of financing small business participation in our auction program.⁶⁴ As we indicated in the *Second Report and Order* in the Part 1 docket, the Commission must balance competing objectives in Section 309(j) that require, *inter alia*, that it promote the development and rapid deployment of new spectrum-based services and ensure that designated entities are given the opportunity to participate in the provision of such services.⁶⁵ While we are not ruling out the possibility that installment payments may return as a means of assisting designated entities for other auctionable services, their use will be suspended for the foreseeable future until we resolve all attendant issues. The Commission has found, for example, that obligating licensees to pay for their licenses as a condition of receipt requires greater financial accountability from applicants.⁶⁶ To balance the impact on small businesses of our decision to discontinue the use of installment payments, we are adopting a higher bidding credit than that adopted in the *Second Report and Order*, as discussed in paragraph 27, *infra*.

⁶¹ See 47 C.F.R. § 1.2112(a).

⁶² See 47 C.F.R. § 1.2110(l).

⁶³ "Wireless Telecommunications Bureau Seeks Comment on Broadband PCS C and F Block Installment Payment Issues," *Public Notice*, DA 97-82 (rel. June 2, 1997) ("*Installment Payment Public Notice*").

⁶⁴ See "FCC Announces Spectrum Auction Schedule for 1998," *Public Notice*, DA 97-2497 (rel. November 25, 1997), announcing the following upcoming auctions: LMDS, 220 MHz, Broadband PCS C block Reaction, 39 GHz, Paging, 800 MHz SMR (Lower 80 and General Category Channels), Location Monitoring Services (LMS), Public Coast Stations, Pending Analog Broadcast Licenses for Commercial Radio and Television Stations; "FCC Announces Auction Schedule for the General Wireless Communications Service," *Public Notice*, DA 97-2634 (rel. December 17, 1997); *Part 1 Third Report and Order* at ¶ 35.

⁶⁵ See 47 U.S.C. §§ 309(j)(3) and (4).

⁶⁶ See *800 MHz Memorandum Opinion and Order* at ¶ 130.

C. Bidding Credits

26. Background. The Commission adopted a single bidding credit of 10 percent for all small businesses in the *Second Report and Order*. At that time, the Commission believed that this bidding credit, in conjunction with Economic Area ("EA") licensing and installment payments, would give small businesses a meaningful opportunity to obtain GWCS licenses.⁶⁷ The Commission decided not to offer a separate bidding credit to rural telephone companies ("rural telcos"). The Commission concluded that most rural telcos would benefit from their competitive advantages resulting from incumbency and economies of scale, and lower costs associated with acquiring smaller EA licenses, and no commenters have since advocated a rural telco bidding credit.⁶⁸ In the *Second Further Notice*, we proposed raising the small business bidding credit to balance the effect of eliminating installment payments. We received no comments or replies on this proposal.

27. Discussion. We will offer a higher bidding credit than that adopted in the *Second Report and Order* for small businesses. Although no commenters addressed this issue, we believe a greater bidding credit is appropriate in the absence of installment payments, as discussed in Section V(B) above. Consistent with the schedule of bidding credits adopted in the *Part 1 Third Report and Order*, the bidding credit for small business applicants in the GWCS auction will be 15 percent.⁶⁹

VI. CONCLUSION

28. Based on our auction experience, we believe bidders in the GWCS auction will benefit from the use of the streamlined Part 1 rules. We have adjusted our auction procedures for different services as we gained experience with the process, resulting in the adoption of different procedures for different auctionable services. Therefore, this *Fourth Report and Order* replaces the competitive bidding rules adopted for GWCS with Subpart Q of Part 1 of the Commission's rules⁷⁰ to reflect substantive amendments and modifications intended to simplify these regulations. We believe that the rules we adopt today will benefit GWCS bidders and the GWCS auction process generally.

VII. ORDERING CLAUSES

29. Accordingly, IT IS ORDERED THAT, pursuant to Sections 4(i), 5(b), 5(c)(1), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 155(b), 155(c)(1), 303(r), and 309(j), this *Fourth Report and Order* IS HEREBY ADOPTED, and Part 26, Subparts A, E, and F of the Commission's rules are revised as set forth in Appendix C, effective 60 days after publication in the *Federal Register*.

30. IT IS FURTHER ORDERED THAT pursuant to 47 U.S.C. § 155(c) and 47 C.F.R. §§ 0.131(c) and 0.331, the Chief of the Wireless Telecommunications Bureau IS GRANTED DELEGATED AUTHORITY to prescribe and set forth procedures as set forth herein, including mechanisms relating to the day-to-day conduct of the GWCS auction.

⁶⁷ *Second Report and Order* at ¶ 102.

⁶⁸ *Id.* at ¶¶ 101-102.

⁶⁹ See *Part 1 Third Report and Order* at ¶ 47; 47 C.F.R. § 1.2110(e). The bidding credit is 15 percent for small businesses that have average annual gross revenues for the preceding three years not exceeding \$40 million.

⁷⁰ 47 C.F.R. §§ 1.2101 *et seq.*

31. IT IS FURTHER ORDERED THAT the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this *Fourth Report and Order*, including the Final Regulatory Flexibility Analysis at Appendix B, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

APPENDIX A

List of Parties

Comments in Response to the *Third Report and Order and Second Further Notice of Proposed Rule Making*

None. (i.e., no parties filed comments on the GWCS portion of the *Third Report and Order and Second Further Notice of Proposed Rule Making*)

Parties Filing Comments on the Controlling Interest Standard

NextWave Telecom Inc.
The Rural Telecommunications Group

Parties Filing Replies

Western Wireless Corporation

APPENDIX B

Final Regulatory Flexibility Analysis
(*Fourth Report and Order*)

As required by the Regulatory Flexibility Act ("RFA"),¹ an Initial Regulatory Flexibility Analysis ("IRFA") was incorporated in the *Second Further Notice of Proposed Rule Making* in WT Docket No. 97-82 and ET Docket No. 94-32. The Commission sought written public comment on the proposals in the *Second Further Notice of Proposed Rule Making*, including comment on the IRFA. This Final Regulatory Flexibility Analysis ("FRFA") in this *Fourth Report and Order (Order)* conforms to the RFA, as amended by the Contract With America Advancement Act of 1996 ("CWAAA"), Pub. L. No. 104-121, 110 Stat. 847 (1996). The Commission received no public comments on the IRFA.

A. Need for, and objectives of, this *Order*.

The General Wireless Communications Service ("GWCS") was created by the Commission on July 31, 1995 by transferring 25 MHz of spectrum in the 4660-4685 MHz band from the federal government to private sector use. This *Order* replaces most of the auction rules adopted in 1995² for GWCS with the streamlined Part 1 rules.³ With regard to auction provisions for designated entities, we simplify the definition of "small business," eliminate installment payments, and increase the bidding credit. While retaining the \$40 million definition of "small business," we will use the Part 1 definitions of gross revenues and affiliate for determining the small business status of GWCS applicants.⁴ The Commission believes that these rule changes will further simplify and streamline the rules and regulations and increase the overall efficiency of the competitive bidding process for GWCS.

B. Summary of significant issues raised by public comments in response to the IRFA

The Commission received no comments in response to the IRFA.

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

¹ See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) ("CWAAA"). Title II of CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA").

² Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, 4660-4685 MHz, ET Docket No. 94-32, *Second Report and Order*, 11 FCC Rcd 624 (1995) ("*Second Report and Order*").

³ Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Procedures, Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, 4660-4685 MHz, WT Docket No. 97-82, ET Docket No. 94-32, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374 (1997). ("*Part 1 Third Report and Order*").

⁴ See 47 C.F.R. §§ 1.2110(b)(4), (m).

The Commission is required to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the rules here adopted.⁵ The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."⁶ A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."⁷ Nationwide, there are 275,801 small organizations. "Small governmental jurisdiction" generally means "governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000."⁸ As of 1992, there were 85,006 such jurisdictions in the United States.¹⁰

In addition, the term "small business" has the same meaning as the term "small business concern" under Section 3 of the Small Business Act.¹¹ Under the Small Business Act, a "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) meets any additional criteria established by the Small Business Administration ("SBA").¹² The Commission sought and obtained SBA approval of a refined definition of "small business" for GWCS.¹³ According to this definition, a small business is any entity, together with its affiliates and entities holding controlling interests in the entity, that has average annual gross revenues over the three preceding years that are not more than \$40 million.¹⁴

The Commission will offer 875 geographic area licenses, based on Economic Areas, for GWCS. In estimating the number of small entities that may participate in the GWCS auction, the Commission anticipates that the makeup of current wireless services licensees is representative of future auction winning bidders.

D. Description of reporting, recordkeeping, and other compliance requirements

⁵ 5 U.S.C. § 604(a)(3).

⁶ 5 U.S.C. § 601(6).

⁷ 5 U.S.C. § 601(4).

⁸ 1992 Economic Census, U.S. Bureau of the Census, Table 6 (special tabulation of data under contract to Office of Advocacy of the U.S. Small Business Administration).

⁹ 5 U.S.C. § 601(5).

¹⁰ U.S. Department of Commerce, Bureau of the Census, "1992 Census of Governments."

¹¹ 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632).

¹² 15 U.S.C. § 632.

¹³ See Letter to Daniel B. Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, U.S. Small Business Administration, dated May 19, 1998.

¹⁴ See 47 C.F.R. § 26.4.

The *Order* adopts no additional compliance requirements for auction participation.¹⁵ As noted previously in this docket, however, all GWCS license applicants will be subject to reporting and recordkeeping requirements to comply with the competitive bidding rules. Specifically, applicants will apply for the GWCS auction by filing a short-form application and will file a long-form application at the conclusion of the auction. Additionally, entities seeking treatment as "small businesses" will need to submit information pertaining to the gross revenues of the small business applicant, its affiliates, and certain investors in the applicant.

E. Steps taken to minimize significant economic impact on small entities, and significant alternatives considered

Among other goals, Section 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(j), directs the Commission to disseminate licenses among a wide variety of applicants, including small businesses and other designated entities.¹⁶ At the same time, Section 309(j) requires that the Commission ensure the development and rapid deployment of new technologies, products, and services for the benefit of the public, and recover for the public a portion of the value of the public spectrum resource made available for commercial use.¹⁷

The Commission received no comments with respect to the issue of eliminating installment payments for GWCS. The Commission has determined, consistent with its decision to suspend the use of installment payments for the immediate future,¹⁸ that installment payments should not be offered in the GWCS auction as a means of financing small businesses and other designated entities. The Commission notes that installment payments are not the only tool available to assist small businesses, and that section 3007 of the Balanced Budget Act requires that the Commission conduct certain future auctions in a manner that ensures that all proceeds from such bidding are deposited in the U.S. Treasury not later than September 30, 2002.

In assessing the public interest, the Commission must try to ensure that all the objectives of Section 309(j) are considered. In this *Order*, the Commission adopts the Part 1 uniform definitions of "gross revenues" and "affiliate" for GWCS; eliminates the use of installment payments for GWCS; provides for a higher bidding credit, in lieu of installment payments, to encourage and facilitate the participation of designated entities in future auctions; and adopts the Part 1 unjust enrichment rule. With respect to the attribution rules for GWCS, the Commission adopts a "controlling interest" standard. Under this standard, determination of eligibility for small business provisions would be made by attributing the gross revenues only of principals of the applicant who exercise both "de jure" and "de facto" control, and their affiliates. The Commission believes the standard is sufficient to calculate size so that only those entities truly meriting small business status qualify for bidding credits. The Commission chooses not to impose a minimum equity requirement for the GWCS auction. The Commission wants rules that provide for the greatest flexibility in business structuring.

By this *Order*, the Commission applies to GWCS the general auction rules contained in Part 1 of its rules. These rules include a uniform definition of major amendments to the short-form application; general ownership disclosure requirements; a provision to refund upfront payments before the end of an auction to bidders that lose eligibility; uniform default rules; a rule that permits auction winners who have submitted a timely down payment to submit final payments 10 business days after the applicable deadline, provided the

¹⁵ See ¶¶ 13-15 in *Order*.

¹⁶ 47 U.S.C. § 309(j)(3)(B).

¹⁷ 47 U.S.C. §§ 309(j)(3)(A), (C).

¹⁸ *Part 1 Third Report and Order* at ¶ 38.

appropriate late fee is paid; a rule that modifies the attributable investor threshold of the anti-collusion rule to include controlling interests and/or holders of a 10 percent or greater interest in the applicant and to permit an entity that has invested in an applicant that withdraws from an auction to invest in other applicants that have applied to bid in the same markets; and permits all auction winners to begin construction at their own risk upon issuance of a public notice announcing the auction winners.

The Balanced Budget Act of 1997 provides for shortened periods for the filing of petitions to deny and for the grant of licenses.¹⁹ Under this provision, the Commission is permitted to grant any application for authorization assigned under competitive bidding not earlier than seven days following public notice that an application has been accepted for filing, and may specify a period of not less than five days for filing petitions to deny.²⁰ The Commission received no comments on its proposal to truncate the petition to deny period for GWCS. After the Commission announces that long form applications have been accepted for filing, it will announce by Public Notice the length of the period for filing petitions to deny.²¹

Finally, consistent with the *Part I Third Report and Order*, the Commission directs the Wireless Telecommunications Bureau to establish day-to-day auction conduct procedures for the GWCS auction. These procedures include upfront payment determination, activity requirements for each stage of the auction, activity rule waivers, criteria for determining reductions in eligibility, information regarding bid withdrawal and bid removal, stopping rules, and information relating to auction delay, suspension, or cancellation.

The Commission believes that the objectives of section 309(j) are met by the rule changes in this *Order*. In addition, this *Order* serves the public interest by simplifying regulations, eliminating unnecessary rules, increasing the efficiency of the competitive bidding process, and providing more specific guidance to auction participants while also giving them more flexibility.

The Commission will send a copy of the *Order*, including this FRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, *see* 5 U.S.C. § 801(a)(1)(A). In addition, the Commission will send a copy of the *Order*, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *Order* and FRFA (or summaries thereof) will also be published in the Federal Register. *See* 5 U.S.C. § 604(b).

¹⁹ Section 3008, Balanced Budget Act of 1997, P.L. 105-33, 111 Stat. 251 (1997).

²⁰ *Id.*

²¹ *See* ¶¶ 16-17 in *Order*.

APPENDIX C

Final Rules

Part 26, Subparts A, E, and F, of Title 47 of the Code of Federal Regulations are amended to read as follows:

PART 26 - GENERAL WIRELESS COMMUNICATIONS SERVICE

1. Amend § 26.4 to revise the definitions of "Gross Revenues," "Rural Telephone Company," and "Small Business: Consortium of Small Businesses," and add the definitions of "Controlling Interest" and "Affiliate."

§ 26.4 Terms and Definitions.

* * * * *

Gross Revenues. See Section 1.2110(m).

* * * * *

Rural telephone companies. A rural telephone company is any local exchange carrier operating entity to the extent that such entity --

- (i) provides common carrier service to any local exchange carrier study area that does not include either
 - (A) any incorporated place of 10,000 inhabitants or more, or any part thereof, based on the most recently available population statistics of the Bureau of the Census, or
 - (B) any territory, incorporated or unincorporated, included in an urbanized area, as defined by the Bureau of the Census as of August 10, 1993;
- (ii) provides telephone exchange service, including exchange access, to fewer than 50,000 access lines;
- (iii) provides telephone exchange service to any local exchange carrier study area with fewer than 100,000 access lines; or
- (iv) has less than 15 percent of its access lines in communities of more than 50,000 on the date of enactment of the Telecommunications Act of 1996.

Small Business: Consortium of Small Businesses.

- (1) A small business is an entity that, together with its affiliates and entities holding controlling interests in the entity, has average annual gross revenues that are not more than \$40 million for the preceding three years
- (2) A small business consortium is a conglomerate organization formed as a joint venture between or among mutually independent business firms, each of which individually satisfies the definition of a small business. Where an applicant (or licensee) is a consortium of small businesses, the gross revenues of each business shall not be aggregated.
- (3) Applicants without identifiable controlling interests. Where an applicant (or licensee) cannot identify controlling interests under the standards set forth in this section, the gross revenues of all interest holders in the applicant, and their affiliates, will be attributable.

* * * * *

Controlling interest.

(i) For purposes of this section, controlling interest includes individuals or entities with both de jure and de facto control of the applicant. De jure control is greater than 50 percent of the voting stock of a corporation, or in the case of a partnership, the general partner. De facto control is determined on a case-by-case basis. An entity must disclose its equity interest and demonstrate at least the following indicia of control to establish that it retains de facto control of the applicant:

(A) the entity constitutes or appoints more than 50 percent of the board of directors or management committee;

(B) the entity has authority to appoint, promote, demote, and fire senior executives that control the day-to-day activities of the licensee; and

(C) the entity plays an integral role in management decisions.

(ii) Calculation of Certain Interests.

(A) Ownership interests shall be calculated on a fully diluted basis; all agreements such as warrants, stock options and convertible debentures will generally be treated as if the rights thereunder already have been fully exercised.

(B) Partnership and other ownership interests and any stock interest equity, or outstanding stock, or outstanding voting stock shall be attributed as specified below.

(C) Stock interests held in trust shall be attributed to any person who holds or shares the power to vote such stock, to any person who has the sole power to sell such stock, and, to any person who has the right to revoke the trust at will or to replace the trustee at will. If the trustee has a familial, personal, or extra-trust business relationship to the grantor or the beneficiary, the grantor or beneficiary, as appropriate, will be attributed with the stock interests held in trust.

(D) Non-voting stock shall be attributed as an interest in the issuing entity.

(E) Limited partnership interests shall be attributed to limited partners and shall be calculated according to both the percentage of equity paid in and the percentage of distribution of profits and losses.

(F) Officers and directors of an entity shall be considered to have an attributable interest in the entity. The officers and directors of an entity that controls a licensee or applicant shall be considered to have an attributable interest in the licensee or applicant.

(G) Ownership interests that are held indirectly by any party through one or more intervening corporations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, except that if the ownership percentage for an interest in any link in the chain exceeds 50 percent or represents actual control, it shall be treated as if it were a 100 percent interest.

(H) Any person who manages the operations of an applicant or licensee pursuant to a management agreement shall be considered to have an attributable interest in such applicant or licensee if such person or its affiliate pursuant to Section 1.2110(b)(4), has authority to make decisions or otherwise engages in practices or activities that determine, or significantly influence

(i) The nature or types of services offered by such an applicant or licensee;

(ii) The terms upon which such services are offered; or

(iii) The prices charged for such services.

(I) Any licensee or its affiliate who enters into a joint marketing arrangement with an applicant or licensee, or its affiliate, shall be considered to have an attributable interest, if such applicant or licensee, or its affiliate, has authority to make decisions or otherwise engage in practices or activities that determine, or significantly influence,

(i) The nature or types of services offered by such an applicant or licensee;

(ii) The terms upon which such services are offered; or

(iii) The prices charged for such services.

Affiliate. See Section 1.2110(b)(4).

2. Amend § 26.203 so it is revised to read as follows:

§ 26.203 Competitive Bidding Mechanisms.

See Section 1.2104.

3. Section 26.204 is withdrawn and reserved.

4. Amend § 26.205 so it is revised to read as follows:

§ 26.205 Bidding application (FCC Form 175 and 175-S Short-Form).

See Section 1.2105.

5. Amend § 26.206 so it is revised to read as follows:

§ 26.206 Submission of upfront payments and down payments.

See Section 1.2106.

6. Amend § 26.207 so it is revised to read as follows:

§ 26.207 Long form applications.

See Section 1.2107.

7. Amend § 26.208 so it is revised to read as follows:

§ 26.208 License grant, denial, default, and disqualification.

See Section 1.2109.

8. Amend § 26.210 so it is revised to read as follows:

§ 26.210 Provisions for small businesses.

(a) *Bidding credits.* A winning bidder that qualifies as a small business or a consortium of small businesses may use the bidding credit specified in Section 1.2110(e)(2)(iii).

(b) *Demonstrating small business qualifications.* See Section 1.2110(i).

(c) *Audits.* See Section 1.2110(l).

(d) *Unjust Enrichment*

See Section 1.2111.

9. Amend § 26.307 so it is revised to read as follows:

§ 26.307 General application requirements.

(a) See Section 1.2112.

* * * * *

10. Remove and reserve Section 26.313.

11. Amend § 26.317 by revising paragraph (b) as follows:

§ 26.317 Public notice period.

* * * * *

(b) The Commission will not grant an application filed on Form 601 filed either by a winning bidder or by an applicant whose Form 175 application is not mutually exclusive with other applicants, until the expiration of a period of not less than seven (7) days following the issuance of a public notice listing the application, or any major amendments thereto, as acceptable for filing. See also § 1.2108 of this chapter.

* * * * *

12. Amend § 26.320 so that it is revised to read as follows:

§ 26.320 Opposition to applications.

See Section 1.2108.