

Relevant Authority: Prospective bidders must familiarize themselves thoroughly with the Commission's rules relating to Broadband PCS contained in Title 47, Part 24, of the Code of Federal Regulations, and those relating to application and auction procedures, contained in Title 47, Part 1, of the Code of Federal Regulations.

Prospective bidders must also be thoroughly familiar with the procedures, terms and conditions contained in the *C Block Second Report and Order and Further Notice of Proposed Rule Making*;¹ the *C Block Reconsideration Order*;² the *C Block Fourth Report and Order*;³ Part 24, Subparts A, B, C, E, H, and I, of the Commission's rules concerning broadband PCS; and Part 1, Subpart Q, of the Commission's rules concerning competitive bidding proceedings.

The terms contained in the Commission's Rules, relevant orders, public notices, and bidder information package are not negotiable. The Commission may amend or supplement the information contained in our public notices or the bidder information package at any time, and will issue public notices to convey any new or supplemental information to bidders. It is the responsibility of all prospective bidders to remain current with all Commission rules and with all public notices pertaining to this auction. Copies of most Commission documents, including public notices, can be retrieved from the FCC Internet node via anonymous ftp @ftp.fcc.gov or the FCC World Wide Web site at <http://www.fcc.gov/wtb/auctions>. Additionally, documents may be obtained for a fee by calling the Commission's copy contractor, International Transcription Service, Inc. (ITS), at (202) 857-3800. When ordering documents from ITS, please provide the appropriate FCC number (e.g., FCC 97-342 for the *C Block Second Report and Order and Further Notice of Proposed Rule Making*, FCC 98-46 for the *C Block Reconsideration Order*, and FCC 98-176 for the *C Block Fourth Report and Order*).

¹ Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, *Second Report and Order and Further Notice of Proposed Rule Making*, FCC 97-342, 12 FCC Rcd 16,436 (1997) ("*C Block Second Report and Order and Further Notice*").

² Amendment of the Commission's Rules Regarding Installment Payment Financing For Personal Communications (PCS) Licensees, WT Docket No. 97-82, *Order on Reconsideration of the Second Report and Order*, FCC 98-46, 13 FCC Rcd 8345 (1998) ("*C Block Reconsideration Order*").

³ Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, WT Docket No. 97-82, *Fourth Report and Order*, FCC 98-176, 13 FCC Rcd. 15,743 (1998) ("*C Block Fourth Report and Order*").

Selected FCC C Block Orders

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, DC 20554

In the Matter of)	
)	
Amendment of the Commission's)	
Rules Regarding Installment Payment)	WT Docket No. 97-82
Financing for Personal Communications)	
Services (PCS) Licensees)	

FOURTH REPORT AND ORDER

Adopted: July 27, 1998

Released: August 19, 1998

By the Commission:

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I. INTRODUCTION

1. In this *C Block Fourth Report and Order*, we resolve the Commission's proposals in its *C Block Further Notice of Proposed Rule Making ("C Block Further Notice")*.¹ In so doing, we set forth the rules that will govern reauctions of C block spectrum surrendered to the Commission pursuant to the *C Block Second Report and Order*² and the *C Block Order on Reconsideration of the Second Report and Order ("C Block Reconsideration Order")*,³ as well as any other C block spectrum available for reauction.

II. BACKGROUND

A. C Block Proceedings

2. Consistent with Congress' mandate to promote the participation of small business and other "designated entities" in the provision of spectrum-based services,⁴ the Commission limited eligibility in the initial C block auctions to entrepreneurs and small businesses.⁵ The C block auction concluded on May 6,

¹ See Amendment of the Commission's Rules Regarding Installment Payment Financing For Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, *Second Report and Order and Further Notice of Proposed Rule Making*, 12 FCC Rcd 16,436 ("*C Block Second Report and Order*" and "*C Block Further Notice*"). The Commission received 14 comments, 11 reply comments and one ex parte filing in response to the *C Block Further Notice*. Appendix A contains a list of full and abbreviated names of commenting parties.

² Amendment of the Commission's Rules Regarding Installment Payment Financing For Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, *Second Report and Order and Further Notice of Proposed Rule Making*, 12 FCC Rcd 16,436 ("*C Block Second Report and Order*" and "*C Block Further Notice*").

³ Amendment of the Commission's Rules Regarding Installment Payment Financing For Personal Communications (PCS) Licensees, WT Docket No. 97-82, *Order on Reconsideration of the Second Report and Order*, 13 FCC Rcd 8345 (1988) ("*C Block Reconsideration Order*"). We have received 11 petitions for reconsideration and clarification of the *C Block Reconsideration Order*. See *Petitions for Reconsideration and Clarification of Action in Rulemaking Proceedings*, Report No. 2283, 63 Fed. Reg. 38,404 (July 16, 1998).

⁴ See Communications Act of 1934, as amended ("Communications Act"), § 309(j)(4)(D), 47 U.S.C. § 309(j)(4)(D).

⁵ See 47 C.F.R. §§ 24.709 and 24.720; Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket 93-253, *Fifth Report and Order*, 9 FCC Rcd 5532 (1994), *Fifth Memorandum Opinion and Order*, 10 FCC Rcd 403 (1994), *Sixth Report and Order*, 11 FCC Rcd 136 (1995).

1996,⁶ and the subsequent reauction of defaulted licenses concluded on July 16, 1996,⁷ with a total of 90 bidders winning 493 licenses. The winning bidders were permitted to pay 90 percent of their net bid price over the ten-year license term.⁸

3. The Commission decided in the *C Block Second Report and Order* (as modified by the *C Block Reconsideration Order*) to allow each C block licensee to elect one of four options for each of its licenses: resumption of payments under the licensee's original installment payment plan, disaggregation, amnesty, or prepayment. The array of choices was intended to provide limited relief to financially troubled licensees without harming the integrity of the auction process.⁹ The Commission required C block licensees to file a written election notice, specifying whether they would resume payments under the terms of the original installment payment plan or would proceed under one of the alternative options.¹⁰ Included with the *C Block Second Report and Order* was the *C Block Further Notice*, in which the Commission sought comment on proposed changes to the C block rules to govern the reauction of surrendered spectrum in the C block.¹¹ The Wireless Telecommunications Bureau (the "Bureau") announced by public notice on April 17, 1998 an election date of June 8, 1998 and a payment resumption date for C block licensees of July 31, 1998.¹²

B. Part 1 Proceedings

4. On December 31, 1997, we released the *Part 1 Third Report and Order* in which we adopted general competitive bidding rules to supplant, wherever practicable, auction rules that were specific

⁶ See "FCC Announces Winning Bidders in the Auction of 493 Licenses to Provide Broadband PCS in Basic Trading Areas: Auction Event No. 5," *Public Notice*, DA 96-716 (released May 8, 1996).

⁷ See "FCC Announces Winning Bidders in the Reauction of 18 Licenses to Provide Broadband PCS in Basic Trading Areas: Auction Event No. 10," *Public Notice*, DA 96-1153, 11 FCC Rcd. 8183 (released July 17, 1996).

⁸ See 47 C.F.R. § 24.711(b)(3). The net bid price is equal to the winning bid less any bidding credit for which the licensee was eligible. See 47 C.F.R. § 24.712.

⁹ See *Second Report and Order*, 12 FCC Rcd at 16,437-38 para. 2 and 16,444-46 paras. 15-17.

¹⁰ See *C Block Second Report and Order*, 12 FCC Rcd at 16,470-76 paras. 70-76; *C Block Reconsideration Order* at para. 61-65; and "Wireless Telecommunications Bureau Announces June 8, 1998 Election Date for Broadband PCS C Block Licensees," *Public Notice*, DA 98-741 (released April 17, 1998).

¹¹ *Second Report and Order*, 12 FCC Rcd at 16,437 para. 1. The language of the *C Block Second Report and Order* suggests that there will be a single C block reauction; however, for reasons discussed below, we now anticipate that there could be more than one reauction.

¹² See "Wireless Telecommunications Bureau Announces June 8, 1998 Election Date for Broadband PCS C Block Licensees," *Public Notice*, DA 98-741 (released April 17, 1998).

to each auctionable service or class of service.¹³ Our purpose was to streamline competitive bidding regulations, eliminate unnecessary rules, and increase the overall efficiency and consistency of the auction process.¹⁴ In the process, we resolved many of the issues that had been raised in the *C Block Further Notice*.¹⁵ Accordingly, future C block reactions will adhere to Part 1 rules,¹⁶ as amended, to the extent applicable. Where our rules in Part 1 are not determinative, bidders will continue to look to Part 24 rules,¹⁷ as amended in this *C Block Fourth Report and Order*.

III. LICENSES TO BE REAUTIONED

A. Background

5. In the *C Block Further Notice*, the Commission proposed that it react: (1) all licenses representing C block spectrum returned pursuant to the disaggregation, prepayment, or amnesty options; and (2) all C block licenses held as a result of defaults.¹⁸ The Commission believed that including all available licenses in a reaction would allow it fairly and efficiently to facilitate the rapid provision of service to the public and also would allow for the most efficient aggregation of licenses.¹⁹

B. Discussion

6. We adopt the Commission's proposal in the *C Block Further Notice* to react all available C block licenses held by the Commission. Several commenters agree, and no commenter disagrees,

¹³ See Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Procedures, WT Docket No. 97-82, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374 (released December 31, 1997) ("*Part 1 Third Report and Order*" and "*Part 1 Further Notice*"); see also Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Second Report and Order*, 9 FCC Rcd 2348 ("*Competitive Bidding Second Report and Order*"); Amendment of Part 1 of the Commission Rules -- Competitive Bidding Proceeding, *Order, Memorandum Opinion and Order and Notice of Proposed Rule Making*, WT Docket No.97-82, 12 FCC Rcd 5686 (1997) ("*Part 1 Notice*").

¹⁴ See *Part 1 Third Report and Order*, 13 FCC Rcd at 376 para.1

¹⁵ Issues addressed in the *C Block Further Notice* and subsequently resolved, either in whole or in part under the *Part 1 Third Report and Order* include: competitive bidding design, bidding procedures; activity rules; reserve price, minimum opening bid, and minimum bid increments; pre-auction application procedures; upfront payment; down payment and full payment; amendments and modifications of applications; bid withdrawal, default, and disqualification; anti-collusion rules; small business size and bidding credits; and the installment payment program.

¹⁶ See 47 C.F.R. Part 1--Practice and Procedure.

¹⁷ See 47 C.F.R. Part 24--Personal Communications Services.

¹⁸ *C Block Further Notice*, 12 FCC Rcd at 16,474 para. 83.

¹⁹ *Id.*

with this proposal.²⁰ Our recent modifications to the C block payment options in the *C Block Reconsideration Order* provide no reason to deviate from this basic approach. Any C block license that becomes available for reauction after the next C block reauction will be reauctioned in a subsequent reauction as soon as practicable.

7. NatTel, Starcom, and CPCS I argue that the next reauction should include licenses owned by entities that have filed for bankruptcy protection.²¹ CPCS I maintains that if licenses held by C block bankruptcy petitioners are excluded from the next reauction, the uncertainty surrounding the fate of those licenses will make business planning difficult for other C block entities.²² NatTel urges the Commission to amend its rules in order to be able to revoke automatically the licenses of licensees that have declared bankruptcy.²³

8. In the *Part 1 Third Report and Order*, we addressed the issue of whether the Commission can immediately reclaim and reauction licenses held by a licensee that declares bankruptcy.²⁴ As we stated there, we are confident of our position that the Commission can reclaim licenses quickly since the Commission conditions licenses upon payment and requires automatic cancellation in the event of nonpayment.²⁵ Nevertheless, until controlling precedent is established by the courts, or legislation addressing conflicting rights is enacted, a delay in the reauction of licenses in bankruptcy litigation may occur.²⁶ The pendency of bankruptcy proceedings involving certain C block licenses²⁷ makes it impossible for us to resolve at this time whether those licenses will be available in the next C block reauction. We do not intend,

²⁰ See AirGate Comments at 2, 3; Conestoga Comments at 7; Duluth Comments at 1; NextWave Comments at 1, 2; Starcom Comments at 1; Airgate Reply at 2; and NextWave Reply at 1-2.

²¹ NatTel Comments at 2-8; Starcom Comments at 1; and CPCS I Reply at 1-3.

²² CPCS I Reply at 2-3.

²³ NatTel Comments at 6-8.

²⁴ *Part 1 Third Report and Order*, 13 FCC Rcd at 398 para. 39.

²⁵ *Id.*

²⁶ *Id.*; see also FCC Report to Congress on Spectrum Auctions, WT Docket No. 97-150, *Report*, FCC 97-353 (released October 9, 1997) at 39 (recommending that Congress clarify that FCC licensees that default on their installment payments may not use bankruptcy litigation to refuse to relinquish their spectrum licenses for reauction); Statement of Dan Phythyon, Chief, Wireless Telecommunications Bureau Before the Subcommittee on Communications, Committee on Commerce, Science, and Transportation, United States Senate, on Wireless Telecommunications Bureau Oversight (May 13, 1998) (asking that Congress act to protect spectrum licenses from being held captive by bankruptcy delays); and Third Annual Commercial Mobile Radio Service (CMRS) Competition Report, Report No. WT 98-13, *Third Report*, FCC 98-91 (released June 11, 1998) at Separate Statement of Chairman William E. Kennard (suggesting that Commission should work with Congress to eliminate regulatory obstacles to the development of wireless communications services posed by bankruptcy delays).

²⁷ *In re GWI PCS I, Inc.*, No. 397-39676-SAF-11 (Bankr. N.D.Tex. April 24, 1998); *In re Pocket Communications, Inc.*, No. 97-5-4105(ESD) (Bankr. D.Md.); *In re NextWave Personal Communications, Inc.*, 98-21529 (ASH) (Bankr. S.D.N.Y.).

however, to delay a reauction of other available C block licenses because of such litigation. Such a delay easily could become the first in an interminable series of delays, undermining our primary goal of getting licenses into the hands of parties that will provide service to the public and competition in the market. For this reason, we believe that the public will realize a greater benefit if we auction all available C block spectrum as soon as practicable than it will if we postpone a reauction until we have resolved all issues connected with every bankruptcy proceeding. Licenses made available in any bankruptcy proceeding will be included in the next appropriate reauction.

9. CPCSI asks that the Commission also address the issue of whether a reauction will additionally encompass licenses, such as those won by CPCSI, that are the subject of petitions pending before the Commission.²⁸ Because the Commission granted CPCSI's application for review on December 24, 1997,²⁹ and granted its license applications on December 29, 1997,³⁰ CPCSI's request is moot as to the licenses at issue in its application for review. The decision will be made on a case by case basis whether to include in a reauction any other C block licenses held by the Commission that are the subject of pending Commission or judicial proceedings.

²⁸ CPCSI Comments at 9-10; *see also* CPCSI Reply at 3-5.

²⁹ *See* Carolina PCS I Limited Partnership Request for Waiver of Section 24.711(a)(2) of the Commission's Rules Regarding BTA Nos. B016, B072, B091, B147, B177, B178, B312, B335, and B436, Frequency Block C, *Memorandum Opinion and Order*, 12 FCC Rcd 22,938 (1997).

³⁰ *See* "Application Grants to Carolina PCS I Limited Partnership," *Public Notice*, DA 97-2714 (released December 29, 1997).

IV. ELIGIBILITY FOR PARTICIPATION

A. Background

10. In the *C Block Second Report and Order*, the Commission decided that the public interest considerations mandated by Section 309(j) of the Communications Act³¹ would be furthered by applying to a C block reauction the same eligibility rules that had been used for the original C block auction.³² The Commission, therefore, deemed eligible to participate in a C block reauction: (1) all applicants qualifying, as of the start of the reauction, as entrepreneurs under the Commission's rules;³³ and (2) all entities that had filed a short-form application (FCC Form 175) to participate in, and had been eligible to participate in, the original C block auction.³⁴ Accordingly, the Commission decided that all entities that had participated in the original C block auction would be eligible to participate in the next reauction; however, the Commission prohibited C block licensees that return spectrum pursuant to the disaggregation or prepayment options from reacquiring their returned spectrum for a period of two years from the start date of the next C block reauction.³⁵ This prohibition extended to qualifying members of the licensee's control group, and their affiliates.³⁶

11. In the *C Block Further Notice*, the Commission sought comment on whether it should restrict participation in the C block reauction to entities that have not defaulted on any payments owed the Commission.³⁷ The Commission asked for comment on possible alternatives to excluding defaulters from participation in a reauction. One possibility was for the Commission to have an expedited hearing on a winning defaulter's financial qualifications, allowing the defaulter to attempt to rebut a presumption that it is not financially qualified.³⁸ Another idea was for the Commission to require defaulters to submit either more detailed financial information at the application stage or a larger upfront payment.³⁹ The Commission observed that C block licensees would not be in default simply by virtue of having elected the alternative payment options established in the *C Block Second Report and Order*.⁴⁰

³¹ See 47 U.S.C. § 309(j)(3).

³² *C Block Second Report and Order*, 12 FCC Rcd at 16,448 paras. 21-22.

³³ See 47 C.F.R. § 24.709.

³⁴ *C Block Second Report and Order*, 12 FCC Rcd at 16,448 para. 22.

³⁵ *Id.* at 16,457 para. 42 and 16,470 para. 69.

³⁶ *Id.*; see 47 C.F.R. § 24.709.

³⁷ *C Block Further Notice*, 12 FCC Rcd at 16,474 para. 84; see also 47 U.S.C. § 309(j)(5).

³⁸ *C Block Further Notice* at 12 FCC Rcd at 16,474 para. 84; see also 47 C.F.R. § § 24.832(e), 1.2108(d)(3).

³⁹ *C Block Further Notice*, 12 FCC Rcd at 16,474 para. 84.

⁴⁰ *Id.*

12. In the *C Block Reconsideration Order*, we modified the alternative payment options to, *inter alia*, divide the amnesty option into two categories: "pure amnesty" and "amnesty/prepayment."⁴¹ We decided that, while licensees returning spectrum pursuant to the "pure amnesty" option would not be prohibited from reacquiring their returned spectrum, licensees returning spectrum pursuant to the "amnesty/prepayment" option would have to forgo, for a period of two years from the start date of next C block reaction, eligibility to reacquire their spectrum.⁴² This prohibition extends to qualifying members of a licensee's control group, and their affiliates.⁴³ In addition, we retained the two-year prohibition on the reacquisition of spectrum returned pursuant to the disaggregation or prepayment options established in the *C Block Second Report and Order*.⁴⁴ We also responded to petitions for reconsideration of the *C Block Second Report and Order* filed by Cellexis International, Inc. and RFW PCS Inc., both of which disagree with comments filed by Nextel in response to the *C Block Further Notice*.⁴⁵ As discussed below, Nextel asks that the Commission open eligibility for a reaction to "all qualified bidders." We disagreed with Nextel's proposal, affirming the Commission's ruling in the *C Block Second Report and Order* to limit eligibility for participation in C block reactions to applicants meeting the Commission's definition of entrepreneur.⁴⁶

B. Discussion

13. We retain the C block eligibility parameters established in the *C Block Second Report and Order*. The following entities will be eligible for C block reactions: (1) entities that filed an FCC Form 175 short-form application for, and were eligible for, the original C block auction and (2) entities qualifying as entrepreneurs under Section 24.709 of the Commission's rules, as of the deadline for the filing of short-form

⁴¹ *C Block Reconsideration Order*, 13 FCC Rcd at 8360 para. 37.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 8360 para. 38, 8361-62 para. 41, 8367 para. 50, and 8374-76 paras. 68-72.

⁴⁵ See petitions for reconsideration of the *C Block Second Report and Order* filed by Cellexis International, Inc. at 7-8 and RFW PCS Inc. at 6-7; see also Reply of MFRI Incorporated at 6-7 and Reply of Wireless Ventures, Inc. at 4, both responding to oppositions to petitions for reconsideration of the *C Block Second Report and Order*.

⁴⁶ *C Block Reconsideration Order*, 13 FCC Rcd at 8374 para. 69; see also *C Block Second Report and Order*, 12 FCC Rcd at 16,448 para. 22. Section 24.709 of the Commission's rules defines an entrepreneur for purposes of C and F block auctions without actually using the term 'entrepreneur':

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

[emphasis in original; italicized terms are defined in 47 C.F.R. §§ 1.2110, 24.720] 47 C.F.R. § 24.709(a)(1); see also *id.* § 24.709(a)(2).

applications for the reauction.⁴⁷ While, under these rules, entities that participated in the original C block reauction will be eligible for C block reauctions, we retain the eligibility restriction established in the *C Block Second Report and Order*, as modified in the *C Block Reconsideration Order*, for licensees that surrender licenses pursuant to the disaggregation, prepayment, and/or "amnesty/prepayment" options. Such licensees will be ineligible to reacquire their surrendered licenses through reauction or by any other means for a period of two years from the start date of the next C block reauction.⁴⁸

14. The Commission's decision in the *C Block Second Report and Order* to impose a two-year bar on the eligibility of licensees to reacquire licenses they return pursuant to the disaggregation and prepayment options sparked comment. NextWave wants all licensees to be permitted to participate in a reauction, regardless of their election of an alternative payment option.⁴⁹ Sprint, on the other hand, urges the Commission to bar licensees electing the amnesty option from bidding on their surrendered spectrum in a reauction.⁵⁰ We dealt with the respective concerns of NextWave and Sprint in the *C Block Reconsideration Order*.⁵¹ As we stated there, we believe that the modified approach we adopted in that order addresses the concerns of both of these parties.⁵² Therefore, we affirm the decision we made in that order. Starcom asks that the qualifications of licensees electing any of the alternative payment options be subjected to a higher level of scrutiny regarding their financial qualification to deal with the requirements of additional licenses.⁵³ We believe that a higher level of scrutiny is not warranted. As noted above, C block licensees that have elected alternative payment options are not defaulters.⁵⁴ Moreover, all applicants for C block reauctions will be required to pay a substantial upfront payment, which should help ensure that only serious, qualified bidders participate.⁵⁵

⁴⁷ See 47 C.F.R. § 24.709.

⁴⁸ *C Block Reconsideration Order*, 13 FCC Rcd at 8360-61 paras. 37, 38, and 41 and 8367 para. 50. Licensees that surrender licenses pursuant to the "pure amnesty" option will remain eligible to reacquire those surrendered licenses in a reauction or through a secondary market transaction. *Id.* at para. 37.

⁴⁹ NextWave Comments at 3-4.

⁵⁰ Sprint Reply at 1-4.

⁵¹ *C Block Reconsideration Order*, 13 FCC Rcd at 8376 paras. 71-72.

⁵² See *id.* at para. 72.

⁵³ Starcom Comments at 2.

⁵⁴ See *C Block Further Notice*, 12 FCC Rcd at 16,474 para. 84.

⁵⁵ See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, *Second Report and Order*, 9 FCC Rcd 2348 at para. 169 (1994); see also *infra* Section V.B.5.

15. Because we are not planning to include C block licenses that remain involved in bankruptcy proceedings in the next C block reauction,⁵⁶ there likely will be more than one reauction for C block. Accordingly, we must evaluate whether to allow applicants for and participants in the original C block auction to remain eligible to participate in all future C block reauctions, regardless of whether they still qualify as entrepreneurs under the Commission's rules at the deadline for filing a short-form application. While we believe that flexibility in this regard is appropriate, we believe that fairness to other future bidders prevents our providing an open eligibility standard indefinitely. Consequently, in order to be eligible for any C block reauction that begins more than two years from the start date of the next C block reauction, an applicant must qualify as an entrepreneur under the Commission's rules at the time of filing its short-form application.⁵⁷

16. Several parties commented on the eligibility rules established in *C Block Second Report and Order*, with most commenters supporting the Commission's decision.⁵⁸ As mentioned, however, Nextel urges the Commission not to limit a reauction just to entrepreneurs but rather to allow "all qualified bidders" to participate.⁵⁹ Nextel argues that a restricted auction skews the marketplace and that the increasing level of competition in the wireless arena makes it less likely that small business entrepreneurs can survive.⁶⁰ According to Nextel, the Commission could enable small businesses to bid competitively by providing them bidding credits and permitting them to partition and disaggregate 30 MHz licenses after the auction.⁶¹ No other commenter supports Nextel's views, and several parties oppose them.⁶² As stated, we recently denied Nextel's request in the *C Block Reconsideration Order*, and the record in this proceeding provides us with no basis to alter our decision.

17. The Commission received considerable comment on whether and how defaulters on payments owed the Commission should be able to participate in a reauction. Several parties would preclude defaulters from eligibility, with some commenters identifying parties that have defaulted on any Commission payment, one commenter specifying entities that have defaulted on a PCS license obligation, and another commenter targeting parties in default on Commission payments at the time their reauction upfront payment

⁵⁶ See *supra* para. 8.

⁵⁷ An entity will not be eligible to receive bidding credits unless it meets our small business size requirements at the time of the reauction. See discussion *infra* Section V.B.10.

⁵⁸ Alpine Comments at 2; CIRI Comments at ii, 2-4; Conestoga Comments at 5-6; NextWave Comments at 2; Omnipoint Comments at 2-3; Alpine Reply at para. 1, 2-5; DiGiPH Reply at 2-5, 6; Fidelity Reply at 2-3; NextWave Reply at 2; Omnipoint Reply at 1-3.

⁵⁹ Nextel Comments at i-ii, 1-12.

⁶⁰ *Id.* at 4, 7, 11-12.

⁶¹ *Id.* at ii, 5, 9-11, 12.

⁶² See, e.g., Alpine Reply at 1, 2-5; DiGiPH Reply at 2-5, 6; Fidelity Reply at 2-3; NextWave Reply at 2; and Omnipoint Reply at 1-3.

is due.⁶³ CPCSI, however, would allow defaulters to participate under the rationale that they are no different from licensees electing an alternative payment option.⁶⁴ CIRI argues that a reauction should be restricted to parties that have neither defaulted on Commission payment obligations nor sought bankruptcy protection,⁶⁵ pointing out that "[t]he Debt Collection Improvement Act generally prohibits the provision of any federal loan to an entity that is delinquent on any non-tax debt owed to a federal agency⁶⁶. . . ." Commenters oppose allowing (or requiring) defaulters to submit more detailed financial information at the application stage,⁶⁷ but exhibit little reaction to the idea of holding an expedited hearing or requiring defaulters to submit a higher upfront payment amount.⁶⁸

18. The Commission's FCC Form 175 short-form application for all auctions requires applicants to certify that they are not in default on any Commission debt and that they are not delinquent on any non-tax debt owed to any Federal agency.⁶⁹ We believe that, in order to preserve the integrity of C block reauctions and to support our ongoing effort to streamline the licensing process, it is necessary to limit participation in C block reauctions to entities that can make the certification. Consequently, to be eligible to participate in any future C block reauction, an applicant must certify on its short-form application that it is not in default on any Commission licenses and not delinquent on any non-tax debt owed to any Federal agency.⁷⁰ At the same time, we believe that past business misfortunes do not inevitably preclude an entity from being able to meet its present and future responsibilities as a Commission licensee. Therefore, we will allow "former defaulters," i.e., applicants that have defaulted or been delinquent in the past, but have since paid all of their

⁶³ See AirGate Comments at 2, 4-5 (Defaulters on PCS license obligations should be excluded.); Conestoga Comments at 6 ("The FCC should restrict participation in a reauction to entities that have not defaulted on any FCC payments."); CIRI Comments at 5-6 ("[R]estrict participation in the C block reauction to entities that have neither defaulted on any Commission installment payment obligations nor sought bankruptcy protection." [citation omitted]); NatTel Comments at 6-8 (The Commission should amend its rules so that it can find automatically that any licensee that declares bankruptcy is financially unfit to be a licensee. Prior defaulters should be allowed to participate in a reauction, provided that they make good on all outstanding indebtedness to the Commission prior to or at the time that their reauction upfront payment is due.); and Fidelity Reply at 3 ("[E]ntities that have defaulted on FCC payment obligations should not be eligible to participate in the C-Block re-auction.").

⁶⁴ CPCSI Comments at ii, 10-12.

⁶⁵ CIRI Comments at 5-6.

⁶⁶ See 31 U.S.C. § 3720B(a).

⁶⁷ See AirGate Comments at 2, 4-6; Duluth Comments at 1; Starcom Comments at 1.

⁶⁸ See CPCSI Comments at ii, 10-12, (opposing both ideas) for the only comment.

⁶⁹ See 47 C.F.R. § 1.2105(a)(2)(x).

⁷⁰ Under the Commission's rules, a licensee that fails to submit payment on an installment obligation will automatically have an additional 90 days in which to submit its required payment without being considered delinquent. Any licensee making its required payment during this period will be assessed a late fee equal to five percent of the amount of the past due payment. If any licensee fails to make the required payment at the close of the 90-day period, it will automatically be provided with a subsequent 90-day grace period. Any licensee making a required payment during this subsequent period will be assessed a late payment fee equal to 10 percent of the amount of the past due payment. *Id.* §1.2110(f)(4).

outstanding non-Internal Revenue Service Federal debts and all associated charges or penalties, to be eligible to participate in C block reauctions, provided that they are otherwise qualified.

19. In its comments, CIRI asks that eligibility for a reauction include the Indian tribal affiliation exemption featured in the Commission's rules for broadband PCS auctions.⁷¹ CIRI's request is unnecessary. Neither the Commission nor any party has proposed eliminating or altering this exemption, which applied in the original C block auction. Moreover, in our recent *Part 1 Third Report and Order*, we adopted a proposal by CIRI to include this exemption in our general definition of the term "affiliate."⁷²

V. APPLICATION OF GENERAL AUCTION RULES TO C BLOCK

A. Background

20. The Commission tentatively concluded in the *C Block Further Notice* that the next reauction will be conducted in conformity with the general competitive bidding rules in Part 1, Subpart Q, of the Commission's rules, as revised, consistent with other auctions for wireless services. The Commission also proposed to use Part 24 rules to the extent they do not conflict with the Commission's Part 1 rules or with rules specifically adopted or proposed in the *C Block Second Report and Order* and *C Block Further Notice*. The Commission sought comment on the application of Part 1 rules to the following aspects of the C block reauction: competitive bidding mechanisms;⁷³ bidding application and certification procedures and prohibition of collusion;⁷⁴ submission of upfront payment, down payment and filing of long-form applications;⁷⁵ procedures for filing long-form applications;⁷⁶ and procedures regarding license grant, denial, and default.⁷⁷

21. Subsequently, in the *Part 1 Third Report and Order*, we adopted general competitive bidding rules that apply to each auctionable service or class of service, including the C block of broadband personal communications services.⁷⁸ In that order, we addressed, and in some cases completely or partly resolved, the issues raised in the *C Block Further Notice*, except for the two issues discussed above in this *C Block Fourth Report and Order*, i.e., licenses to be reaucted and eligibility for participation in C block reauctions. We also clarified that specific auction procedures not established by Commission rules will be

⁷¹ CIRI Comments at 7-9; see 47 C.F.R. § 24.720(l)(11).

⁷² *Part 1 Third Report and Order*, 13 FCC Rcd at 392-393 para. 28; 47 C.F.R. § 1.2110(b)(4)(xi).

⁷³ 47 C.F.R. § 1.2104.

⁷⁴ *Id.* § 1.2105

⁷⁵ *Id.* §§ 1.2106, 1.2107.

⁷⁶ *Id.* § 1.2108.

⁷⁷ *Id.* § 1.2109; see *C Block Further Notice*, 12 FCC Rcd at 16,476 para. 90.

⁷⁸ See *Part 1 Third Report and Order*, 13 FCC Rcd at 376 para. 1.

established by the Bureau in advance of each auction, pursuant to public notice and comment.⁷⁹ However, the Commission received sufficient comment in response to the *C Block Further Notice* to make further comment unnecessary for many of the C block reaction procedures. Consequently, in the remainder of this *C Block Fourth Report and Order*, we review the issues raised in the *C Block Further Notice* and addressed in the *Part 1 Third Report and Order*. Where necessary, we clarify the effect of the *Part 1 Third Report and Order* on the rules for future C block reactions. In cases where C block auction rules are the same as or parallel to F block auction rules, we also clarify the effect of the *Part 1 Third Report and Order* on the rules for F block reactions. We have included, as Appendix B herein, a discussion of the comments relevant to these issues filed in response to the *C Block Further Notice*.

B. Discussion

1. Competitive Bidding Design

22. The Commission tentatively concluded in the *C Block Further Notice* that it would award all licenses and spectrum in the C block reaction by means of a simultaneous multiple-round electronic auction.⁸⁰ This type of auction would facilitate any aggregation strategies of bidders and provide the most information about license values during the auction. The Commission further tentatively concluded that telephonic bidding (instead of electronic bidding) should be permitted only in exceptional circumstances, and that those circumstances would be determined by the Bureau in each instance.⁸¹ This tentative conclusion was prompted by the Commission's desire to conduct the reaction quickly, as well as by recent improvements in the Commission's electronic bidding software.⁸² In the *Part 1 Third Report and Order*, we clarified that the Bureau, consistent with its existing delegated authority,⁸³ would seek comment in advance of each auction on auction-specific issues, including the competitive bidding design of the auction.⁸⁴ We note, as previously mentioned, that there likely will be more than one C block reaction.⁸⁵

⁷⁹ See Balanced Budget Act of 1997 ("Balanced Budget Act"), Pub. L. 105-33, 111 Stat. 251, 259 (1997) (requiring that, in the scheduling of any competitive bidding, an adequate period be allowed before issuance of bidding rules, to permit notice and comment on proposed auction procedures).

⁸⁰ *C Block Further Notice*, 12 FCC Rcd at 16,475 paras. 86-88.

⁸¹ *Id.* at 16,476 para. 89.

⁸² *Id.*

⁸³ See Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Proceeding, WT Docket No. 97-82, *Order, Memorandum Opinion and Order and Notice of Proposed Rule Making*, 12 FCC Rcd 5686, 5697 para. 16 (1997).

⁸⁴ *Part 1 Third Report and Order*, 13 FCC Rcd at 452 para. 134.

⁸⁵ See *supra* para. 15.

23. Even though the Bureau normally would determine the bidding design of an auction, because no commenter opposed the proposal for a simultaneous multiple-round auction,⁸⁶ we believe that the simultaneous multiple-round design is appropriate for the next C block reauction. If, however, in preparing for a C block reauction, the Bureau determines that another design might be warranted, it remains within the Bureau's authority to seek comment on, and to modify, the competitive bidding design of the reauction. The Commission received two comments addressing the subject of telephonic bidding, with one party supporting the proposal that telephonic bidding be permitted only in exceptional circumstances and the other party asking that telephonic bidding remain an option.⁸⁷ We have decided, on further consideration, to permit the use of telephonic bidding as an alternative to electronic bidding in the next C block reauction. In the recent local multipoint distribution service (LMDS) auction (Auction No. 17),⁸⁸ telephonic bidding was a viable option; and telephonic bidding is being made available to bidders in the upcoming phase II 220 MHz service auction (Auction No. 18).⁸⁹ We believe that allowing parties to use either electronic or telephonic bidding, as their circumstances dictate, will promote auction participation by as many qualified applicants as possible and is not inconsistent with our decision to require that, beginning January 1, 1999, all short and long-form applications for auctionable services be filed electronically.⁹⁰

2. Activity Rules

24. In the *C Block Further Notice*, the Commission tentatively concluded that a reauction should be conducted in three stages, as the Commission has done in other simultaneous multiple-round auctions.⁹¹ The Commission proposed to use high activity requirements in C block reauctions, with bidders required to be more active in each subsequent stage than they had been in the last. These activity levels would be similar to those used in other auctions, such as requiring bidders to be active on eighty percent of their eligible licenses in Stage I, ninety percent in Stage II, and ninety-eight percent in Stage III. The Commission also proposed requiring the Bureau to use its delegated authority to schedule bidding rounds aggressively, to move quickly into the next stage of the auction when bidding activity falls, and to use higher minimum bid increments for very active licenses. In the *Part 1 Third Report and Order*, we directed the Bureau to seek

⁸⁶ See *infra* Appendix B.

⁸⁷ *Id.*

⁸⁸ See "Auction of Local Multipoint Distribution Service (LMDS) Licenses 138 Qualified Bidders," *Public Notice*, DA 98-230 (released February 6, 1998) (showing that telephonic bidding was an option for all LMDS auction bidders).

⁸⁹ "Auction of the Phase II 220 MHz Service Licenses," *Public Notice*, DA 98-1010, at 3 (released May 29, 1998).

⁹⁰ See *Part 1 Third Report and Order*, 13 FCC Rcd at 410-11 para. 59 (amending 47 C.F.R. §§ 1.2105(a) and 1.2107(c)).

⁹¹ *C Block Further Notice*, 12 FCC Rcd at 16,476 para. 91.

comment prior to the start of each auction on activity requirements for each stage of the auction and activity rule waivers.⁹²

25. We believe that the proposal to conduct reactions in three stages is reasonable for the next C block reaction, particularly in the absence of opposing comment and in light of the general interest in beginning the reaction as soon as possible.⁹³ The Bureau normally would determine this structure, however; and it remains within the Bureau's discretion to deviate from the proposed three-stage structure if, after appropriate notice and comment, it determines that a different structure would better serve the public interest. Given that the *C Block Further Notice* mentioned the eighty, ninety, and ninety-eight percent activity levels as an example,⁹⁴ we continue to delegate to the Bureau determination of the specific activity levels to employ for each C block reaction. As proposed, the Bureau will use its delegated authority to schedule bidding rounds aggressively, move quickly into the next stage of the auction when bidding activity falls, and use higher minimum bid increments for very active licenses.

3. Reserve Price, Minimum Opening Bid, and Minimum Bid Increments

26. The Balanced Budget Act of 1997⁹⁵ requires the Commission to prescribe methods by which a reasonable reserve price will be required or a minimum opening bid established, unless the Commission determines that neither is in the public interest.⁹⁶ The terms "minimum opening bid" and "reserve price" are generally employed for different purposes.⁹⁷ A minimum opening bid is the minimum bid price set at the beginning of an auction below which no bids are accepted.⁹⁸ A reserve price is the minimum price below which an auctioneer will not sell an object.⁹⁹

27. In the *C Block Further Notice*, the Commission stated that, in the C block reaction, employing a minimum opening bid would help make certain that the public is fairly compensated, the auction is expedited, and the Commission is able to make adjustments based on the competitiveness of the auction.¹⁰⁰ The Commission sought comment on its proposal to use a minimum opening bid for a reaction, as well as on

⁹² *Part 1 Third Report and Order*, 13 FCC Rcd at 447-48 paras. 124-25.

⁹³ *See infra* Appendix B.

⁹⁴ *C Block Further Notice*, 12 FCC Rcd at 16,476 para. 91.

⁹⁵ Pub. L. 105-33, 111 Stat. 251 (1997) (codified at 47 U.S.C. § 309(j)(4)(F)).

⁹⁶ *See C Block Further Notice*, 12 FCC Rcd at 16,477-78 para. 92.

⁹⁷ *Part 1 Third Report and Order*, 13 FCC Rcd at 455 para. 140.

⁹⁸ *C Block Further Notice*, 12 FCC Rcd at 16,477-78 para. 92.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

which methodology to employ and factors to consider in establishing minimum opening bids.¹⁰¹ The Commission proposed minimum opening bids for each market equal to ten percent of the corresponding net high bid for the market in the original C block auction.¹⁰² The Commission asked commenters to explain whether this proposal would be reasonable or would result in a substantial number of unsold licenses.¹⁰³ The Commission asked further whether the amount of the minimum opening bid should be capped and whether the Commission should establish a different amount.¹⁰⁴

28. After requesting comment on minimum opening bids in the *C Block Further Notice*, we clarified in the *Part I Third Report and Order* that the Bureau has the authority to seek comment on minimum opening bids and reserve prices and to establish such mechanisms for each auction, consistent with the Bureau's role in managing the auction process and setting valuations for other purposes.¹⁰⁵ We instructed the Bureau to consider such factors as the amount of spectrum being auctioned, levels of incumbency, the availability of technology to provide service, the size of the geographic service areas, issues of interference with other spectrum bands, and any other relevant factors that could reasonably affect valuation of the spectrum being auctioned.¹⁰⁶

29. For the next C block reauction, we believe that the proposal of a minimum opening bid for each market equal to ten percent of the corresponding net high bid for the market in the original C block auction is appropriate. Because the Commission has already sought and received comment on this issue,¹⁰⁷ and because there is a strong public interest in beginning the next C block reauction as soon as possible, the Bureau will not seek further comment on a specific amount for a minimum opening bid for the next reauction. Instead, the specific amount of the minimum opening bid for each market will be listed in a public notice to be released by the Bureau in advance of the next C block reauction. The Bureau may exercise its discretion to set forth a minimum opening bid smaller than ten percent if, based upon further evaluation, the Bureau believes that a smaller amount is warranted.

4. Electronic Filing

30. In the *C Block Further Notice*, the Commission sought comment on its tentative conclusion to require electronic filing of all short-form applications in a reauction. The Commission believed that

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Part I Third Report and Order*, 13 FCC Rcd at 454-55 para. 139.

¹⁰⁶ *Id.*

¹⁰⁷ Appendix B, *infra*, summarizes comments received by the Commission on reserve price, minimum opening bid, and minimum bid increments.

electronic filing of applications would serve the best interests of auction participants and members of the public monitoring a reauction.¹⁰⁸ Commission policies have consistently encouraged electronic filing. In the *Part 1 Third Report and Order*, we pointed out that electronic filing helps ensure the accuracy and completeness of applications prior to submission, and we required electronic filing of all short-form and long-form applications by January 1, 1999, unless operationally infeasible.¹⁰⁹ More recently, we proposed mandatory electronic filing of applications for all wireless services, whether auctionable or non-auctionable.¹¹⁰ Accordingly, we will require electronic filing of both short-form and long-form applications for C block reauctions.

5. Upfront Payment

31. In accordance with Section 1.2106 of the Commission's rules, which requires submission of an upfront payment as a prerequisite to participation in spectrum auctions,¹¹¹ the Commission proposed in the *C Block Further Notice* to set an upfront payment for the next C block reauction at \$.06 per MHz per pop.¹¹² The Commission determined that this amount was appropriate to further its goal of allowing only serious, qualified applicants to participate in a reauction.¹¹³ The Commission noted that it had adopted the same upfront payment for its most recent broadband PCS auction, the D, E, and F block auction.¹¹⁴ The Commission explained that, in the *Competitive Bidding Second Report and Order*, it had indicated that the upfront payment should be set using a formula based upon the amount of spectrum and population ("pops")

¹⁰⁸ *C Block Further Notice*, 12 FCC Rcd at 16,477 para. 93.

¹⁰⁹ *Part 1 Third Report and Order*, 13 FCC Rcd at 410-11 para. 59 (amending 47 C.F.R. §§ 1.2105(a) and 1.2107(c)).

¹¹⁰ See Biennial Regulatory Review -- Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97, and 101 of the Commission's Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services, WT Docket No. 98-20, *Notice of Proposed Rule Making*, 13 FCC Rcd 9672, 9681-83 paras. 19-22 (1998) ("*Universal Licensing System Notice of Proposed Rule Making*") (proposing mandatory electronic filing of all forms used for wireless radio services by January 1, 1999); Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996, CC Docket No. 96-187, *Report and Order*, 12 FCC Rcd 2170, 2195, para. 47 (1997), *recon. pending*, ("*Electronic Tariff Filing Report and Order*"). The Electronic Tariff Filing System was established on November 17, 1997; see "Common Carrier Bureau Implements Electronic Tariff Filing System," *Public Notice*, DA 97-2491 (released November 25, 1997).

¹¹¹ 47 C.F.R. § 1.2106

¹¹² *C Block Further Notice*, 12 FCC Rcd at 16,478-79 para. 94.

¹¹³ The amount of the upfront payment is intended to approximate five percent of the expected amount of the winning bid for a given license. See Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service, MM Docket No. 94-131, *Report and Order*, 10 FCC Rcd 9589, 9650 para. 136 (1995).

¹¹⁴ *Id.*; see 47 C.F.R. § 24.716(a)(1).

covered by the license(s) for which the parties intend to bid.¹¹⁵ It had also concluded that the best approach would be to determine the amount of the upfront payment on an auction-by-auction basis.¹¹⁶ In the *C Block Further Notice*, the Commission sought comment on its \$.06 per MHz per pop proposal, as well as on alternative methods of establishing an upfront payment and, in particular, on how the Commission may estimate the present market value of the spectrum to be auctioned.¹¹⁷ Subsequently, in the *Part 1 Third Report and Order*, we affirmed the Commission's reasoning in the *Competitive Bidding Second Report and Order*, stating our belief that we should maintain the current competitive bidding rules, which allow the amount of the upfront payment and the terms under which it is assessed to be determined on an auction-by-auction basis.¹¹⁸

32. Deciding the amount and terms of the upfront payment amount on an auction-by-auction basis pursuant to the Part 1 rule is consistent with past auction procedure. The Bureau normally establishes the upfront payment after public notice and comment. We therefore find that specific provisions contained in Part 24 of the Commission's rules addressing the upfront payment amount for C block (and F block) auctions are unnecessary.¹¹⁹ Accordingly, and consistent with our ongoing streamlining effort, we repeal those Part 24 provisions as of the effective date of this order.

33. There is support among the commenters for setting the upfront payment amount at the proposed \$.06 per MHz per pop,¹²⁰ and we believe that in the next C block reaction the upfront payment should be no higher than this amount. The Bureau may establish a lower upfront payment if it deems a lower amount to be reasonable.¹²¹ Because the Commission has already sought and received comment on this issue, and because there is a strong public interest in beginning the next C block reaction as soon as possible, there is no need for the Bureau to seek further comment on the upfront payment amount for the next reaction. Instead, the specific upfront payment amount for each market will be listed in a public notice to be released by the Bureau in advance of the next C block reaction.

34. While we have decided not to prohibit "former defaulters" from participating in C block reactions,¹²² we believe that the integrity of the auctions program and the licensing process dictates requiring

¹¹⁵ See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Second Report and Order*, 9 FCC Rcd 2346, 2377-78 (1994) ("*Competitive Bidding Second Report and Order*").

¹¹⁶ *Id.* at 2378.

¹¹⁷ *C Block Further Notice*, 12 FCC Rcd at 16,478-79 para. 94.

¹¹⁸ *Part 1 Third Report and Order*, 13 FCC Rcd at 425 para. 86; see 47 C.F.R. § 1.2106.

¹¹⁹ See 47 C.F.R. §§ 24.711(a)(1) and 24.716(a)(1).

¹²⁰ See *infra* Appendix B.

¹²¹ The Bureau is securing the services of a firm to provide guidance concerning spectrum valuation methodology.

¹²² See *supra* para. 18.

a more stringent financial showing from applicants with a poor Federal financial track record. Consequently, we amend our rules to require that the upfront payment amount for "former defaulters" be fifty percent more than the normal amount set by the Bureau for any given license in a C block reauction. So that the Bureau may implement this rule, we will require applicants to make an additional certification on their short-form applications revealing whether they have ever been in default on any Commission debt or have ever been delinquent on any non-tax debt owed to any Federal agency. Our policy here is analogous to the Congressional policy reflected in the Debt Collection Improvement Act, which bars delinquent Federal debtors from obtaining Federal loans, loan insurance, or guarantees.¹²³

6. Down Payment and Full Payment

35. The Commission tentatively concluded in the *C Block Further Notice* that each winning bidder should be required to tender a down payment sufficient to bring its total amount on deposit with the Commission up to twenty percent of its winning bid within ten business days after issuance of a public notice announcing the winning bidder for the license.¹²⁴ The Commission also proposed to require a winning bidder to file an FCC Form 600 long-form application (since renumbered FCC Form 601) with a timely down payment,¹²⁵ pursuant to Section 1.2107 of the Commission's rules.¹²⁶ Upon review of the long-form applications and receipt of the down payments, the Commission would announce the applications that were accepted for filing, triggering the filing window for petitions to deny.¹²⁷ If any or all petitions to deny were dismissed or denied, a public notice announcing that the Commission was prepared to grant the license conditioned upon final and full payment would be issued.¹²⁸ The winning bidder would then have ten days following release of that public notice to submit the balance of its winning bid in order to be awarded its license(s). The *C Block Further Notice* proposed having a period of fifteen days, following the issuance of the public notice announcing that an application had been accepted for filing, in which to file petitions to deny.¹²⁹

¹²³ See 31 U.S.C. § 3720B.

¹²⁴ *C Block Further Notice*, 12 FCC Rcd at 16,479 para. 95; see also 47 C.F.R. § 1.2107(b).

¹²⁵ *C Block Further Notice*, 12 FCC Rcd at 16,479 para. 96; see also *Universal Licensing System Notice of Proposed Rule Making* at App. A (proposed revisions to FCC Form 600).

¹²⁶ 47 C.F.R. § 1.2107; see *C Block Further Notice*, 12 FCC Rcd at 16,479 para. 96; 47 C.F.R. § 1.2107(c).

¹²⁷ *C Block Further Notice*, 12 FCC Rcd at 16,479 para. 96.

¹²⁸ *Id.*

¹²⁹ *Id.* at 16,479 para. 96. The Balanced Budget Act of 1997 authorizes the Commission to establish a period as short as 5 days for the filing of petitions to deny applications for licenses won at auction. See Balanced Budget Act of 1997, § 3008; P.L. 105-33, 111 Stat. 251 (1997).

36. The *Part 1 Third Report and Order* adopted a standard down payment of twenty percent of an applicant's high bids, which is similar to the proposal in the *C Block Further Notice*.¹³⁰ It also amended Sections 1.2109(a) of the Commission's rules¹³¹ to permit auction winners to make their final payments within ten business days after the designated deadline, provided that they also pay a late fee equal to five percent of the amount due.¹³² In accordance with the 1997 Balanced Budget Act,¹³³ the *Part 1 Third Report and Order* amended Sections 1.2108(b) and (c) to prohibit the Commission from granting a license earlier than seven days following issuance of the public notice announcing the application is accepted for filing.¹³⁴ Additionally, the *Part 1 Third Report and Order* established that the filing periods for petitions to deny, oppositions, and replies are to be no shorter than five days.¹³⁵

37. The conclusions we reached in the *Part 1 Third Report and Order* do not conflict with our proposals in the *C Block Further Notice*. Accordingly, we will apply the Part 1 rules, as amended. The Bureau will announce by public notice the deadline for petitions to deny. As discussed in the *Part 1 Third Report and Order*, in order to preserve the integrity of the auction process, it is important to use an indicator of potential licensees' financial capability to attract capital to build out and operate systems. We believe that the use of one substantial down payment is a necessary tool to gauge an applicant's financial viability, its seriousness in building its system, and the likelihood of default.¹³⁶ For these reasons, we repeal the Part 24 C

¹³⁰ *Part 1 Third Report and Order*, 13 FCC Rcd at 427 para. 91.

¹³¹ 47 C.F.R. § 1.2109(a).

¹³² *See Part 1 Third Report and Order*, 13 FCC Rcd at 429 para. 94.

¹³³ *See* Balanced Budget Act of 1997, Pub. L. 105-33, § 3008, 111 Stat. 251, 269 (1997). The relevant provision states:

Notwithstanding section 309(b) of the Communications Act of 1934 (47 U.S.C. 309(b)), no application for an instrument of authorization for frequencies assigned under this title . . . shall be granted by the Commission earlier than 7 days following issuance of a public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereto. Notwithstanding section 309(d)(1) of such Act (47 U.S.C. 309(d)(1)), the Commission may specify a period (no less than 5 days following issuance of such public notice) for the filing of petitions to deny any application for an instrument of authorization for such frequencies.

See Part 1 Third Report and Order, 13 FCC Rcd at 431-32 para. 98 (seeking comment in the *Second Further Notice of Proposed Rule Making* to have the period for filing petitions to deny not be shorter than five days) .

¹³⁴ 47 C.F.R. §§ 1.2108(b) and (c).

¹³⁵ *Part 1 Third Report and Order*, 13 FCC Rcd at 431-32 para. 98; *see also* Balanced Budget Act of 1997, Pub. L. 105-33, § 3008, 111 Stat. 251, 269 (1997).

¹³⁶ *See id.*, 13 FCC Rcd at 427 para. 90.

block rules on down payment and full payment.¹³⁷ Pursuant to the same rationale, we also repeal the Part 24 F block rules on down payment and full payment.¹³⁸

7. Amendments and Modifications of Applications

38. In the *C Block Further Notice*, the Commission proposed to allow applicants to amend or modify their short-form applications at any time before or during the auction, pursuant to Section 1.2105 of the Commission's rules.¹³⁹ In the *Part 1 Third Report and Order*, we created a uniform definition of minor and major amendments to an applicant's short-form application (FCC Form 175).¹⁴⁰ We also amended Section 1.2105 of the Commission's rules so that it would mirror our Part 24 rule, Section 24.822, and allow applicants, after the short-form filing deadline, to make minor amendments to their short-form applications both prior to and during the auction. The amendment to Section 1.2105 of the Commission's rules has rendered Section 24.822 unnecessary. Accordingly, we repeal Section 24.822 of the rules.

39. The Commission also proposed in the *C Block Further Notice* to create an exception to the general rule prohibiting major amendments and permit short-form amendments to reflect the departure of a consortium member.¹⁴¹ In the *Part 1 Third Report and Order*, we determined that, under Part 1 of the Commission's rules, major amendments to the short-form include changes in license areas, ownership changes constituting a change in control, and the addition of members to a bidding consortium.¹⁴² Minor amendments include, *inter alia*, any amendment not identified as major.¹⁴³ We did not identify the deletion of members to a bidding consortium as a major amendment. Consequently, it would be a minor amendment under the Part 1 rules, as amended, and permitted after the short-form filing deadline. Accordingly, the Commission's proposal in the *C Block Further Notice* to allow short-form amendments reflecting the departure of a consortium member is no longer necessary.

¹³⁷ See 47 C.F.R. § 24.711(a)(2).

¹³⁸ See *id.* § 24.716(a)(2).

¹³⁹ See *C Block Further Notice*, 12 FCC Rcd at 16,480 para. 97; 47 C.F.R. § 1.2105(b).

¹⁴⁰ *Part 1 Third Report and Order*, 13 FCC Rcd at 413-414 paras. 65-66; see also 47 C.F.R. § 24.822.

¹⁴¹ See *C Block Further Notice*, 12 FCC Rcd at 16,480 para. 97.

¹⁴² *Part 1 Third Report and Order*, 13 FCC Rcd at 414 para. 66.

¹⁴³ *Id.*

8. Bid Withdrawal, Default, and Disqualification

40. The Commission tentatively concluded in the *C Block Further Notice* that the withdrawal, default, and disqualification rules for a reauction should be based upon the procedures established in our general competitive bidding rules.¹⁴⁴ In the *Part 1 Third Report and Order*, we recognized that bidders sometimes improperly withdraw bids (e.g., to delay the close of an auction for strategic purposes), and we suggested that the Bureau exercise its discretion to prevent such abuses of the auction process.¹⁴⁵ We asked the Bureau to consider limiting the number of rounds in which bids may be withdrawn, thereby preventing any entities that violate the Commission's withdrawal procedures from continuing to bid on that particular market.¹⁴⁶ The Bureau has announced that, in the upcoming phase II 220 MHz service auction (Auction No. 18), it will limit the number of rounds in which bids may be withdrawn,¹⁴⁷ and it has proposed such a limitation for the upcoming 156-162 MHz VHF public coast station spectrum auction.¹⁴⁸ Similarly, the Bureau will seek comment in advance of the next C block reauction on limiting the number of rounds in that reauction in which bids may be withdrawn.

41. For bids submitted in error, the Commission proposed in the *C Block Further Notice* to follow the guidelines it had developed to provide relief from the bid withdrawal payment requirements under certain circumstances.¹⁴⁹ In the *Part 1 Third Report and Order*, we decided that when a winning bidder or licensee defaults, and its license has yet to be reauctioned, the Commission will assess an initial default payment of at least three percent, but not exceeding twenty percent, of the defaulted bid amount.¹⁵⁰ Once the license has been reauctioned, when the total default payment can be determined, the Commission will either assess the balance of the remaining default payment or refund any amounts due.¹⁵¹ As a result of "click box bidding" and other mechanisms employed to reduce erroneous bids, we concluded that a decreased bid withdrawal payment rule, meant to provide some bidders relief from full application of bid withdrawal

¹⁴⁴ 47 C.F.R. § 1.2101

¹⁴⁵ *Part 1 Third Report and Order*, 13 FCC Rcd at 459-60 para. 150.

¹⁴⁶ *Id.*

¹⁴⁷ See, e.g., "Auction of the Phase II 220 MHz Service Licenses," *Public Notice*, DA 98-1010, at 32-34 (released May 29, 1998).

¹⁴⁸ "156-162 MHz VHF Public Coast Station Spectrum Auction Scheduled for December 3, 1998," *Public Notice*, DA 98-1469 (released July 23, 1998).

¹⁴⁹ *C Block Further Notice*, 12 FCC Rcd at 16,480 para. 98.

¹⁵⁰ *Part 1 Third Report and Order*, 13 FCC Rcd at 434 para. 102.

¹⁵¹ *Id.*

payments, is not necessary.¹⁵² We direct the Bureau to follow the Part 1 rule on bid withdrawal, default, and disqualification, Section 1.2104(g), to the extent applicable.¹⁵³

9. Anti-Collusion Rules

42. The Commission proposed in the *C Block Further Notice* to apply the anti-collusion rules enumerated in the *Competitive Bidding Second Report and Order*.¹⁵⁴ In the *Part 1 Third Report and Order*, we created an exception to the Commission's general anti-collusion rules.¹⁵⁵ Under this exception, a non-controlling attributable interest holder in an applicant may obtain an ownership interest in, or enter into a consortium arrangement with, another applicant for a license in the same geographic area, provided that the original applicant has withdrawn from the auction, is no longer placing bids, and has no further eligibility.¹⁵⁶ The exception provides flexibility for non-controlling investors to invest in other auction applicants if their original applicant fails to complete the auction.¹⁵⁷

43. Although one commenter to the *C Block Further Notice* raised the issue of creating a "safe harbor" for discussions of non-auction related business matters between applicants in the same license area,¹⁵⁸ we determined in the *Part 1 Third Report and Order* that there was no need to create a "safe harbor."¹⁵⁹ Section 1.2105(c) of the Commission's rules places significant limitations on applicants seeking business opportunities in geographic license areas where they plan to bid. We concluded that interpretations of the anti-collusion rules provided by the Bureau instruct the public as to permissible non-auction discussions, obviating the need for a "safe harbor" in the auction process.¹⁶⁰

¹⁵² *Id.* at 458 para. 147.

¹⁵³ *See* 47 C.F.R. § 1.2104(g).

¹⁵⁴ *C Block Further Notice*, 12 FCC Rcd at 16,480 para. 99; *see* *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2386-88, codified at 47 C. F. R. § 1.2105(c); *Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Second Memorandum Opinion and Order*, PP Docket No. 93-253, 9 FCC Rcd 7245-7254 (1994); *Erratum*, Mimeo No. 50278, 1994, WL 575828 (released October 19, 1994).

¹⁵⁵ *See* 47 C.F.R. § 1.2105(c).

¹⁵⁶ *Part 1 Third Report and Order*, 13 FCC Rcd at 465-66 para. 160.

¹⁵⁷ *Id.*

¹⁵⁸ *See infra* Appendix B.

¹⁵⁹ *Part 1 Third Report and Order*, 13 FCC Rcd at 466-67 para. 162.

¹⁶⁰ *Id.* *See, e.g.*, Public Notice, "Wireless Telecommunications Bureau Provides Guidance on the Anti-Collusion Rules for D, E and F Block Bidders," DA 96-1460 (August 28, 1996) ("*August 28 Public Notice*"); Public Notice, "FCC Staff Clarifies Application of Anti-Collusion Rule to Broadband PCS 'C' Block Reaction," DA 96-929 ("*June 10 Public Notice*") 11 FCC Rcd 7031 (released June 10, 1996); *Public Notice*, "Wireless Telecommunications Bureau Clarifies Spectrum Auction Anti-Collusion Rules, DA 95-2244 (released October 26, 1995); News Release, "Staff Adopts Order and Releases Letters Clarifying Issues on Broadband PCS

44. As we noted in the *Third Report and Order*, however, auction applicants should be aware that communications concerning, but not limited to, issues such as management, resale, roaming, interconnection, partitioning and disaggregation may all raise impermissible subject matter for discussion because they may convey pricing information and bidding strategy. Because auction applicants should avoid all communication with each other that will likely affect bids or bidding strategies, we believe that individual applicants, and not the Commission, are in the best position to determine in the first instance which communications are permissible and which are not.¹⁶¹ Bidders should familiarize themselves with Commission rules and rule interpretations regarding unauthorized communications in auction proceedings, and they should report any such communications to the Bureau.¹⁶² As always, the Commission retains the right to investigate possible instances of collusion or to refer any allegations of collusion to the United States Department of Justice for investigation.¹⁶³

10. Bidding Credits

45. The original C block auction offered winning bidders qualifying as a small business or a consortium of small businesses a bidding credit of twenty-five percent of winning bids. The Commission's rules defined a small business as "an entity that, together with its affiliates and persons or entities that hold interest in such entity and their affiliates, has average annual gross revenues that are not more than forty million dollars for the preceding three years."¹⁶⁴ Subsequent to that auction, we amended our rules to define also a *very* small business in the C or F blocks as "an entity that, together with its affiliates and persons or entities that hold interest in such entity and their affiliates, has average annual gross revenues that are not more than fifteen million dollars for the preceding three years."¹⁶⁵ The Commission proposed in the *C Block*

Auctions" (released October 26, 1994); Letter from William E. Kennard, FCC, to Gary M. Epstein & James H. Barker, October 25, 1994; Letter from Rosalind K. Allen, FCC, to R. Michael Senkowski, Dec. 1, 1994; Letter from Rosalind K. Allen, FCC, to Leonard J. Kennedy, Dec. 14, 1994; Letter from Kathleen O'Brien Ham, FCC, to Mark Grady, April 16, 1996; Letter from Kathleen O'Brien Ham, FCC, to David L. Nace, DA 96-1566, September 17, 1996.

¹⁶¹ *Part I Third Report and Order*, 13 FCC Rcd at 467-68 para. 163.

¹⁶² *See, e.g.*, letter from Carl W. Northrop, attorney, Paul, Hastings, Janofsky & Walker LLP, to Kathleen O'Brien Ham, FCC (April 14, 1998) (on file with the FCC); letter from Glenn B. Manishin, attorney, Blumenfeld & Cohen, to Carl W. Northrop, Esq. (April 14, 1998) (copy on file with the FCC).

¹⁶³ *See Application of US West Communications, Inc., Notice of Apparent Liability for Forfeiture*, FCC 98-41 (released March 16, 1998); *Application of Western PCS BTA I Corp., Notice of Apparent Liability for Forfeiture*, FCC 98-42 (released March 16, 1998); letter from Joel I. Klein, Assistant Attorney General, Antitrust Division, Department of Justice, to Reed Hundt, Chairman, Federal Communications Commission (dated October 8, 1997, filed with the Commission October 17, 1997).

¹⁶⁴ 47 C.F.R. § 24.720(b)(1).

¹⁶⁵ *Id.* § 24.720(b)(2); *see* Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, WT Docket No. 96-59, *Report and Order*, 11 FCC Rcd 7824 at para. 60 (1996).

Further Notice to have two tiers of bidding credits for the next C block reauction, a twenty-five percent bidding credit for small businesses and a thirty-five percent bidding credit for very small businesses.¹⁶⁶

46. In order to provide continuity and certainty for auction participants, we adopted a schedule of bidding credits in the *Part 1 Third Report and Order* to be used in future auctions for all services.¹⁶⁷ The schedule sets the bidding credit percentage according to the average annual gross revenues of the designated entity.¹⁶⁸ Applying the Part 1 schedule to the gross revenue thresholds for small and very small businesses under our rules for C and F block auctions, we conclude that a small business will receive a fifteen percent bidding credit,¹⁶⁹ and a very small business will receive a bidding credit of twenty-five percent.¹⁷⁰ We recognize that the amount of bidding credits differs from the Commission's proposal in the *C Block Further Notice*; however, use of the Part 1 schedule benefits potential bidders by providing them with certainty about the size of available bidding credits well in advance of C block reauctions. We will amend Sections 24.712 and 24.717 of the Commission's rules¹⁷¹ to reflect our application of the Part 1 bidding credits schedule to C and F block reauctions.

47. Eligibility for bidding credits will be determined at the deadline for filing short-form applications. Thus, if an entity no longer qualifies as a small business as of the deadline for filing short-form applications, but is eligible to participate in the next C block reauction because it was eligible to participate in the original C block auction,¹⁷² it will *not* be eligible for bidding credits. Because of the complex issues involved in the original C block auction,¹⁷³ we are willing to allow former C block auction participants and eligible applicants to participate in the next reauction (and in reauctions for the ensuing two years). However, we do not feel that it is in the best interests of the public and, in particular, of competing small business bidders and licensees to provide a discount to applicants that no longer meet the small business size standards.

48. We remind applicants that, under Section 1.2111(d) of our rules, as amended, C block licensees that utilize a bidding credit, and during their initial license term seek to make a change in the ownership or control of a license that would result in the license's being owned or controlled by an entity that

¹⁶⁶ *C Block Further Notice*, 12 FCC Rcd at 16,481 paras. 100-101.

¹⁶⁷ *Part 1 Third Report and Order*, 13 FCC Rcd at 402-04 paras. 44-48.

¹⁶⁸ *Id.* at 388, 403 paras. 18, 46-47.

¹⁶⁹ *See* 47 C.F.R. § 1.2110(e)(2)(iii).

¹⁷⁰ *See Part 1 Third Report and Order*, 13 FCC Rcd at 403-04 para. 47; 47 C.F.R. §§ 1.2110(e)(2)(ii), 24.720.

¹⁷¹ 47 C.F.R. §§ 24.712, 24.717.

¹⁷² *See supra* para. 13.

¹⁷³ *See C Block Reconsideration Order*, 13 FCC Rcd 8348 at para. 7.

does not meet the eligibility criteria for a bidding credit, or that is eligible for a lower bidding credit, will have to reimburse the U.S. Government for a percentage of the amount of the bidding credit.¹⁷⁴ This percentage, in some circumstances, will be as high as the full amount of the bidding credit plus interest.¹⁷⁵

11. Installment Payment Program

49. The Commission tentatively concluded in the *C Block Further Notice* that it would not provide an installment payment program in the next reauction.¹⁷⁶ Subsequently, in the *Part 1 Third Report and Order* we suspended the installment payment program for the immediate future.¹⁷⁷

50. We will apply our decision in the *Part 1 Third Report and Order* and not offer installment payments in the next reauction. It is our responsibility to balance the competing goals in Section 309(j) that require, *inter alia*, that the Commission promote the development and rapid deployment of new spectrum-based services, while ensuring that designated entities are given an opportunity to participate in the provision of such services.¹⁷⁸ We recognize that conditioning receipt of a license upon payment requires greater financial resources.¹⁷⁹ However, many C block licensees have requested relief from their installment payment obligations and three have sought bankruptcy protection.¹⁸⁰ The objective of Section 309(j) to speed service to the public cannot be achieved when licenses are held in abeyance in bankruptcy court. Other financing alternatives, such as the provision of bidding credits,¹⁸¹ will help to ensure meaningful small business participation.¹⁸²

VII. PROCEDURAL MATTERS AND ORDERING CLAUSES

A. Final Regulatory Flexibility Analysis

¹⁷⁴ See 47 C.F.R. § 1.2111(d).

¹⁷⁵ *Id.*

¹⁷⁶ *C Block Further Notice*, 12 FCC Rcd at 16,481 para. 101.

¹⁷⁷ *Part 1 Third Report and Order*, 13 FCC Rcd at 397-98 para. 38.

¹⁷⁸ 47 U.S.C. §§ 309(j)(3), (4).

¹⁷⁹ *C Block Further Notice*, 12 FCC Rcd at 16,481 para. 101.

¹⁸⁰ *Part 1 Third Report and Order*, 13 FCC Rcd at 396, 397-98 paras. 36, 38. See *In re GWI PCS1, Inc.*, No. 397-39676-SAF-11 (Bankr. N.D.Tex. April 24, 1998); *In re Pocket Communications, Inc.*, No. 97-5-4105(ESD) (Bankr. D.Md.); *In re NextWave Personal Communications, Inc.*, 98 21529 (ASH) (Bankr. S.D.N.Y.).

¹⁸¹ See Communications Act, § 309(j)(4)(D); 47 U.S.C. § 309(j)(4)(D).

¹⁸² See *Part 1 Third Report and Order*, 13 FCC Rcd at 397-98 para. 38.

51. The Final Regulatory Flexibility analysis, pursuant to the Regulatory Flexibility Act, *see* 5 U.S.C. § 604, is attached as Appendix D.

B. Paperwork Reduction Act Analysis

52. This Order contains a modified information collection that was submitted to the Office of Management and Budget requesting clearance under the Paperwork Reduction Act of 1995.

C. Ordering Clauses

53. 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), 156(c)(1), 303(r), and 309(j), this *Fourth Report and Order* is hereby ADOPTED, and Sections 1.2105, 24.703, 24.704, 24.705, 24.706, 24.707, 24.709, 24.711, 24.712, 24.716, 24.717, 24.822 of the Commission's rules, 47 C.F.R. Sections 1.2105, 24.703, 24.704, 24.705, 24.706, 24.707, 24.709, 24.711, 24.712, 24.716, 24.717, 24.822, are amended as set forth in Appendix C, effective 60 days after publication in the Federal Register.

54. 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, to the Chief Counsel for Advocacy of the Small Business Administration.

55. IT IS FURTHER ORDERED THAT, pursuant to 47 U.S.C. § 155(c) and 47 C.F.R. § 0.331, the Chief of the Wireless Telecommunications Bureau IS GRANTED DELEGATED AUTHORITY to prescribe and set forth procedures for the implementation of the provisions adopted herein.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

Appendix A**List of Parties Filing Comments and Reply Comments****Parties Filing Comments:**

1. Airgate Wireless, L.L.C. ("Airgate")
2. Alpine PCS, Inc. ("Alpine")
3. Carolina PCS I Limited Partnership ("CPCSI")
4. ClearComm., L.P. ("ClearComm")
5. Conestoga Wireless Company ("Conestoga")
6. Cook Inlet Region, Inc. ("CIRI")
7. DiGiPH PCS Inc. ("DiGiPH")
8. Duluth PCS, Inc., St. Joseph PCS, Inc. and West Virginia PCS, Inc ("Duluth")
9. MFRI Incorporated ("MFRI")
10. National Telecom PCS, Inc. ("NatTel")
11. Nextel Communications, Inc. ("Nextel")
12. NextWave Telecom. Inc. ("NextWave")
13. Omnipoint Corporation ("Omnipoint")
14. Starcom Telecommunications ("Starcom")

Parties Filing Reply Comments:

1. Airgate Wireless, L.L.C. ("Airgate")
2. Alpine PCS, Inc. ("Alpine")
3. AT&T Wireless Services, Inc. ("AT&T")
4. Carolina PCS I Limited Partnership ("CPCSI")
5. DiGiPH PCS Inc. ("DiGiPH")
6. Fidelity Capital ("Fidelity")
7. Meretel Communications, L.P. ("Meretel")
8. NextWave Telecom. Inc. ("NextWave")
9. Omnipoint Corporation ("Omnipoint")
10. PrimeCo Personal Communications, L.P. ("PrimeCo")
11. Sprint Corporation ("Sprint")

Ex Parte Filings:

1. NextWave Telecom. Inc. ("NextWave")

Appendix B**Comments on Issues Addressed in *Part 1 Third Report and Order***

- **Competitive Bidding Design**

Omnipoint supports the Commission's proposal to have a single simultaneous, multiple-round reauction.¹ Duluth also supports the proposal, provided that telephonic bidding remains as an option; whereas, NextWave asks for a requirement that all bids be submitted electronically with emergency telephone backup.²

- **Bidding Procedures**

Duluth suggests the initial C block competitive bidding rules contained in Part 24 would be appropriate for a reauction since both the initial auction and the next reauction involve the provision of only one frequency block.³

- **Activity Rules**

Parties commenting on activity rules for a reauction generally support the Commission's tentative conclusion and its proposal.⁴

- **Reserve Price, Minimum Opening Bid, and Minimum Bid Increments**

Conestoga asks that the Commission set neither a minimum opening bid nor a reserve price for any C block license or spectrum.⁵ Duluth opposes any minimum opening bid or reserve price that differs from that used in the original C block auction.⁶ Several parties disagree with setting the minimum opening bids for

¹ Omnipoint Comments at 4.

² Duluth Comments at 1; NextWave Comments at 4-5.

³ Duluth Comments at 1.

⁴ See Duluth Comments at 2; NextWave Comments at 5 (asking that the Commission continue its practice of reviewing potential changes with bidders and soliciting online input).

⁵ Conestoga Comments at 2, 3-4.

⁶ Duluth Comments at 2. We note that no minimum opening bids or reserve prices were employed for the original C block auction.

each market at 10 percent of the corresponding high bid for the market in the original C block auction.⁷ AT&T asks that the Commission set a reserve price of not less than fifty percent of the corresponding high bid in the original C block auction.⁸

- **Electronic Filing**

Only one commenter addressed this proposal, supporting mandatory electronic filing for short-form applications.⁹

- **Upfront Payment**

Several parties filed comments addressing this issue. While some commenters believe that \$.06 per MHz per pop is excessive,¹⁰ others agree that this upfront payment amount is appropriate.¹¹

- **Down Payment and Full Payment**

Two commenters oppose requiring full cash payment upon winning a license.¹²

- **Bid Withdrawal, Default, and Disqualification**

NextWave proposes to prohibit a bidder from rebidding on the same market from which it withdraws a bid, once overall auction activity falls below a certain level.¹³ ClearComm suggests that no withdrawal payment be imposed when an unintended bidding error is made.¹⁴

⁷ See Airgate Comments at 2, 7-9; CIRI Comments at ii, 10-13; Omnipoint Comments at 5-6; Starcom Comments at 2-5; Airgate Reply at 3-4; and Fidelity Reply at 4; *see also* NextWave Reply at 7-9.

⁸ AT&T Reply at 1-3.

⁹ Duluth Comments at 2.

¹⁰ Airgate Comments at 2, 7; Conestoga Comments at 4-5; NextWave Comments at 6-7; Airgate Reply at 4; and NextWave Reply at 2.

¹¹ Duluth Comments at 2; Omnipoint Comments at 5.

¹² Duluth Comments at 2; Alpine Comments at 5.

¹³ NextWave Comments at 7.

¹⁴ ClearComm Comments at 4-9; *see* Application for Review of PCS 2000, L.P. [now ClearComm, L.P.], filed January 21, 1997 (asking for a waiver of a \$3,273,374 bid withdrawal payment assessed against it); letter from Daniel B. Phythyon, FCC, to Tyrone Brown, ClearComm, L.P., DA 98-1074, June 12, 1998 (granting ClearComm's request for reduction of its bid withdrawal payment to \$425,000); In the Matter of ClearComm, L.P., *Order*, DA 98-1081, (released June 12, 1998) (granting ClearComm's request for dismissal of its Application for Review).

- **Anti-Collusion Rules**

NextWave proposes the creation of a "safe harbor."¹⁵ Two commenters propose that the Commission clarify specific aspects of the anti-collusion rules.¹⁶

- **Bidding Credits**

CIRI supports the Commission's proposal in the *C Block Further Notice* to adopt a "very small business" definition, but urges the adoption of "heightened" bidding credits of 45 percent for very small businesses and 35 percent for small businesses.¹⁷ CIRI also suggests limiting eligibility for bidding credits to participants that are not delinquent on installment payments at the time short-form applications are filed for a reauction.¹⁸ AirGate suggests that eligibility for bidding credits be determined at the time the short-form is filed for a reauction, so that an entity that was initially eligible for bidding credits, but has grown beyond that classification, would not continue to receive that benefit.¹⁹ Omnipoint disagrees, arguing that if an entity received bidding credits in the initial auction, it should be awarded bidding credits in a reauction, even though it no longer meets our criteria for bidding credits.²⁰ Otherwise, according to Omnipoint, the Commission will be punishing such entities for their "financial progress."²¹ Omnipoint further argues that the Commission's *Competitive Bidding Fifth Memorandum Opinion and Order* states a licensee's increased gross revenues or total assets or that of its attributable entities should not be counted against that licensee's continuing eligibility as an entrepreneur.²²

¹⁵ NextWave Comments at 8 - 11.

¹⁶ AirGate Comments at 11 (seeking clarification as to prohibited "disclosures"); Duluth Comments at 2. (requesting a definition of collusion and its penalties).

¹⁷ See CIRI Comments at 13-15; id. at 6; DiGiPH Comments at 8-9; Nextel Comments at 10; 47 C.F.R. §1.2110(b)(1).

¹⁸ CIRI Comments at 5.

¹⁹ See AirGate Comments at 10-11; AirGate Reply Comments at 4; NextWave Reply Comments at 2-4 (requesting that the Commission clarify that those exceeding the revenue caps, and not qualified as small businesses, will not be able to take advantage of bidding credits).

²⁰ Omnipoint Comments at 2-3.

²¹ *Id.*

²² *Id.* at 3 (arguing that our *Fifth Memorandum Opinion and Order* states a licensee's increased gross revenues or total assets or that of its attributable entities should not be counted against that licensee's continuing eligibility as an entrepreneur); see also *Fifth Memorandum Opinion and Order* at 420 para. 27.

- **Installment Payment Program**

Several commenters favor continuation of the installment payment program.²³

²³ See AirGate Comments at 9-10; Alpine Comments at 5-6; CPCI Comments at 3; DiGiPH Comments at 3-7; *see also* Duluth Comments at 2; NatTel Comments at 10; Airgate Reply Comments at 2 -3; DiGiPH Reply Comments at 2 -3, 5 - 6.

Appendix C**REVISED RULES****PART 1 - PRACTICE AND PROCEDURE**

1. Section 1.2105 is revised by adding (a)(2)(xi) to read as follows:

§ 1.2105 Bidding application and certification procedures; prohibition of collusion

* * * * *

(xi) For C block applicants, an attached statement made under penalty of perjury indicating whether or not the applicant has ever been in default on any Commission licenses or has ever been delinquent on any non-tax debt owed to any Federal agency.

PART 24 - PERSONAL COMMUNICATIONS SERVICES

2. Section 24.703 is removed.

§ 24.703 [Removed]

3. Section 24.704 is revised to read as follows:

§ 24.704 Withdrawal, default and disqualification penalties.

See § 1.2104 of this chapter.

4. Section 24.705 is removed.

§ 24.705 [Removed]

5. Section 24.706 is revised to read as follows:

§ 24.706 Submission of upfront payments and down payments.

(a) All auction participants are required to submit an upfront payment in accordance with § 1.2106 of this chapter. Any C block applicant that has previously been in default on any Commission licenses or has previously been delinquent on any non-tax debt owed to any Federal agency must submit an upfront payment equal to 50 percent more than that set for each particular license.

(b) * * *

6. Section 24.707 is removed.

§ 24.707 [Removed]

7. Section 24.709 is revised by adding paragraphs (a)(4) and (a)(5) and revising paragraphs (b)(9)(i) and (e) to read as follows:

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

(a) * * *

(4) In order to be eligible for participation in a C block auction, an applicant must certify that it is not in default on any Commission licenses and that it is not delinquent on any non-tax debt owed to any Federal agency. *See* § 24.706.

(5) An applicant for participation in a C block auction must state under penalty of perjury whether or not it has ever been in default on any Commission licenses or has ever been delinquent on any non-tax debt owed to any Federal agency. *See* § 24.706.

(b) * * *

(9) * * *

(i) In addition to entities qualifying under this section, any entity that was eligible for and participated in the auction for frequency block C, which began on December 18, 1995, or the reauction for frequency block C, which began on July 3, 1996, will be eligible to bid in any reauction of block C spectrum that begins within two years of the start date of the first reauction of C block spectrum following the effective date of this rule.

* * * * *

(e) Definitions. The terms affiliate, business owned by members of minority groups and/or women, and gross revenues used in this section are defined in § 1.2110. The terms consortium of small businesses, control group, existing investor, institutional investor, nonattributable equity, preexisting entity, publicly traded corporation with widely dispersed voting power, qualifying investor, small business, and total assets used in this section are defined in § 24.720.

8. Section 24.711 is amended by revising paragraphs (a)(1) and (a)(2) to read as follows:

§ 24.711 Upfront payments, down payments and installment payments for licenses for frequency Block C.

(a) Upfront Payments and Down Payments.

(1) Each eligible bidder for licenses subject to auction on frequency Block C shall pay an upfront payment as set forth in a Public Notice pursuant to the procedures in § 1.2106 of this chapter.

(2) Each winning bidder shall make a down payment and the balance of its winning bids pursuant to § 1.2107 and § 1.2109 of this chapter.

* * * * *

9. Section 24.712 is revised to read as follows:

§ 24.712 Bidding credits for licenses for frequency Block C.

(a) A winning bidder that qualifies as a small business or a consortium of small businesses as defined in § 24.720(b)(1) or § 24.720(b)(4) may use a bidding credit of fifteen percent, as specified in § 1.2110(e)(2)(iii), to lower the cost of its winning bid.

(b) A winning bidder that qualifies as a very small business or a consortium of very small businesses as defined in § 24.720(b)(2) or § 24.720(b)(5) may use a bidding credit of twenty-five percent as specified in § 1.2110(e)(2)(ii), to lower the cost of its winning bid.

(c) Unjust Enrichment. *See* § 1.2111 of this chapter.

10. Section 24.716 is amended by revising paragraphs (a)(1) and (a)(2) to read as follows:

§ 24.716 Upfront payments, down payments and installment payments for licenses for frequency Block F.

(a) Upfront Payments and Down Payments.

(1) Each eligible bidder for licenses subject to auction on frequency Block F shall pay an upfront payment as set forth in a Public Notice pursuant to the procedures in § 1.2106 of this chapter.

(2) Each winning bidder shall make a down payment and the balance of its winning bids pursuant to § 1.2107 and § 1.2109 of this chapter.

* * * * *

11. Section 24.717 is revised to read as follows:

§ 24.717 Bidding credits for licenses for frequency Block F.

(a) A winning bidder that qualifies as a small business or a consortium of small businesses as defined in § 24.720(b)(1) or § 24.720(b)(4) may use a bidding credit of fifteen percent, as specified in § 1.2110(e)(2)(iii), to lower the cost of its winning bid.

(b) A winning bidder that qualifies as a very small business or a consortium of very small businesses as defined in § 24.720(b)(2) or § 24.720(b)(5) may use a bidding credit of twenty-five percent, as specified in § 1.2110(e)(2)(ii), to lower the cost of its winning bid.

(c) Unjust Enrichment. *See* § 1.2111 of this chapter.

* * * * *

12. Section 24.822 is removed.

§ 24.822 [Removed]

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

In the Matter of
Amendment of the Commission's
Rules Regarding Installment Payment
Financing For Personal Communications
Services (PCS) Licensees
WT Docket No. 97-82

ORDER ON RECONSIDERATION
OF THE SECOND REPORT AND ORDER

Adopted: March 23, 1998

Released: March 24, 1998

By the Commission: Commissioners Ness and Powell concurring in part, dissenting in part, and issuing separate
statements; Commissioner Tristani issuing a statement.

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I. INTRODUCTION

1. On September 25, 1997, the Commission adopted a *Second Report and Order and Further Notice of Proposed Rule Making* ("*Second Report and Order*" and "*Further Notice*") establishing March 31, 1998, as the deadline for broadband Personal Communications Services ("PCS") C and F block licensees to resume installment payments.¹ In addition, the Commission offered C block licensees a choice of three alternative payment options in lieu of resuming payments under the terms of the original payment plan. The three options were intended to provide limited relief to C block licensees experiencing financial difficulties, while preserving the fairness and integrity of the auction process.

2. In response to the rulings in the *Second Report and Order*, we received 37 petitions for reconsideration, 17 oppositions to the petitions, 16 replies to the oppositions, and 38 *ex parte* filings.² After considering the arguments raised in those filings, we generally affirm the framework established in the *Second Report and Order*, but we make a few modifications designed to provide C block licensees greater flexibility in making their elections. We believe that these changes improve upon the *Second Report and Order* by allowing more existing licensees to adjust their business plans and remain in the wireless market to compete against other providers, while also providing for the return of spectrum to the Commission so that other entrepreneurs will have opportunities to obtain broadband PCS licenses in a reauction. In a forthcoming Order, we will address comments filed in response to the *Further Notice*, which covers rules for the reauction of returned C block licenses.

II. BACKGROUND

3. Consistent with Congress' mandate to promote the participation of small businesses and other "designated entities" in the provision of spectrum-based services,³ the Commission limited eligibility in the initial C block auctions to entrepreneurs and small businesses. The C block auction concluded on May 6, 1996, and the subsequent reauction of defaulted licenses concluded on July 16, 1996, with a total of 90 bidders winning 493 licenses. The winning bidders were permitted to pay 90 percent of their net bid price over a period of ten years, paying only interest for the first six years and paying both interest and principal for the remaining four years.⁴

4. On March 31, 1997, the Wireless Telecommunications Bureau (the "Bureau") suspended the deadline for payment of installment payments for all C block licensees.⁵ The suspension was implemented in response to a joint request from several C block licensees seeking modification of their installment payment obligations and to allow more time for discussions with other federal agencies concerning "the transfer of

¹ Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, *Second Report and Order and Further Notice of Proposed Rule Making*, 12 FCC Rcd 16,436 (1997).

² A list of the parties that filed pleadings in response to the *Second Report and Order*, and the abbreviations used to refer to such parties, is attached as Appendix A. Although CX Systems and Dorne & Margolin filed petitions for reconsideration after the filing deadline, we will accept their filings as *ex parte* filings. For the sake of consistency, we refer to filings as oppositions if they were filed at the time oppositions were due, even if they are supportive of arguments raised in the petitions.

³ Communications Act of 1934, as amended ("Communications Act") § 309(j)(4)(D), 47 U.S.C. § 309(j)(4)(D).

⁴ See 47 C.F.R. § 24.711(b)(3). The net bid price is equal to the winning bid less any bidding credit for which the licensee was eligible. See 47 C.F.R. § 24.712.

⁵ See *Installment Payments for PCS Licenses, Order*, 12 FCC Rcd 17,325 (WTB 1997).

responsibilities for certain debt functions related to [the installment payment] program."⁶ On April 28, 1997, the Bureau extended the suspension to F block licensees.⁷ As mentioned above, on September 25, 1997, the Commission ended this suspension and established March 31, 1998, as the deadline for C and F block licensees to resume their installment payments.⁸

5. After reviewing various proposals for relief, the Commission decided in the *Second Report and Order* to allow each C block licensee to elect one of three options for all of its licenses in lieu of continuing payments under the licensee's original installment payment plan.⁹ Each of the three options -- disaggregation, amnesty, and prepayment -- was intended to provide limited relief to financially troubled licensees without harming the integrity of the auction process.¹⁰ The Commission determined that further relief for F block licensees was unnecessary.¹¹

6. In the *Second Report and Order*, the Commission required C block licensees to file a written election notice on or before January 15, 1998, specifying whether they would resume payments under the terms of the original installment payment plan or would proceed under one of the alternative options.¹² On January 7, 1998, we postponed the election date until February 26, 1998, in order to resolve issues raised on reconsideration before licensees submitted their elections.¹³ In addition, we announced that the reauction of spectrum surrendered by C block licensees pursuant to their elections would begin on September 29, 1998.¹⁴ On February 24, 1998, we revised both the February 26, 1998, election date and the March 31, 1998, payment resumption date.¹⁵ We changed the election date to 60 days from publication of this Order in the *Federal Register* and the payment resumption date to at least 30 days after the new election date.¹⁶

III. OVERVIEW

⁶ *Id.*, 12 FCC Rcd at 17,325 para. 1.

⁷ See "FCC Announces Grant of Broadband Personal Communications Services D, E, and F Block BTA Licenses," *Public Notice*, DA 97-883 (released April 28, 1997) at 2.

⁸ *Second Report and Order*, 12 FCC Rcd at 16,448 para. 21.

⁹ *See id.*, 12 FCC Rcd at 16,444-46 paras. 15-17.

¹⁰ *See id.*, 12 FCC Rcd at 16,437-38 para. 2.

¹¹ *Id.*, 12 FCC Rcd at 16,447 para. 20.

¹² *Id.*, 12 FCC Rcd at 16,470 para. 70.

¹³ Amendment of the Commission's Rules Regarding Installment Payment Financing For Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, *Order*, FCC 98-2 (released January 7, 1998) at para. 2 ("*Election Date Order I*").

¹⁴ *Id.* at para. 3.

¹⁵ Amendment of the Commission's Rules Regarding Installment Payment Financing For Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, *Order*, FCC 98-28 (released February 24, 1998) ("*Election Date Order II*").

¹⁶ *Id.* at paras. 2-3. The Bureau will issue a public notice setting forth the procedures for filing an election notice.

7. The Commission determined in the *Second Report and Order* that it would serve the public interest to provide a variety of relief mechanisms to assist C block licensees that were experiencing difficulties in meeting the financial obligations under the installment payment plan. The Commission believed the "extraordinary procedures" it adopted to offer relief to C block licensees appropriately balanced a number of important policy goals.¹⁷ In formulating a resolution to the complex issues involved, one of the Commission's foremost objectives was to preserve the integrity of the auction process and to maintain public confidence in the stability of the Commission's auction rules.¹⁸ The Commission also believed it was essential to ensure fair and impartial treatment for all auction participants, including winning bidders, unsuccessful bidders, and licensees in competing services.¹⁹ At the same time, the Commission was cognizant of its statutory mandate to promote economic opportunity and to encourage broad participation in the provision of spectrum-based services.²⁰ In addition, the Commission attempted to implement a workable solution in a timely manner that would facilitate rapid introduction of service to the public without further regulatory or marketplace delay.²¹

8. We believe the approach adopted in the *Second Report and Order* largely accomplishes these objectives. The relief provided C block licensees will speed deployment of service to the public by easing lenders' and investors' concerns regarding regulatory uncertainty and by potentially making more capital available for investment and growth. By facilitating the provision of service to consumers, the Commission advanced Congress' objective to promote "the development and rapid deployment of new technologies, products, and services for the benefit of the public."²² In addition, the mechanisms the Commission created to help these small businesses remain viable competitors in the marketplace furthered its statutory mandate to "promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses . . ."²³ However, out of fairness to bidders that withdrew from the auction and to maintain the integrity of the auction process, the Commission rejected proposals that would have significantly altered the amounts paid for individual licenses. Mindful of the effect its decision would have on future auctions, the Commission opted for a more modest approach.

9. Although we believe the decision adopted in the *Second Report and Order* largely should be maintained, we believe that certain aspects of the adopted approach were overly restrictive. A number of petitioners claim that the options presented by the Commission do not provide economically viable alternatives

¹⁷ *Second Report and Order*, 12 FCC Rcd at 16,437-38 para. 2.

¹⁸ *Id.*, 12 FCC Rcd at 16,437-38 paras. 2-3. *But see* MFRI Reply at 2-6 (the real solution to maintaining auction integrity is to resolve bid signaling practices; a modest adjustment to the installment payment plan is not related to auction integrity); Hyundai Reply at 2-3 (auction integrity is not a sufficient basis for denying relief).

¹⁹ *Second Report and Order*, 12 FCC Rcd at 16,437-38 paras. 2-3.

²⁰ *Id.*, 12 FCC Rcd at 16,437-38 para. 2 (citing Communications Act § 309(j)(3)(A), (B), 47 U.S.C. § 309(j)(3)(A), (B)).

²¹ *Id.*, 12 FCC Rcd at 16,437-39 paras. 2, 4-5.

²² Communications Act § 309(j)(3)(A), 47 U.S.C. § 309(j)(3)(A).

²³ Communications Act § 309(j)(3)(B), 47 U.S.C. § 309(j)(3)(B).

for financially troubled licensees.²⁴ Indeed, a frequent complaint expressed throughout the numerous petitions is that the available options fall short of providing meaningful relief. We also received several letters from members of Congress asking that we take additional measures to assist C block licensees.²⁵

10. After reviewing the extensive record on reconsideration, we believe that a radical departure from the *Second Report and Order* is not warranted.²⁶ The *Second Report and Order* created an innovative solution to requests from C block licensees needing financial relief. Certain requirements, however, may constrain many C block licensees from making use of the relief measures offered. We believe that, with a few adjustments to the adopted approach, we can better effectuate the Commission's intent to provide C block licensees a limited measure of relief under the unique but varied circumstances presented. We therefore will leave the basic framework intact, but we will alter it slightly to allow licensees to be more flexible in making their elections for licenses in different geographic areas, to use more of the down payments already on deposit, and to be more flexible in the use of those down payments. We believe that this approach improves upon the *Second Report and Order* by better enabling C block licensees to remain participants in the wireless market, which will promote competition and the delivery of new services to the public.

11. First, we will eliminate the requirement that a licensee must make the same election for all its licenses. Instead, a licensee may make different elections for the different Major Trading Areas ("MTAs") in which it holds licenses. The election made for an MTA will apply to every Basic Trading Area ("BTA") license held by the licensee in that MTA. As under the *Second Report and Order*, the possible elections include resumption of payments, amnesty, prepayment, or disaggregation. As part of the modifications to the adopted approach, we will also permit a combination of disaggregation and prepayment. Resumption of payments and prepayment of 30 MHz licenses will remain essentially the same as in the *Second Report and Order*. We will, however, modify the amnesty and disaggregation options, as follows.

12. Under the revised amnesty option, a licensee may return to the Commission licenses in any MTA it wishes so long as it returns all its BTA licenses within the MTA. The entire outstanding debt on the returned licenses will be forgiven. For each MTA that is returned, the licensee will have two choices, and its decision will apply to all its BTA licenses within the MTA. If the licensee wishes to bid on those licenses it returns in the reauction, none of the down payment associated with such licenses will be available, consistent with the *Second*

²⁴ See, e.g., New Wave Petition at 2 (the presented options are not economically viable for numerous licensees and the punitive damages levied will impede network build-out and possibly lead to widespread bankruptcies); GWI Petition at 2 (a major reduction in the license debt is the only commercially viable way for many small businesses to obtain necessary funding); One Stop Wireless Petition at 1 (the options offered do not work for C block licensees); OnQue Petition at 1 (the Commission's options do not provide any stability); Omnipoint Petition at 13 (without further clarification of the Commission's position on bankruptcy, bankruptcy may be a licensee's lowest risk alternative); RFW Reply at 3 (the Commission's punitive provisions likely will increase the number of bankruptcy filings).

²⁵ The Honorable J. Robert Kerrey *ex parte* filing at 1; The Honorable Barbara Boxer *ex parte* filing at 1-2; The Honorable Albert R. Wynn *ex parte* filing at 1-2; The Honorable Xavier Becerra *ex parte* filing at 1-2; Members of the Congressional Hispanic Caucus *ex parte* filing at 2; The Honorable Richard H. Bryan and The Honorable Harry Reid *ex parte* filing at 1; see also The Honorable Sue W. Kelly *ex parte* filing at 1; The Honorable Thomas Daschle *ex parte* filing at 1; The Honorable Gary L. Ackerman *ex parte* filing at 1.

²⁶ See AT&T Opposition at 2 (the options offered in the *Second Report and Order* provide sufficient financial relief without undermining the integrity of the auction process); PrimeCo Opposition at 5 ("the *Second Report and Order* reflects a reasonable balancing of Congress' statutory objectives and marketplace considerations and should be affirmed"); Fidelity Capital Opposition at 5 (the *Second Report and Order* "presents a fair and balanced plan to provide relief to struggling C-Block licensees, while not disadvantaging licensees who are successfully building out their systems"); Northcoast Opposition at 4 (significant change would be fundamentally unfair to licensees that have honored their financial commitments); AirGate Opposition at 5-6 (the financing options available to C block licensees, including the Commission's original installment payment plan, are more generous than financing offered to any participants in other auctions); Frontier Reply at 2 (significant relief would be unfair to bidders that were unsuccessful in the auction process).

Report and Order. Alternatively, the licensee may opt to forgo the opportunity to bid on its returned licenses in exchange for a credit of 70 percent of the down payment made on the licenses. This credit may be used to prepay the entire principal owed for a retained MTA with 30 MHz licenses. This, essentially, is the prepayment option as adopted in the *Second Report and Order*. Alternatively, we permit a combination of prepayment and disaggregation, so that the licensee may prepay the entire principal owed for the retained 15 MHz licenses of an MTA that has been disaggregated.

13. As under the *Second Report and Order*, a licensee that disaggregates an MTA may continue making installment payments on the retained spectrum. However, for each disaggregated license, the licensee will now receive credit for 40 percent of the down payment applicable to the returned 15 MHz of spectrum. This 40 percent credit may be applied only to the 15 MHz of spectrum retained from the same license. It may be used to reduce the principal outstanding and/or to pay "Suspension Interest" (i.e., all unpaid simple interest accruing from the date of license grant through March 31, 1998). Because the down payment applicable to the retained spectrum will be considered the down payment for that spectrum and the licensee thus retains 100 percent of that portion of the down payment, the licensee in effect receives a blended credit of 70 percent of the total down payment made on the full 30 MHz license.

14. Alternatively, under our modified approach, a licensee will be allowed to prepay a disaggregated MTA. In that case, the licensee will receive credit for 70 percent of the down payment applicable to the returned spectrum. Because the licensee retains 100 percent of the portion of the down payment associated with the retained portion of the license, the licensee in effect receives a blended credit of 85 percent of the total down payment. The 70 percent credit may be applied toward the prepayment of a retained MTA with 30 MHz licenses (so long as the retained 15 MHz license is prepaid) and/or toward the prepayment of the retained 15 MHz licenses of an MTA that has been disaggregated.

15. In addition, we adopt the following limited modifications: (1) we extend to 90 days the 60-day non-delinquency period for payments not made on the payment resumption date, and we impose a 5 percent late payment fee for payments made within this 90-day non-delinquency period; (2) we instruct the Bureau to modify the payment schedules of all C and F block licensees so that all payments will be due on the same date; (3) we eliminate the build-out exception to the amnesty option because it is rendered moot by our modified approach; and (4) for purposes of the rule that a licensee electing prepayment that does not have sufficient funds to prepay all its BTA licenses within an MTA may prepay only the BTA licenses within the MTA that it can afford, we clarify that a licensee can "afford" as many BTA licenses within an MTA that it can prepay using only the amount of credit available to the licensee for prepayment.

IV. MTA-BY-MTA ELECTIONS

A. Background

16. Under the *Second Report and Order*, a licensee was not permitted to make more than one election. Therefore, whatever election was chosen would apply to all licenses held by the licensee. For practical purposes, there was a limited mixing of options to the extent that payments would have to be resumed under the terms of the original installment plan with respect to any licenses not halved under the disaggregation option and any licenses retained under the build-out exception to the amnesty option. Licensees were precluded, however, from forming any other combinations among the options. For example, a licensee could not prepay some licenses and disaggregate others.

B. Discussion

17. By offering a menu of options, the Commission attempted to accommodate the fact that different licensees face different circumstances. However, the requirement that a licensee make the same election for all its licenses failed to account for the situation where a licensee faces different circumstances in its different license areas. We believe that licensees will be able to take better advantage of the varied benefits of the options if they are allowed to make different elections for the different areas in which they hold licenses. Therefore, we eliminate the requirement that a licensee must make the same election for all its licenses. We agree with NextWave and other parties that instead we should allow a licensee to make one election for each MTA in which it holds licenses.²⁷ In other words, the same election must be applied to each BTA license held in a given MTA, but different elections may be selected for different MTAs. For this purpose, the available elections that may be applied to an MTA are the resumption of payments under the existing installment payment plan, amnesty, prepayment, disaggregation, and a combination of disaggregation and prepayment. These elections are discussed in detail below.

18. We believe the MTA is the appropriate unit for making an election for similar reasons that the Commission previously determined it was an appropriate cut-off point.²⁸ We do not believe licensees should be permitted to make elections on a BTA-by-BTA basis. As the Commission stated in the *Second Report and Order*, allowing options to be applied at the BTA level would threaten the interdependency of licenses and would limit the potential for aggregation of licenses within an MTA.²⁹ It also would permit licensees to "cherry-pick" the most desirable markets within an area.³⁰ The return of only the less desirable markets would discourage participation in the reauction and could substantially delay the deployment of service to those areas. This danger does not exist at the MTA level because MTAs are large enough market areas that the value of an MTA would not be diminished if it was surrendered and its neighboring MTAs were not.

19. By allowing elections to be made on an MTA-by-MTA basis, we enable licensees to make election decisions that are not based solely on the elements of each option, but rather on their own business plans and financial situation. For example, a licensee may be successfully financing its license holdings on the east coast but experiencing difficulties in financing its west coast holdings. Under the approach adopted in the *Second Report and Order*, the prepayment option was the only means by which the licensee could return its west coast licenses while keeping its east coast licenses.³¹ We believe that the decision to retain or surrender licenses in an MTA should depend on the particular circumstances surrounding those licenses. The decision should not be driven by the terms of the options or by unrelated circumstances in other areas, which might dictate a universal election unsuitable for the licenses in that MTA.

²⁷ NextWave Reply at 8; *ex parte* letter jointly filed by 43 companies on February 20, 1998, at 1. We also received letters from members of Congress generally supporting greater flexibility regarding licensees' ability to choose which licenses may be returned. The Honorable Xavier Becerra *ex parte* filing at 1; Members of the Congressional Hispanic Caucus *ex parte* filing at 2.

²⁸ *Second Report and Order*, 12 FCC Rcd at 16,455, 16,458, 16,463-64, 16,469 paras. 38, 44, 57, 67.

²⁹ *Id.*, 12 FCC Rcd at 16,463, 16,469 paras. 56, 67.

³⁰ *Id.*, 12 FCC Rcd at 16,455, 16,463-64, 16,469 paras. 38, 56-57, 67.

³¹ Note, however, that under the build-out exception to the original amnesty option, the licensee could retain any licenses that satisfied the build-out requirement. *Id.*, 12 FCC Rcd at 16,463-64 para. 57.

20. Further, we believe that MTA-by-MTA elections will promote rapid deployment of service to the public.³² Licensees will have more opportunity to localize their business plans by surrendering licenses in markets where success now seems unlikely due to financial difficulties. As a result, they will be able to focus on providing service in those markets where they have retained their licenses. In addition, the surrendered licenses presumably will be reaucted to entities better positioned to provide service in those license areas. Indeed, we anticipate that MTA-by-MTA elections will produce a more robust and competitive reauction. We expect more licenses to be returned for reauction because a licensee choosing disaggregation or resumption will now be free to surrender licenses it was reluctant to keep, but was forced to do so under the previous terms of those elections. Allowing those licenses to be reaucted to entities that are more committed, or better able, to serve those markets will stimulate competition and benefit consumers. Furthermore, permitting elections on an MTA-by-MTA basis will not undermine the integrity of the auction process because licensees still must pay the full amount of their licenses.

V. RESUMPTION OF PAYMENTS

A. Background

21. In the *Second Report and Order*, the Commission rescinded, effective March 31, 1998, the Bureau's prior suspension of the deadline for all broadband PCS C block and F block installment payments.³³ All payments due and owing after March 31, 1998, were to be made in accordance with the terms of each licensee's Note, associated Security Agreement, and the Commission's Orders and regulations.³⁴ The Commission stated that all rules regarding installment payments and defaults for the broadband PCS C and F blocks would remain in effect, except as modified by the *Second Report and Order*.³⁵ The Commission ruled that any licensee that failed to remit the payment due on March 31, 1998, and remained delinquent for more than 60 days (in other words, failed to make the March 31, 1998, payment on or before May 30, 1998), would be in default on its license. As the Commission noted, the 60-day non-delinquency period was an exception to existing Commission rules that provide for an automatic 90-day non-delinquency period for each installment payment.³⁶

22. The Commission directed in the *Second Report and Order* that Suspension Interest would become due and payable over a two-year period, beginning on March 31, 1998, on which date broadband PCS C and F block licensees would be required to submit one-eighth of the Suspension Interest.³⁷ After March 31, 1998, one-eighth of the Suspension Interest was to be paid along with each regular installment payment on each

³² See Communications Act § 309(j)(3)(A), 47 U.S.C. § 309(j)(3)(A).

³³ *Second Report and Order*, 12 FCC Rcd at 16,449-50 para. 25.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* See also 47 C.F.R. § 1.2110(f)(4)(i).

³⁷ *Second Report and Order*, 12 FCC Rcd at 16,449-51 paras. 25-27. For those C block licensees that retained licenses under the disaggregation option or under the build-out exception to the amnesty option, the Suspension Interest would be adjusted accordingly. C block licensees that elected the prepayment option or surrendered all licenses under the amnesty option would not be charged Suspension Interest.

subsequent payment due date until the Suspension Interest had been fully paid.³⁸ Payment due dates would conform to those indicated in the Notes executed by the licensees.³⁹

23. On February 24, 1998, we issued an order revising the March 31, 1998, payment resumption date.⁴⁰ We stated that the payment resumption date would be at least 30 days after the date on which C block licensees must file a written election notice specifying their decision to resume payments under the terms of the original installment payment plan or to proceed under one of the alternative options. The election date was postponed in the same February 24, 1998, order to 60 days after publication of this reconsideration order in the *Federal Register*.⁴¹ As we stated in that order, the Bureau will announce the specific dates for election and payment resumption as soon as this reconsideration order is published.⁴²

³⁸ *Id.*

³⁹ *Id.* We previously provided specific examples of the schedule for paying the Suspension Interest. *See id.*, 12 FCC Rcd at 16,450-51 para. 27 and nn.53-54.

⁴⁰ *Election Date Order II.*

⁴¹ *Id.* The election date had been postponed once before on January 7, 1998. *Election Date Order I.*

⁴² *Election Date Order II* at para. 3.

B. Discussion

24. By the time they must resume making payments, C and F block licensees will have enjoyed a respite from their payment obligations substantially longer than one year. Several parties, however, seek a much longer deferral of the payment deadline.⁴³ We do not find their requests persuasive. No matter what deadline we establish, it is inevitable that some licensees will seek more time to pay. As stated in the *Second Report and Order*, a more extensive deferral would be unfair to unsuccessful bidders that might not have withdrawn from the auction had they known of deferral opportunities.⁴⁴ The Commission properly rejected a further deferral because it did "not wish to adopt temporary solutions such as those that might only postpone these difficulties and further prolong uncertainty."⁴⁵ We agree with parties that urge the Commission to reject any attempts to extend further the suspension of payments.⁴⁶

25. Although we will not grant the lengthy postponement requested by some parties, we will provide modest relief by extending the non-delinquency period for licensees that fail to meet the payment resumption deadline. In response to Urban Communicators' request, we will extend to 90 days the automatic 60-day non-delinquency period applicable to payments due on the payment resumption date.⁴⁷ As mentioned above, the Commission's rules allow a 90-day non-delinquency period for all other installment payments.⁴⁸ Although we stated in the *Second Report and Order* that a shorter non-delinquency period was justified in light of the one-year

⁴³ See Alpine Petition at 13 and Alpine Reply at 8-9 (suggesting a moratorium on interest payments for up to five years); Cellexis Petition at 1, 5 and Cellexis Reply at 2-5 (supporting an earlier proposal by the U.S. Small Business Administration ("SBA") for a five-year deferral); McBride Petition at 5 (proposing elimination of all payments for the first seven years, with no interest on the debt for the first five years); Meretel Petition at 1-2 (asking the Commission to reconsider the deferral issue); MFRI Petition at 3 (endorsing a suspension of all payments until the end of the fifth year of the license, with the balance of principal and interest paid over the remaining five years of the license); NextWave Petition at 4-5, 22-25 (proposing a "modest deferral" to facilitate network deployment, while requiring payment in full with accrued interest within the existing license term); NextWave Reply at 5-8 (proposing resumption of payments phased in on a graduated basis for first three years); New Wave Petition at 1, 2 (requesting a deferral spanning a period of five or more years); Northern Michigan Petition at 5-6 (indicating a preference for an additional two-year suspension); One Stop Wireless Petition at 2-3 (seeking consideration of SBA proposal for short-term deferral combined with extension of five-year construction deadline, or long-term deferral with no change in construction deadline); OnQue Petition at 2 (supporting a two-year deferral from December 31, 1996); RFW Petition at 1, 4-5 (recommending a five-year deferral of principal and interest payments); Urban Communicators Petition at ii, 2, 5-7 (asking for an extension of the suspension until March 31, 1999, and two additional one-year deferrals, so long as licensees make certain demonstrations of financial ability and substantial construction progress and pay an interest rate increased by 0.5 percent for the deferral period); CONXUS Opposition at 6 (agreeing with NextWave and Alpine); Duluth PCS, et al. Opposition at 5 (advocating a five-year deferral of payment obligations); and Polycell Opposition at 5 (same as Duluth PCS, et al.). See also The Honorable Barbara Boxer *ex parte* filing at 1 (asking the Commission to consider a "limited deferral"); The Honorable Albert R. Wynn *ex parte* filing at 1 (requesting that the payment resumption date be extended by six months).

⁴⁴ *Second Report and Order*, 12 FCC Rcd at 16,446-47 para. 18.

⁴⁵ *Id.*

⁴⁶ See, e.g., Antigone/Devco Opposition at 6 ("The public treasury is harmed by every deferral of payments."); AirGate Opposition at 10 ("as time elapses, the prospect for repayment diminishes"); Sprint Opposition at 5 ("further delay puts C block licensees at a competitive disadvantage, making attracting investment capital difficult; creates a cloud of uncertainty over the wireless sector; and unjustly enriches defaulting licensees by affording them financing opportunities not available to those who in good faith fulfilled their payment obligations"); Northcoast Opposition at 3-4 ("additional C Block installment payment rule changes would be bad policy because it would create uncertainty as to how the Commission will handle situations of licensee default that occur outside of the C Block context").

⁴⁷ Urban Communicators Petition at 7-8.

⁴⁸ 47 C.F.R. § 1.2110(f)(4)(i).

payment suspension,⁴⁹ we now believe that it is preferable to make the length of that non-delinquency period consistent with our rule for all other payments. We are providing this 30-day extension to assist licensees that are experiencing last-minute delays in raising capital. We believe that by offering this additional time, we will help these licensees complete their fund-raising efforts.

26. Consistent with our rule for all other payments, payments made within this 90-day non-delinquency period will be assessed the 5 percent late payment fee that we recently adopted.⁵⁰ However, in light of the more than one-year suspension and this expanded non-delinquency period, we believe that a subsequent grace period is not warranted. Therefore, there will be no subsequent automatic grace period for licensees that fail to make payment within the 90-day non-delinquency period.⁵¹ Subsequent payments, due after the initial resumption payment, will be subject to the rules adopted in the *Part I Third Report and Order*.

27. Under this plan, the Suspension Period (as defined in the *Second Report and Order*) will still end on March 31, 1998.⁵² All interest accrued from the date of license grant through March 31, 1998, (i.e., Suspension Interest) will continue to be payable over eight equal payments. Interest accrued from April 1, 1998, through the payment resumption date will be due on the payment resumption date, in addition to one-eighth of the Suspension Interest. We believe that this plan will require licensees continuing under an installment payment plan, either through resumption or disaggregation, to demonstrate their financial viability by making a reasonable payment on the payment resumption date. This payment will evidence the ability of licensees to access the capital necessary to both service their government debt obligations and provide service to the public. In addition, we instruct the Bureau to modify the payment schedule so that all C and F block installment payments will be due on a quarterly basis, beginning on the payment resumption date.

28. We reject Urban Communicators' suggestion that Suspension Interest be forgiven, as well as its alternative proposals that Suspension Interest be paid either in a balloon at the end of the ten-year installment payment period or over six years in conjunction with other interest payments.⁵³ Because the Commission already has provided sufficient relief by granting the one-year suspension, we will neither forgive nor defer payment of the Suspension Interest. The Commission has accommodated licensees sufficiently by allowing payment of the Suspension Interest over eight equal payments.

29. We also reject requests from parties seeking a deviation from the payment schedule and from amounts established by the licensees' Notes.⁵⁴ We are providing all C block licensees with an array of alternative

⁴⁹ *Second Report and Order*, 12 FCC Rcd at 16,449-50 para. 25.

⁵⁰ See Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Procedures, WT Docket No. 97-82, *Third Report and Order and Second Further Notice of Proposed Rule Making*, FCC 97-413 (released December 31, 1997) at para. 106 ("*Part I Third Report and Order*") (reconsideration pending). See 47 C.F.R. § 1.2110(f)(4)(i).

⁵¹ See *Part I Third Report and Order* at para. 106; 47 C.F.R. § 1.2110(f)(4)(ii). But see The Honorable Albert R. Wynn *ex parte* filing at 1 (the Commission's newly adopted 180-day payment period should apply to C block licensees).

⁵² See *Second Report and Order*, 12 FCC Rcd at 16,448 para. 21 (the Suspension Period was defined as "the period beginning with the date on which each license was conditionally granted through and including March 31, 1998").

⁵³ Urban Communicators Petition at 8-9.

⁵⁴ Alpine asks that: (1) principal and interest payments be spread over a period of 20 years; (2) principal and interest payments be paid annually, rather than quarterly; and (3) the accrual of interest be suspended from the date of license grant until 90 days after the issuance of reaucted licenses. Alpine Petition at 12-13, n.6; see also Alpine Reply at 8. Alpine also argues that licenses awarded in the original C block auction have diminished in value and, on that basis, urges the

payment options, designed to accommodate licensees' various needs. These options were developed and are now being modified in an effort to balance complex and competing interests, with the recognition that it is impossible to devise alternatives that satisfy every entity with an interest in this proceeding. The record before us does not provide a sufficient basis for creating additional payment choices; indeed, there is opposition to our doing so.⁵⁵ Moreover, as explained above and in the *Second Report and Order*, the Commission purposefully adopted an approach that does not significantly alter the amounts paid for individual licenses.⁵⁶ Retroactively changing the payment terms would be unfair to other applicants that might have bid differently under more relaxed payment terms.

30. Finally, we will not adopt the proposal made only by DiGiPH that the Commission somehow compensate those licensees that timely made the March 31, 1997, payment and, as a consequence, did not benefit from a suspension of that payment obligation.⁵⁷ Compensating licensees for complying with Commission rules would establish a precedent we consider inadvisable.⁵⁸ Furthermore, if a licensee opts to return all its licenses, we will refund any installment payments previously submitted for those licenses. If a licensee returns some licenses and retains others, the licensee will be allowed to apply previously submitted installment payments toward the prepayment of retained licenses or toward the Suspension Interest for retained licenses which the licensee does not prepay. For example, if a licensee elects resumption of payments for an MTA, any installment payments previously submitted for a BTA license within that MTA will be applied toward the Suspension Interest owed for that license, as described in the *Second Report and Order*.⁵⁹ The treatment of installment payments with respect to the disaggregation and prepayment options is specified below. Therefore, because installment payments will either be refunded or credited, we believe additional compensation is unnecessary.

VI. SURRENDER OF LICENSES FOR REACTION (AMNESTY)

Commission to reduce the price for each "so affected" license by 15 percent per year until 90 days after the grant of reaucted licenses. Alpine Petition at 13 n.6. DiGiPH similarly maintains that reauction will result in lower prices for licenses than at the original auction and therefore requests that the Commission reduce the debt of original licensees in an amount equal to the average reduction in cost for licenses sold at reauction. DiGiPH Petition at 8-11. Northern Michigan states that cash flow projections are not sufficient to support principal repayment over only four years and believes that beginning principal payments in year six is feasible if repayment occurs over 15 years. Northern Michigan Petition at 5-6. In addition, Northern Michigan and McBride seek relaxation of the construction requirements for C block licensees but fail to present convincing rationales for their proposals. See Northern Michigan Petition at 9; McBride Petition at 5.

⁵⁵ See AT&T Opposition at 3 ("Bidders in any Commission auction understand that there is no guarantee of business success even if they win a license. The Commission should not now create an expectation that it will shield applicants or licensees from the results of bad business decisions, or take actions that suggest that some licensees are 'too big to fail.' The menu of options the Commission provided in the *Order* will provide most C-block licensees with sufficient financial relief to permit them to continue to participate in the wireless marketplace, although it may be on a reduced basis."); see also PrimeCo Opposition at 4 ("[A] fundamental restructuring of the installment payment terms previously established and agreed to would contravene the Commission's established auction objective of awarding licenses to parties who value them the most and are the most likely to rapidly deploy service." [citation omitted]).

⁵⁶ *Second Report and Order*, 12 FCC Rcd at 16,438-39 para. 5.

⁵⁷ See DiGiPH Petition at 7-8.

⁵⁸ Moreover, the Commission has no explicit authority to pay interest to licensees, which was one of DiGiPH's suggestions. *Id.* at 8. For example, unsuccessful bidders in Commission auctions do not earn interest on their upfront payments or down payments. Rather, the accrued interest on these funds is transferred to the Telecommunications Development Fund. See Communications Act § 309(j)(8)(C), 47 U.S.C. § 309(j)(8)(C); 47 C.F.R. §§ 1.2106(a) and 1.2107(b).

⁵⁹ *Second Report and Order*, 12 FCC Rcd at 16,451 n.54 para. 27.

A. Background

31. In the *Second Report and Order*, the Commission adopted an amnesty option under which a C block licensee would be permitted to surrender all of its licenses in exchange for relief from its outstanding debt.⁶⁰ The Commission would waive any applicable default payments, subject to coordination with the Department of Justice pursuant to applicable federal claims collections standards.⁶¹ Licensees electing this option would not have their down payments returned; however, neither would they be deemed in default or delinquent in meeting government debt obligations.⁶² In addition, they would be eligible to bid for any and all licenses in the reauction⁶³ and would not be restricted in making post-auction acquisitions.⁶⁴

32. Subject to one exception, licensees availing themselves of the amnesty option would be required to surrender all of their licenses to the Commission.⁶⁵ The sole exception to this "all-or-nothing" rule allowed licensees that met or exceeded the five-year build-out requirement on September 25, 1997, the date of adoption of the *Second Report and Order*, to keep licenses for built-out markets.⁶⁶ Specifically, a licensee utilizing this exception would be allowed to retain any built-out BTA, on the condition that it also keep any additional BTAs in the MTA where the built-out BTA is located and that it pay for all of those retained licenses under the terms of their original notes.⁶⁷

33. The Commission noted in the *Second Report and Order* that, although the Bureau had suspended installment payments on C block licenses on March 31, 1997, some licensees had made installment payments after the suspension.⁶⁸ In addition, some licensees had made their regularly scheduled installment payments prior to the suspension.⁶⁹ The Commission directed the Bureau to refund any installment payments made (whether due on or before March 31, 1997) on any license surrendered under the amnesty option and announced that it would forgive payment of any due, but unpaid, installment payments for any surrendered license.⁷⁰ Licensees retaining licenses under the build-out exception were to pay over eight equal payments (beginning with the payment due on March 31, 1998) all Suspension Interest applicable to the retained licenses.

⁶⁰ *Second Report and Order*, 12 FCC Rcd at 16,462-64 paras. 53-58.

⁶¹ *Id.*, 12 FCC Rcd at 16,462 para. 53. *See also* 4 C.F.R. Parts 101-105.

⁶² *Second Report and Order*, 12 FCC Rcd at 16,462-63 para. 55.

⁶³ *Id.*, 12 FCC Rcd at 16,462 para. 54.

⁶⁴ *Id.*, 12 FCC Rcd at 16,439-40 para. 6.

⁶⁵ *Id.*, 12 FCC Rcd at 16,463 para. 56.

⁶⁶ *Id.*, 12 FCC Rcd at 16,463-64 para. 57.

⁶⁷ *Id.*

⁶⁸ *Id.*, 12 FCC Rcd at 16,464 para. 58. Some of these payments were installments due on March 31, 1997; others were amounts due on December 31, 1996, but not paid until March 31, 1997, based on the Commission's automatic 90-day non-delinquency rule. *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

All installment payments previously made by the licensee on any of its licenses would be applied to reduce the Suspension Interest applicable to the retained licenses, and any amounts remaining would be refunded.⁷¹

B. Discussion

34. In keeping with our decision on reconsideration to allow licensees to make elections on an MTA-by-MTA basis, we modify the amnesty option to permit licensees to select that option for as many of their MTAs as they choose. Because amnesty no longer requires an "all-or-nothing" choice, we also eliminate as moot the build-out exception.⁷² Our decision is consistent with DiGiPH's recommendation that licensees be permitted "to return licenses for all BTAs on a per MTA basis, separate and apart from having met the five-year build out provisions"⁷³ The change also satisfies Alpine's request that licensees be entitled to turn in any or all of their licenses under amnesty.⁷⁴

35. The Commission originally adopted the "all-or-nothing" requirement for the amnesty option in order to prevent licensees from "cherry-picking" only the most desirable MTAs.⁷⁵ The Commission believed that facilitating a "cherry-picking" scheme would limit the potential for licenses to be aggregated, which would decrease their value to bidders in the reauction.⁷⁶ On reconsideration, we find persuasive DiGiPH's contention that requiring licensees to keep or surrender entire MTAs, rather than BTAs, will sufficiently limit "cherry-picking."⁷⁷ We also agree with DiGiPH's position that applying the amnesty option on an MTA-by-MTA basis does not carry a risk of "cherry-picking" significantly different from that connected with the original disaggregation option.⁷⁸

⁷¹ *Id.*

⁷² NextWave's request that the Commission "clarify" that the build-out exception encompasses all licensees that "invested significantly" in network build-out activities is now moot. *See* NextWave Petition at 17. *See also* Airtel Petition at 1; Christensen Petition at 1; CVI Wireless Petition at 1; Koll Petition at 1; Leifer, Marter Petition at 1; URS Greiner Petition at 1; Dorne & Margolin *ex parte* filing at 1. Also moot is Omnipoint's suggestion that we allow licensees to disaggregate licenses retained under the build-out exception. *See* Omnipoint Petition at 5-6; Omnipoint Reply at 1-2. Permitting licensees to make elections on an MTA-by-MTA basis eliminates any need for Omnipoint's proposal because licensees are free to disaggregate licenses in any built-out MTAs they wish to retain.

⁷³ DiGiPH Petition at 4-7. DiGiPH offered this recommendation as an alternative to its suggestion that the Commission extend the date by which licensees would have to have met the five-year build-out requirement for the build-out exception. *Id.* *See also* NextWave Reply at 8.

⁷⁴ Alpine Petition at 9-10.

⁷⁵ *Second Report and Order*, 12 FCC Rcd at 16,463 para. 56.

⁷⁶ *See id.*, 12 FCC Rcd at 16,469 para. 67.

⁷⁷ DiGiPH Petition at 4-5.

⁷⁸ *Id.* *See also* NextWave Reply at 8 ("[T]he Commission should allow licensees to select options on an MTA basis. Establishing an MTA rule across the board eliminates any concern that permitting flexible selection of options would result in cherry picking.").

36. Several parties object to the fact that a licensee does not receive any refund of its down payment under the amnesty option.⁷⁹ As the Commission explained in the *Second Report and Order*, its intent in retaining the down payment was to ensure that licensees electing the amnesty option and participating in the re-auction of their surrendered licenses do so without the undue advantage of having all of their original funds available to repurchase the same spectrum they surrendered.⁸⁰ The Commission further explained that licensees selecting amnesty would benefit substantially by avoiding being declared in default and thereby being freed from assessments of delinquencies and other collection costs associated with default payments.⁸¹ The rationale of the *Second Report and Order* continues to be valid. If we were to allow C block licensees to return their licenses, receive a refund of their down payments, and participate in the re-auction, we would undermine the integrity of the auction process by placing amnesty licensees in virtually the same position they would have occupied had the initial C block auction never taken place.

37. Nevertheless, we recognize that because all elections now are being applied on an MTA-by-MTA basis, licensees are permitted to return licenses in certain MTAs and retain licenses in other MTAs, as with the prepayment option under the *Second Report and Order*. Thus, licensees electing the amnesty option have the following choice. For licenses in each MTA returned under the amnesty option, the licensee may choose either to: (1) receive no credit for its down payment(s) but remain eligible to bid in the re-auction on all its licenses in the returned MTA (pure amnesty), or (2) obtain credit for 70 percent of its down payment and forgo for a period of two years from the start date of the re-auction eligibility to reacquire the licenses it surrendered pursuant to this option through either re-auction or any other secondary market transaction (amnesty/prepayment).⁸² For purposes of this two-year eligibility restriction, a licensee includes qualifying members of the licensee's control group and their affiliates.⁸³ The 70 percent credit must be applied toward prepayment of the entire principal owed for a retained MTA with 30 MHz licenses and/or toward prepayment of the entire principal owed for the retained 15 MHz licenses of an MTA that has been disaggregated. Providing an additional choice within the amnesty option substantially increases the level of flexibility available to licensees and enables them to formulate new business plans that may be more attractive to lenders and investors. It also reflects a suggestion made by Alpine that licensees not participating in the C block re-auction lose a substantially smaller portion of their down payment than that lost by licensees that do participate.⁸⁴

⁷⁹ See Alpine Petition at 9-10; Hyundai Petition at 6 (contending that "forfeiture of up to 100 percent of a down payment does not appear rationally related to any harm"); Hyundai Reply at 4-7; McBride Petition at 2, 4 (claiming that the amnesty option is punitive in nature and requesting "100 percent return of all down payments, plus all the interest payments"). See also AmeriCall Opposition at 5-7 ("fairness and equity require at least that the forfeiture in an amnesty or disaggregation election be no greater than the forfeiture by a licensee electing prepayment . . .").

⁸⁰ *Second Report and Order*, 12 FCC Rcd at 16,462-63 para. 55.

⁸¹ *Id.*; see also 47 C.F.R. § 1.2110(f)(4)(iii), (iv). We note that both AmeriCall and Omnipoint ask that we establish specific timing goals for providing refunds to licensees electing the amnesty option. AmeriCall Petition at 3; Omnipoint Opposition at 14. The Bureau will address this issue in a forthcoming public notice on procedures.

⁸² As mentioned above, if a licensee opts to return all its licenses, we will refund any installment payments previously submitted for those licenses.

⁸³ See Section X.B.2. below for the definition of "affiliate."

⁸⁴ See Alpine Petition at 9-10 ("[W]ith respect to the amnesty option, the Commission should revise the requirement for the forfeiture of down payments so that licensees have some incentive to accept this option. For those entities *not* participating in the re-auction, a substantially lesser penalty, keyed at most to the estimated cost incurred in re-auctioning the spectrum, would be a more appropriate means of insuring the integrity of the Commission's auction processes than total loss of the down payment. As to those entities who would desire to bid on such spectrum in the re-auction, a penalty of at most 30 percent of the previously made down payment would be appropriate.").

VII. PREPAYMENT

A. Background

38. In the *Second Report and Order*, the Commission offered C block licensees the option to prepay the outstanding principal debt obligations for any licenses, on an MTA basis, that they elected to retain, subject to the restriction described below. The remaining licenses were required to be surrendered to the Commission for reauction.⁸⁵ In exchange, the Commission would forgive the debt on the surrendered licenses, and any associated payments owed.⁸⁶ A licensee electing this option would make its prepayment by using 70 percent of the total of all down payments made on the licenses it surrendered to the Commission, plus 100 percent of any installment payments previously paid for all licenses (collectively, "Available Down Payments"),⁸⁷ plus any "new money" it was able to raise.⁸⁸ The remaining portion of the down payment applicable to the surrendered licenses would not be refunded or credited but simply would be retained by the Commission.⁸⁹ Licensees would be prohibited from bidding on their returned spectrum in the reauction or from reacquiring it in the secondary market for two years from the start of the reauction. Licensees could, however, bid on spectrum or licenses surrendered by other licensees, provided such licensees were not affiliates.

39. The requirement that a licensee had to prepay all its BTA licenses within those MTAs that it selected for prepayment prevented "cherry-picking" because licensees could not prepay only the most desirable BTA licenses within a given MTA and then surrender the rest.⁹⁰ The one exception to this rule was that any licensee lacking sufficient funds to prepay every BTA license within a chosen MTA would be permitted to prepay only those BTA licenses within that MTA that it could afford.⁹¹ The licenses for the remaining BTAs within that MTA which the licensee could not afford to prepay would be surrendered to the Commission.

B. Discussion

40. By providing a license free and clear of debt and payment conditions, prepayment makes it easier for licensees to raise the additional capital necessary to build out their systems and deploy new services. Thus, consumers benefit by receiving service sooner. Prepayment also removes the Commission from the role of lender, which sometimes may conflict with its responsibilities as a regulator.⁹² In addition, prepayment benefits the

⁸⁵ *Second Report and Order*, 12 FCC Rcd at 16,467-70 paras. 64-69.

⁸⁶ *Id.*, 12 FCC Rcd at 16,467 para. 64.

⁸⁷ We clarify that the term "Available Down Payments," as used in paragraph 64 of the *Second Report and Order*, was intended to include both 70 percent of the down payment made on surrendered licenses and any installment payments previously submitted for those licenses. *Id.*

⁸⁸ *Id.* Since the *Second Report and Order* established that interest already paid is to be wholly credited toward prepayment under this option, Urban Communicators' request to that effect is moot. Urban Communicators Petition at 10.

⁸⁹ *Second Report and Order*, 12 FCC Rcd at 16,467 para. 64.

⁹⁰ *Id.*, 12 FCC Rcd at 16,469 para. 67.

⁹¹ *Id.*

⁹² See FCC Report to Congress on Spectrum Auctions, WT Docket No. 97-150, *Report*, FCC 97-353 (released October 9, 1997) at 39-40.

public because it assures taxpayers of full payment of licenses. Indeed, we have implicitly expressed our preference for prepayment by eliminating installment payments as a means of financing small business participation for the immediate future.⁹³

41. Under our modified approach, the prepayment option remains essentially the same as set forth in the *Second Report and Order*. For any 30 MHz licenses that are returned to the Commission, the licensee may continue to apply 70 percent of the down payment made on those licenses toward the prepayment of the entire outstanding principal owed in retained MTAs. The licensee may pool any down payment amounts that have been designated for prepayment, plus installment payments previously paid on any returned licenses.⁹⁴ We will refer to this pool of credit as a licensee's "Prepayment Credit."⁹⁵ This Prepayment Credit may be used to prepay any retained MTAs with 30 MHz licenses. As will be discussed in more detail below, it also may be used to prepay the retained 15 MHz licenses of any MTAs that have been disaggregated.

42. As under the *Second Report and Order*, any "new money" that is used to make prepayment must be submitted on or before the election date. Unlike under the *Second Report and Order*,⁹⁶ affiliated licensees will be allowed to combine their Prepayment Credits.⁹⁷ However, any affiliated licensees that choose to pool their Prepayment Credits will be considered one licensee for purposes of making elections. Therefore, the elections made by those affiliates must be made in concert and must be made on an MTA-by-MTA basis, as is required of individual licensees.⁹⁸ Credit pooling does not require the participation of all of a licensee's affiliates. Any affiliate that chooses not to pool its credit along with its other affiliates will be considered an individual licensee for purposes of making elections. We believe on reconsideration that allowing this flexibility is consistent with the fact that, for purposes of the reauction, we consider a licensee and its affiliates to be the same entity. It also will prevent licensees from being disadvantaged if, without such a rule, they would have been precluded from electing prepayment by virtue of the fact that they transferred BTA licenses to affiliates.

43. In response to a request from DiGiPH, we make one important clarification. DiGiPH argues that, because affordability is a concept subject to differing interpretations, the Commission should further define its requirement that a licensee must prepay all of those BTA licenses within the MTA "that it can afford."⁹⁹ We clarify that, for purposes of this exception, a licensee can "afford" to prepay all of its BTA licenses within that

⁹³ *Part 1 Third Report and Order* at paras. 38-40.

⁹⁴ As described below, down payment amounts may also come from disaggregated licenses if the licensee uses the credit for prepayment. The treatment of installment payments previously submitted for disaggregated licenses is also described below.

⁹⁵ The term "Prepayment Credit" is essentially a substitution for the term "Available Down Payments," updated to account for the additional flexibility provided under our modified approach.

⁹⁶ *Second Report and Order*, 12 FCC Rcd 16,467 n.144 para. 64.

⁹⁷ *See* Section X.B.2. below for the definition of "affiliate."

⁹⁸ Therefore, if affiliated licensees decide to pool their credits, then all BTA licenses held by any of those affiliates must be surrendered for credit in any MTA where one of their BTA licenses is surrendered for credit. Similarly, those affiliated licensees must collectively select MTAs for prepayment, and all BTA licenses held by any of those affiliates in those selected MTAs must be prepaid, subject to the affordability exception. Likewise, if those affiliated licensees choose to disaggregate an MTA, then all BTA licenses held by any of those affiliates in that MTA must be disaggregated, and so on.

⁹⁹ DiGiPH Petition at 11-12.

MTA if it can prepay all BTA licenses using only its Prepayment Credit. If this amount is not enough to prepay all its BTA licenses within an MTA, the licensee must prepay as many BTA licenses in the MTA as this amount will allow and must surrender for reauction the remaining BTA licenses that it cannot afford to prepay.¹⁰⁰ Only under these circumstances may a licensee choose, within the given MTA, which BTA licenses to prepay and which to surrender. Once a licensee adds any "new money" at all to make prepayment, the affordability exception does not apply, and the licensee must add sufficient "new money" that, when added to its Prepayment Credit, is adequate to prepay all its BTA licenses within its chosen MTAs. A licensee claiming the affordability exception may choose only one MTA in which it will apply, and it must prepay all its BTA licenses within all other MTAs selected for prepayment. The Commission will not refund any unspent portion of the Prepayment Credit.¹⁰¹ We believe retaining any unspent portion of the Prepayment Credit is a reasonable price for relieving the requirement that all BTA licenses in all MTAs be prepaid. The affordability exception also will apply to disaggregated MTAs that the licensee wishes to prepay.

44. This clarification provides an objective means for licensees to implement the affordability exception. It eliminates any doubt or confusion regarding the scope of the term "afford," and it is an easy, bright-line test to administer. In addition, we believe the restrictions we impose on the affordability exception minimize a licensee's ability to "cherry-pick" among BTAs. Therefore, we reject Omnipoint's request that the Commission eliminate the affordability exception, or in the alternative, grant all licensees unlimited flexibility under all options to select which BTA licenses to retain and which to surrender.¹⁰²

45. We reject arguments claiming that the prepayment option should be revised or eliminated because it benefits only certain licensees.¹⁰³ Each of the payment relief options presented to C block licensees is designed to strike a fair balance of competing interests, with benefits and obligations appropriate to varying circumstances. Although these options are intended to provide distinct choices for licensees, they adhere to a consistent set of principles. Moreover, the available choices complement each other to provide a range of alternatives to the various C block licensees experiencing financial difficulties. Because it is an important

¹⁰⁰ *But see* ClearComm *ex parte* filing at 1 (urging the Commission to allow licensees to prepay one or more BTA licenses in an MTA while retaining, and resuming payments on, the remaining BTA licenses in the MTA).

¹⁰¹ For example, assume a licensee owns 30 licenses held in 3 MTAs as follows: 2 licenses in MTA #1, 12 licenses in MTA #2, and 16 licenses in MTA #3; that each license cost \$100,000; that the licensee made a down payment of \$10,000 on each license leaving \$90,000 as the debt on each license; and that the licensee made no installment payments. If the licensee chooses to prepay the licenses in MTA #1, its Prepayment Credit will be \$196,000 (28 x \$10,000 down payment for each license not being prepaid x 70 percent). Utilizing its Prepayment Credit of \$196,000, the licensee can "afford" to prepay all of its licenses in MTA #1. The unspent portion of its Prepayment Credit [\$196,000 less (2 x \$90,000) = \$16,000] will be retained by the Commission.

If instead the licensee decided to prepay licenses in MTA #3, it can only "afford" to prepay 2 of those 16 licenses calculated as follows: 2 x \$90,000 = \$180,000 needed to prepay; Prepayment Credit is calculated as follows: 28 x \$10,000 x 70 percent = \$196,000. The licensee may elect which 2 licenses to prepay and must surrender the remaining 14 licenses. The Commission will retain the unspent portion of the Prepayment Credit, which is \$16,000 [\$196,000 less (2 x \$90,000) = \$16,000]. If, however, the licensee elects to add "new money" to its Prepayment Credit, it *must* add enough "new money" to the Prepayment Credit to prepay the remaining 14 licenses in MTA #3 (i.e., 14 x \$90,000 less \$16,000 = \$1,244,000 of "new money" needed). The licensee may not add only \$74,000 of "new money" and prepay a third license while surrendering the remaining 13 unprepaid licenses.

¹⁰² Omnipoint Opposition at 9; Omnipoint Reply at 2.

¹⁰³ *See* McBride Petition at 2-3 (the prepayment option favors large bidders that have multiple licenses from which to choose, whereas small bidders seeking to keep licenses with payment relief are forced to disaggregate); Central Oregon Petition at 6 (single licensees get no benefit from the buy-out option); Omnipoint Reply at 2 (the prepayment option should be eliminated because "it amounts to nothing other than an opportunity for a handful of the largest bidders to 'cherry-pick' licenses").

component in this package of options and because we continue to believe it is sound as a matter of policy, we decline to eliminate the prepayment option. A menu of options is provided because no single solution would be appropriate for every situation; therefore, eliminating any one option would prejudice those licensees for which it may be best suited.

46. We note that we received numerous requests to allow licensees to use their entire down payment under the prepayment option.¹⁰⁴ We will maintain our rule that licensees electing the prepayment option will receive no refund or credit for 30 percent of the down payment made on 30 MHz licenses they surrender to the Commission. We believe that retention of this portion of the down payment is necessary to preserve the integrity of the auction process.¹⁰⁵ Furthermore, to return the entire down payment would undermine the purpose of the down payment -- to help ensure performance on a licensee's debt obligation.¹⁰⁶ We disagree with parties that characterize retention of a portion of the down payment as punitive,¹⁰⁷ a penalty,¹⁰⁸ or a forfeiture.¹⁰⁹ We view 30 percent of the down payment as the fair and reasonable price for receiving the benefits of this option.¹¹⁰ We also note that AirGate correctly characterizes the prepayment option as a method of providing licensees with more flexibility in using their down payments than is permitted under current rules.¹¹¹

¹⁰⁴ See Airtel Petition at 1; Alpine Petition at 10; Cellexis Petition at 6; Cellnet Petition at 2; Christensen Petition at 1; CVI Wireless Petition at 1; Federal Network Petition at 1; Fox Communications Petition at 1; Koll Petition at 1; Leifer, Marter Petition at 1; Meretel Petition at 3; MFRI Petition at 4; New Wave Petition at 1; NextWave Petition at 10-15; OnQue Petition at 2; One Stop Wireless Petition at 2; Prime Matrix Petition at 1; RFW Petition at 5; UCNI Petition at 2; Urban Communicators Petition at 10; URS Greiner Petition at 1; Wireless Nation Petition at 2; Duluth PCS, et al. Opposition at 5-8; Polycell Opposition at 5-8; Third Kentucky Opposition at 2; CX Systems *ex parte* filing at 1; Cyber Sites *ex parte* filing at 1; Dorne & Margolin *ex parte* filing at 1. See also Hyundai Petition at 4-7; Christensen *ex parte* filing at 1; Florida Power *ex parte* filing at 1; Kabbara *ex parte* filing at 1; LaBarge Clayco *ex parte* filing at 1; Leifer, Marter *ex parte* filing at 1; MJA *ex parte* filing at 1; OPM *ex parte* filing at 1; Specialty Teleconstructors *ex parte* filing at 1; Structure Consulting *ex parte* filing at 1; Xway *ex parte* filing at 1; MRFI Reply at 1; Wireless Ventures Reply at 3.

¹⁰⁵ See Communications Act § 309(j), 47 U.S.C. § 309(j).

¹⁰⁶ See Communications Act § 309(j)(4)(B), 47 U.S.C. § 309(j)(4)(B); In the Matter of BDPCS, Inc., *Order*, 12 FCC Rcd 6606 (WTB 1997), *application for review pending*.

¹⁰⁷ See, e.g., Alpine Petition at 8; RFW Petition at 5; MFRI Petition at 4.

¹⁰⁸ See, e.g., NextWave Petition at 10-15; Duluth PCS, et al. Opposition at 5-6; Polycell Opposition at 5-6.

¹⁰⁹ See, e.g., AmeriCall Opposition at 5-7; Hyundai Reply at 4-6.

¹¹⁰ Several parties asking the Commission to reject petitioners' request to use the entire down payment under the prepayment option reiterate the Commission's discussion on this matter in the *Second Report and Order*. See Sprint Opposition at 4-5 (arguing that giving full credit would be unfair to unsuccessful bidders and to licensees that resume payments under their existing obligations); Antigone/Devco Opposition at 3-5 (asking the Commission to retain 30 percent of the down payment to preserve the integrity of the auction process). Although Omnipoint recognizes that retaining the 30 percent down payment on surrendered licenses is not punitive, we disagree with its reasoning that it accounts for reaction costs to the government. See Omnipoint Opposition at 3-5.

¹¹¹ AirGate Opposition at 13. AirGate notes that it would support "a limited exception" to permit licensees that elect to prepay all of their C block licenses to use all of their down payment toward the cash purchase price. *Id.* at 13 n.22. No such exception is necessary, given that AirGate's scenario is no different from paying off the entire installment debt early.

47. We disagree with NextWave, Cellexis, and other parties that the Commission should account for the net present value of forgoing installment payments,¹¹² or otherwise discount the principal amount due under the installment payment plan.¹¹³ As Sprint points out, the Commission has considered this argument extensively and properly rejected it.¹¹⁴ In the *Second Report and Order*, the Commission stated that a licensee should be required to pay the face value of its auction bid.¹¹⁵ Accounting for the net present value of forgoing installment payments would rewrite the auction results because it would have the effect of changing the amounts bid for licenses.¹¹⁶ Therefore, to do so would be unfair to those bidders that withdrew from the auction under the assumption that the winning bid amounts represented the prices that would be paid for the licenses.¹¹⁷ Because we continue to support the policy that auction bids should be paid at their face value, we will not discount the principal due.¹¹⁸ Although the Commission provides favorable terms for financing the bid price, the cost of an installment payment plan is the interest that accrues over time. The benefit to a licensee for early pay-off of its financial obligations is the savings in the amount of interest that otherwise would be owed.¹¹⁹ We believe this trade-off provides a further reason for not discounting the principal.

¹¹² See NextWave Reply at 8-9 (net present value accurately presents the size of PCS debt in light of the licensee's higher cost of capital compared to the government rate of interest); Cellexis Reply at 6 (by charging nominal value rather than net present value, the Commission is raising the effective price of the license). See also Airtel Petition at 1; Alpine Petition at 10; Cellexis Petition at 6-7; Cellnet Petition at 2; Central Oregon Petition at 4-6; Christensen Petition at 1; CVI Wireless Petition at 1; Federal Network Petition at 1; Fox Communications Petition at 1; Koll Petition at 1; Leifer, Marter Petition at 1; MFRI Petition at 4-5; New Wave Petition at 1; NextWave Petition at 5-10; Northern Michigan Petition at 7; OnQue Petition at 2; One Stop Wireless Petition at 2; Prime Matrix Petition at 1; RFW Petition at 6; URS Greiner Petition at 1; UCNI Petition at 2; Urban Communicators Petition at 10; Wireless Nation Petition at 2; Meretel Petition at 2; Polycell Opposition at 9; Duluth PCS, et al. Opposition at 9; Third Kentucky Opposition at 2; Christensen *ex parte* filing at 1; CX Systems *ex parte* filing at 1; Cyber Sites *ex parte* filing at 1; Dorne & Margolin *ex parte* filing at 1; Florida Power *ex parte* filing at 1; LaBarge Clayco *ex parte* filing at 1; Leifer, Marter *ex parte* filing at 1; MJA *ex parte* filing at 1; OPM *ex parte* filing at 1; Specialty Teleconstructors *ex parte* filing at 1; Structure Consulting *ex parte* filing at 1; Xway *ex parte* filing at 1; Wireless Ventures Reply at 3.

¹¹³ Compare Alpine Petition at 10 (a 59 percent discount from the face amount of the note would account for the present value of the Commission's financing) with NextWave Petition at 5-10 (arguing for a discount rate of at least 15 percent) and Third Kentucky Opposition at 2 (same as NextWave). See also Meretel Petition at 2 (prepayment is not a viable option unless the prepaid amount is equal to or below that of the price paid for A and B block licenses).

¹¹⁴ Sprint Opposition at 4.

¹¹⁵ *Second Report and Order*, 12 FCC Rcd at 16,468 para. 66. See also *id.*, Separate Statement of Susan Ness, 12 FCC Rcd at 16,511 ("In my view, the price bid is the price bid. Bidders were not offered a cash versus credit price.").

¹¹⁶ See AirGate Opposition at 7-9 (a reduction in bid amounts would translate into a rewrite of the auction results).

¹¹⁷ See Omnipoint Opposition at 6-7 (a net present value discount would be fundamentally unfair to other bidders in the auction that properly relied on the Commission's rule that high bidders must pay the entire nominal amount of their bids or their licenses automatically cancel).

¹¹⁸ Moreover, if we were to discount the debt at a licensee's cost of capital it would be impossible to determine accurately a cost of capital for all licensees. The cost of capital varies for each licensee because it is based on a licensee's individual cost of debt and equity and on the ratio of debt to equity. Therefore, no single discount rate would be appropriate for every licensee. See Omnipoint Opposition at 6-8 (a net present value discount "would be impossible to implement in a manner that is fair and avoids unjust enrichment, because all parties -- including each Block C licensee and the U.S. Government -- have separate costs of capital").

¹¹⁹ See ALLTEL Opposition at 2-4; Northcoast Opposition at 5; Antigone/Devco Opposition at 2; Fidelity Capital Opposition at 3-4.

48. We decline to provide further flexibility under the prepayment option. Cellexis requests that the Commission grant the five-year build-out exception provided under the amnesty option to licensees choosing the prepayment option.¹²⁰ A build-out exception is not needed because, under our modified approach, licensees are permitted to retain any MTAs they wish, whether built-out or not. Regardless, even under the approach adopted in the *Second Report and Order*, a build-out exception was unnecessary because licensees had the discretion to choose which MTAs to prepay and which to surrender, as opposed to the "all-or-nothing" approach under the original amnesty option.¹²¹ In addition, we decline MFRI's request to allow a licensee that holds both C and F block licenses to use its C block down payment to purchase for cash its F block licenses.¹²² We do not believe such flexibility is warranted because the reduction of debt associated with prepayment will help those licensees address their capital needs in servicing their F block debt. Finally, Urban Communicators argues that the requirement that prepaying licensees must purchase all BTA licenses held within an MTA is unfair to licensees that have licenses in only one MTA.¹²³ We disagree. This restriction is essential to prevent "cherry-picking," and a licensee that cannot avail itself of this option can either choose another option or limit its purchases under the affordability exception, if applicable.

VIII. DISAGGREGATION OF SPECTRUM FOR REACTION

A. Background

49. In the *Second Report and Order*, the Commission offered C block licensees the option to disaggregate a portion of their spectrum and return it to the Commission for reaction.¹²⁴ Licensees electing the disaggregation option would return one-half (i.e., 15 MHz of 30 MHz) of their spectrum from each of their BTA licenses within the MTAs in which they chose to disaggregate spectrum.¹²⁵ In other words, licensees would not be required to disaggregate spectrum for all of the licenses they hold, but they would have to disaggregate spectrum for all of the licenses they hold in a given MTA if they disaggregated spectrum for one license in that MTA. The returned spectrum would have to be at 1895 -1902.5 MHz paired with 1975 - 1982.5 MHz, which is spectrum contiguous to the F block.¹²⁶

50. In exchange, the Commission would reduce by 50 percent the amount of debt that was owed on a 30 MHz license before it was disaggregated.¹²⁷ Fifty percent of the down payment made on the 30 MHz license would be considered the down payment for the retained 15 MHz of spectrum, but the Commission would not

¹²⁰ Cellexis Petition at 6.

¹²¹ See *Second Report and Order*, 12 FCC Rcd at 16,469 para. 68.

¹²² MFRI Petition at 5.

¹²³ Urban Communicators Petition at 10. *But see* AirGate Opposition at 14-15 (licensees should not be permitted to return licenses on a BTA-by-BTA basis).

¹²⁴ *Second Report and Order*, 12 FCC Rcd at 16,455 para. 38.

¹²⁵ *Id.*

¹²⁶ *Id.*, 12 FCC Rcd at 16,456 para. 39.

¹²⁷ *Id.*, 12 FCC Rcd at 16,456 para. 40.

provide a refund or credit for the remaining 50 percent of the down payment.¹²⁸ Licensees were required to repay over eight equal payments (beginning with the payment due on March 31, 1998) all Suspension Interest, adjusted to reflect the reduction in debt obligation.¹²⁹ Any installment payments that were paid prior to the suspension would be credited in full against those amounts.¹³⁰ Licensees were prohibited from bidding on their returned spectrum in the reauction or from reacquiring it in the secondary market for two years from the start of the reauction.¹³¹ Licensees could, however, bid on spectrum or licenses surrendered by other licensees, provided such licensees were not affiliates.¹³²

B. Discussion

51. As provided under the *Second Report and Order*, when a licensee disaggregates an MTA, it will receive full credit for the portion of the down payment applicable to the spectrum retained from a license (i.e., 50 percent of the down payment made on the original 30 MHz license). However, on reconsideration, we modify our decision that licensees electing the disaggregation option receive no refund or credit for the portion of the down payment applicable to the returned spectrum. For each disaggregated license for which the licensee elects to resume installment payments, rather than prepay, we will provide a credit of 40 percent of the down payment applicable to the 15 MHz of spectrum that is returned to the Commission. The 40 percent credit may only be used to reduce the amount owed on the 15 MHz of spectrum retained from the same BTA license that generated the credit. The credit, at the licensee's option, may be applied either to Suspension Interest and/or to reduce the principal outstanding.¹³³ Any installment payments previously submitted for a disaggregated license for which the licensee elects to resume installment payments will be credited as described in the *Second Report and Order* (i.e., toward Suspension Interest).¹³⁴

52. We derived the 40 percent credit because when it is combined with the 100 percent credit associated with the retained spectrum, the licensee will receive a credit of 70 percent of the total down payment for the original 30 MHz license. We have decided to allow this additional credit because we are persuaded by the argument of several parties that the credit permitted under the disaggregation option should be consistent with the 70 percent credit permitted under the prepayment option.¹³⁵ We believe the disparity that existed under the

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*, 12 FCC Rcd at 16,457 para. 42.

¹³² *Id.*

¹³³ See The Honorable Albert R. Wynn *ex parte* filing at 1-2 (licensees electing disaggregation should be allowed "to apply their excess down payments and interest payments they have made to their upcoming installment payments, thereby providing them, in exchange for actual money already paid to the U.S. Government, a brief extension of time to complete their financing").

¹³⁴ *Second Report and Order*, 12 FCC Rcd at 16,456 para. 40.

¹³⁵ Omnipoint Petition at 8-9; McBride Petition at 1-2; AmeriCall Opposition at 6. See also ClearComm Petition at 18-21 (if the Commission refuses to allow licensees full use of their down payments, then licensees electing disaggregation should at least not be subject to a greater penalty than those electing prepayment). *But see* AirGate Opposition at 12 (the Commission's decision to retain 50 percent of the down payment is reasonable).

Second Report and Order was unfair to licensees that were precluded from electing prepayment. Furthermore, allowing this additional credit will advance the purposes of the disaggregation option. Disaggregation benefits both licensees and consumers because it provides a means for licensees to remain in a market area at a significantly reduced cost. By having their outstanding debt decreased by 50 percent, licensees improve their ability to finance their retained spectrum and build out their networks. In addition, disaggregation is pro-competitive because it provides a means for other competitors to enter a market area. It also gives unsuccessful bidders an opportunity to rebid on spectrum in market areas in which they were initially outbid. We believe the additional 40 percent credit will promote these benefits of disaggregation and will help licensees that have expressed an interest in disaggregation to take advantage of this option and continue their plans to provide service in their license areas.

53. We believe a 40 percent credit is warranted when a licensee resumes installment payments on a disaggregated MTA because the licensee remains in the MTA and continues building out its network in order to serve those consumers. We will not provide such a 40 percent credit to licensees that resume installment payments on a license in a different MTA. In contrast to a licensee that uses the 40 percent credit to resume installments on the retained portion of the disaggregated license, a licensee that seeks to apply a 40 percent credit from down payments made on licenses returned under an amnesty election would have, under those circumstances, abandoned service to the entire licensed area affected by that election. We believe that licensees that surrender licenses should not receive a credit for abandoning those markets unless they use the credit to prepay retained licenses.

54. We also revise the approach adopted in the *Second Report and Order* to provide for a combination of disaggregation and prepayment. As we have discussed, there are many advantages to both prepayment and disaggregation, and we believe a combination of the two should be encouraged because it offers the benefits of both options. For example, the licensee continues to build out its network in the market area, the Commission is relieved from its position of lender, and competing entities have the opportunity to bid on the returned spectrum. Therefore, if a licensee disaggregates an MTA and prepays the outstanding principal owed on the retained portion of the MTA, we will provide the licensee with a higher percentage of credit as an incentive to choose both disaggregation and prepayment. Instead of a 40 percent credit, a licensee that elects both disaggregation and prepayment will receive credit for 70 percent of the down payment applicable to the returned spectrum.¹³⁶ This 70 percent credit will be added to the licensee's Prepayment Credit which, as explained above, may be used to prepay any retained MTAs with 30 MHz licenses and/or the retained portions of any MTAs that have been disaggregated. Allowing this 70 percent credit is consistent with our policy of providing a 70 percent credit for 30 MHz licenses that are returned to the Commission. In both cases, the credit is 70 percent of the down payment associated with the amount of spectrum that is returned. In addition, any installment payments previously submitted for the licenses in an MTA that is both disaggregated and prepaid will be added to the licensee's Prepayment Credit.

55. If a licensee elects both disaggregation and prepayment for an MTA, the licensee must prepay the principal owed on the 15 MHz of spectrum retained from each BTA license in the MTA. However, if a licensee's Prepayment Credit is insufficient to make full prepayment on the entire MTA, then the affordability exception will apply. Thus, the licensee will be required to prepay only what it can afford and it must return the rest of the spectrum to the Commission for reauction. As with prepayment of full 30 MHz licenses, the exception

As discussed above, a licensee that selects the amnesty option and chooses to bid on its returned licenses in the reauction will not receive credit for any of its down payment made on its returned licenses. We believe a licensee's opportunity to bid on its returned licenses is equitable compensation for not receiving any down payment credit.

¹³⁶ The portion of the down payment applicable to the returned spectrum is the equivalent of 50 percent of the down payment made on the original 30 MHz license.

will not apply if any "new money" is added to make prepayment, and the exception may be applied to only one MTA.

56. We received numerous requests to allow licensees to receive credit for their entire down payment under the disaggregation option.¹³⁷ We consider it inadvisable to provide full credit because we believe that to do so would undermine the integrity of the auction process.¹³⁸ As the Commission concluded in the *Second Report and Order*, allowing licensees to use their entire down payment would be unfair to those C block licensees electing to continue under the existing installment payment plan and to bidders that were unsuccessful in the auction.¹³⁹ We note that we already provide a substantial credit, and we believe that providing any further credit would not be sound public policy. As Fidelity Capital observes, if a licensee "believes the Commission is not providing an attractive disaggregation policy, then it is free to disaggregate its spectrum privately to another qualifying entity."¹⁴⁰

57. Because numerous benefits are conferred under the disaggregation option, we disagree with NextWave, ClearComm, and other parties that not providing a refund or credit for all of the down payment constitutes a penalty or forfeiture.¹⁴¹ Under disaggregation, the Commission forgives up to half of a licensee's outstanding debt, an action that will facilitate investment and growth by making more funds available to licensees for build-out. In addition, the Commission provides low-cost, long-term financing for the retained spectrum. Furthermore, the Commission renders a valuable service by providing an efficient and cost-effective mechanism for transferring spectrum that licensees otherwise might have been forced to resell in the secondary market at great risk. In exchange, the Commission receives the disaggregated spectrum and retains a portion of the down payment applicable to that spectrum. Therefore, retention of part of the down payment is not a penalty; rather, it is the fair and reasonable price for receiving the benefits of disaggregation.

58. We are not persuaded that we should add even greater flexibility to the disaggregation option. We decline to adopt MFRI's suggestion that we allow C block licensees to retain the 15 MHz of spectrum

¹³⁷ See Airtel Petition at 1; Alpine Petition at 9; Cellexis Petition at 6; Cellnet Petition at 2; Christensen Petition at 1; ClearComm Petition at 6-18; CVI Wireless Petition at 1; Federal Network Petition at 1; Fox Communications Petition at 1; Koll Petition at 1; Leifer, Marter Petition at 1; Meretel Petition at 3; MFRI Petition at 4; NextWave Petition at 10-15; New Wave Petition at 1; One Stop Wireless Petition at 2; Prime Matrix Petition at 1; RFW Petition at 5; UCNI Petition at 2; URS Greiner Petition at 1; Wireless Nation Petition at 2; ClearComm Opposition at 2-4; Duluth PCS, et al. Opposition at 5-8; Polycell Opposition at 5-8; Third Kentucky Opposition at 2; ClearComm Reply at 3-6; Hyundai Reply at 4-7; Wireless Ventures Reply at 3; CX Systems *ex parte* filing at 1; Dorne & Margolin *ex parte* filing at 1. See also Hyundai Petition at 4-7; Christensen *ex parte* filing at 1; Cyber Sites *ex parte* filing at 1; Florida Power *ex parte* filing at 1; Kabbara *ex parte* filing at 1; LaBarge Clayco *ex parte* filing at 1; Leifer, Marter *ex parte* filing at 1; MJA *ex parte* filing at 1; OPM *ex parte* filing at 1; Specialty Teleconstructors *ex parte* filing at 1; Structure Consulting *ex parte* filing at 1; Xway *ex parte* filing at 1.

¹³⁸ See Communications Act § 309(j), 47 U.S.C. § 309(j).

¹³⁹ *Second Report and Order*, 12 FCC Rcd at 16,468 para. 65; see also Sprint Opposition at 4-5.

¹⁴⁰ Fidelity Capital Opposition at 4-5 (the present terms of the disaggregation option are fair). *But see* ClearComm Reply at 7 (Fidelity Capital's argument favoring private disaggregation overlooks the fact that the Commission can more efficiently redistribute the disaggregated spectrum).

¹⁴¹ NextWave Petition at 10-15 (no rational basis exists for the penalty because no rule has been violated and no default or bid withdrawal has occurred); ClearComm Petition at 6-18 (there is no equitable or legal justification for the penalty because disaggregating licensees willingly surrender a *pro rata* portion of spectrum); ClearComm Reply at 2-6 (by imposing a penalty on disaggregating licensees, the Commission's action is inconsistent with that of a reasonable commercial lender). See, e.g., Cellexis Petition at 6; Hyundai Petition at 4-7; Meretel Petition at 3; MFRI Petition at 4; New Wave Petition at 2; ClearComm Opposition at 2-4; Duluth PCS, et al. Opposition at 5-8; Polycell Opposition at 5-8; Hyundai Reply at 4-7.

adjacent to the F block if they also hold the F block license for the same BTA.¹⁴² Allowing certain C block licensees to disaggregate a different portion of spectrum would create a patchwork pattern of spectrum blocks in the reauction and would limit the opportunity for F block licensees to aggregate larger spectrum blocks by bidding on contiguous spectrum in the reauction. To promote consistency and simplicity in the reauction, we also reject McBride's request that we allow licensees the choice to disaggregate 10, 15, or 20 MHz of spectrum.¹⁴³ Allowing licensees to disaggregate different pieces of spectrum would create inefficiency in the market and would limit the potential for aggregation, thereby decreasing the value of spectrum in the reauction and delaying service to the public. Finally, we disagree with Alpine and Urban Communicators that disaggregation should be permitted on a BTA-by-BTA basis, rather than on an MTA-by-MTA basis.¹⁴⁴ As AirGate notes, disaggregation on an MTA-by-MTA basis will promote participation in the reauction because licensees are prohibited from selectively retaining 30 MHz of spectrum in only the most desirable BTAs.¹⁴⁵

59. NextWave and Cellexis argue that the build-out exception permitted under the amnesty option should be extended to licensees selecting the disaggregation option.¹⁴⁶ Under our modified approach, a build-out exception is unnecessary because licensees have the flexibility to determine which MTAs to retain and which to surrender. Nonetheless, as stated in the *Second Report and Order*, a build-out exception was never needed under the disaggregation option because, unlike the original amnesty option, the disaggregation option was never an "all-or-nothing" proposition.¹⁴⁷ Under the original amnesty option, a licensee was required to surrender all licenses except for those in MTAs in which it satisfied the build-out requirement. By comparison, disaggregation was permitted on an MTA-by-MTA basis, and so licensees were never compelled to disaggregate spectrum in all their MTAs.

60. Finally, we affirm the statement in the *Second Report and Order* that upon acceptance of the election notice, the disaggregated spectrum will be deemed returned to the Commission.¹⁴⁸ Further, after disaggregation, notwithstanding the fact that a disaggregating licensee will continue to hold in its possession a

¹⁴² MFRI Petition at 6.

¹⁴³ McBride Petition at 5. In addition, McBride claims that, by allowing the entry of more competitors through disaggregation, the Commission has frustrated expectations that a maximum of six PCS licenses would exist in each market (one each for blocks A through F). *Id.* at 2. McBride's argument is misplaced because Section 24.714 of the Commission's rules permit broadband PCS licensees in blocks A through F to disaggregate any amount of spectrum through the marketplace to qualified entities. 47 C.F.R. § 24.714. Moreover, it has always been the Commission's goal to encourage the widest participation in the wireless market, in accordance with Congress' mandate. *See* Communications Act § 309(j)(3)(B), 47 U.S.C. § 309(j)(3)(B).

¹⁴⁴ Alpine Petition at 9; Urban Communicators Petition at 9. Alpine offers no rationale for a BTA-by-BTA requirement, and Urban Communicators makes an unpersuasive claim that an MTA-by-MTA requirement provides little relief for licensees that hold licenses in only one MTA. A licensee disaggregating spectrum in its only MTA would receive all the benefits of disaggregation, including the forgiveness of half its outstanding debt.

¹⁴⁵ AirGate Opposition at 14-15; *see also Second Report and Order*, 12 FCC Rcd at 16,455 para. 38.

¹⁴⁶ NextWave Petition at 15-16; Cellexis Petition at 6. In addition, a number of parties argue generally that licensees should be allowed to retain licenses in which they have made significant build-out. *See* Airtel Petition at 1; Christensen Petition at 1; CVI Wireless Petition at 1; Koll Petition at 1; Leifer, Marter Petition at 1; URS Greiner Petition at 1; Dorne & Margolin *ex parte* filing at 1.

¹⁴⁷ *Second Report and Order*, 12 FCC Rcd at 16,455 para. 38.

¹⁴⁸ *Id.*, 12 FCC Rcd at 16,470 para. 73.

30 MHz license, that license will no longer authorize use of the 15 MHz of spectrum that is surrendered to the Commission but will continue to be valid with respect to the 15 MHz of spectrum that is retained.

IX. ELECTION PROCEDURES

A. Background

61. In the *Second Report and Order*, the Commission established January 15, 1998, as the deadline for C block licensees to elect to continue under the existing installment payment plan or to elect one of the three alternative options.¹⁴⁹ The Commission also required, *inter alia*, C block licensees whose elections would necessitate ongoing payments to execute any necessary financing documents pursuant to appropriate requirements and time frames established by the Bureau. The Commission specified procedures to be followed by licensees electing to continue under their existing notes or electing disaggregation, amnesty, or prepayment.

62. On January 7, 1998, we changed the election date to February 26, 1998, in order to allow licensees to submit their elections after final disposition of arguments raised on reconsideration.¹⁵⁰ On February 24, 1998, we issued an order changing the election date to 60 days after publication of this *Order on Reconsideration* in the *Federal Register*.¹⁵¹

B. Discussion

63. Moving the election date was an appropriate action given the large number of petitions for reconsideration filed in this proceeding. The revised deadline has provided sufficient time for us to respond to arguments raised on reconsideration so that licensees can be assured of regulatory certainty before making their elections. The postponement satisfies the requests of several parties that the date be delayed.¹⁵² We deny, however, other requests for a still longer postponement.¹⁵³ Licensees already have had several months in which to consider the options under the *Second Report and Order*, and we believe that 60 days after publication in the

¹⁴⁹ *Id.*, 12 FCC Rcd at 16,470 para. 70.

¹⁵⁰ *Election Date Order I* at para. 2.

¹⁵¹ *Election Date Order II*.

¹⁵² *See, e.g.*, Horizon Petition at 2 (requesting that the election deadline be moved to March 15, 1998); MFRI Opposition at 2; Third Kentucky Opposition at 2; RFW *ex parte* filing at 1-2. *But see* AirGate Opposition at 15-16 (the January 15, 1998, election date should be maintained).

¹⁵³ *See* NextWave Petition at 19-22 (before requiring licensees to make an election, the Commission should resolve control group issues, clarify the role of the Department of Justice, and adopt final World Trade Organization implementation rules); Polycell Opposition at 4-5 (same as NextWave); Duluth PCS, et al. Opposition at 4-5 (same as NextWave); Omnipoint Petition at 13-14 (before licensees relinquish valuable spectrum assets, the Commission should clarify its position on bankruptcy and its jurisdiction to engage in debt forgiveness); Omnipoint Opposition at 13-14 (before licensees are required to make irreversible elections, the Commission should issue final decisions on the note interest rate, the procedures for implementing resumption of payments, election filing procedures, the Commission's position on bankruptcy, and the role of the Department of Justice). MFRI asks that the election date be postponed until the bid signaling practices in the D, E, and F block auction have been resolved. MFRI Petition at 3. We note that on September 5, 1997, the Commission announced the implementation of click-box bidding, one purpose of which is to prevent bid signaling practices. *See* "FCC Announces Changes to Auction Procedures for the 800 MHz SMR Auction (Auction No. 16)," *Public Notice*, 12 FCC Rcd 13,449 (WTB 1997).

Federal Register will provide sufficient time for any reevaluation that may be necessary in light of the modifications we make in this Order.¹⁵⁴

64. We disagree with Omnipoint that NextWave should be required to make its election in advance of other C block licensees.¹⁵⁵ Omnipoint claims that NextWave is so dominant in the market that its election decision will have a dramatic impact on the relative value of choices made by the other licensees.¹⁵⁶ Omnipoint argues that, for example, other licensees might be reluctant to surrender spectrum if they knew NextWave was keeping its spectrum because reauction opportunities would be severely limited without the return of any NextWave licenses.¹⁵⁷ We agree with NextWave that all C block licensees should be treated equally, and we will not discriminate against one licensee in order to grant others a competitive advantage.¹⁵⁸

65. In the *Second Report and Order*, the Commission inadvertently omitted reference to the requirement that F block licensees execute fully and deliver timely all necessary financing documents. Consequently, we now clarify that F block licensees, as well as C block licensees, must execute and deliver all necessary financing documents pursuant to appropriate requirements and time frames as will be established by the Bureau in a forthcoming public notice on procedures. We modify the *Second Report and Order* to require both C and F block licensees that fail to execute fully and deliver timely to the Commission any required financing documents to pay on the payment resumption date all unpaid simple interest accruing from the date of license grant through the payment resumption date.¹⁵⁹ The Bureau's forthcoming public notice also will set forth updated election procedures for C block licensees, reflecting our modifications to the *Second Report and Order*.

X. REAUCTION

A. Timing

66. On January 7, 1998, we announced that the C block reauction would begin on September 29, 1998.¹⁶⁰ In light of the postponement of both the election date and the payment resumption date, as discussed above, it will be necessary to establish a new reauction date. We delegate to the Bureau the authority to establish the reauction date. We instruct the Bureau to issue a public notice announcing the new date at least three months in advance of the start of the reauction.

¹⁵⁴ See Northern Michigan Petition at 10 (the election date should be at least 60 days after the release of the order on reconsideration of the *Second Report and Order*).

¹⁵⁵ Omnipoint Petition at 6-8; Omnipoint Reply at 2-5.

¹⁵⁶ Omnipoint Petition at 6.

¹⁵⁷ *Id.* at 7-8.

¹⁵⁸ NextWave Opposition at 2.

¹⁵⁹ See *Second Report and Order*, 12 FCC Rcd at 16,471 para. 76 (requiring payment of all Suspension Interest, which included interest only through the previous payment resumption date of March 31, 1998).

¹⁶⁰ See *Election Date Order I* at para. 3. The Commission has proposed including the following licenses in the reauction: (1) all licenses representing the disaggregated spectrum surrendered to the Commission under the disaggregation option; (2) all licenses surrendered to the Commission by licensees taking advantage of the Commission's prepayment or amnesty options; and (3) all PCS C block licenses currently held by the Commission as the result of previous defaults. See *Further Notice*, 12 FCC Rcd at 16,474 para. 83.

67. CPCSI, a winning bidder for nine licenses in the C block auction whose license grants were subject to resolution of an Application for Review pending at the time of the release of the *Second Report and Order*, asks the Commission not to begin the reauction until final action on its Application for Review or, in the event no such action occurs, until the Pocket and GWI bankruptcy proceedings conclude.¹⁶¹ Because the Commission granted CPCSI's Application for Review on December 24, 1997,¹⁶² CPCSI's request is moot and there is no need to address the merits of CPCSI's request.

B. Eligibility

1. Background

68. The *Second Report and Order* specified that all entrepreneurs, all entities that had been eligible for and had participated in the original C block auction, and all current C block licensees would be eligible to bid in the reauction.¹⁶³ The Commission, however, created an exception for incumbent licensees: for a period of two years from the start date of the reauction, C block licensees (defined as qualifying members of the licensee's control group, and their affiliates) that opted for the disaggregation or prepayment options would be prohibited from reacquiring, either through the reauction or through any secondary market transaction, any spectrum or licenses that they surrendered to the Commission under those options.¹⁶⁴ Such licensees, however, would be permitted to bid on spectrum or licenses surrendered by other licensees, provided that such licensees were not affiliates.¹⁶⁵ Licensees electing the amnesty option would be eligible to bid for any and all licenses at the reauction, with no restrictions on post-auction acquisitions.¹⁶⁶

2. Discussion

69. The only reauction eligibility issues set forth in the *Second Report and Order* ripe for reconsideration in this phase of the proceeding are those related directly to whether and how a licensee's election of a particular payment option should affect its eligibility to participate in the reauction of, or reacquire an ownership interest in, surrendered spectrum. We defer to other phases of WT Docket No. 97-82 additional eligibility issues, including the qualifications of entities that have defaulted on payments to participate in the reauction¹⁶⁷ and the use of a "controlling interest" approach rather than "control group"

¹⁶¹ CPCSI Petition at 4-9. *But see* AirGate Opposition at 16 (encouraging the Commission to reject CPCSI's Application for Review in time for those licenses to be included in the reauction and arguing that the reauction should not be delayed by the bankruptcy proceedings).

¹⁶² *See* Carolina PCS I Limited Partnership Request for Waiver of Section 24.711(a)(2) of the Commission's Rules Regarding BTA Nos. B016, B072, B091, B147, B177, B178, B312, B335, and B436, Frequency Block C, *Memorandum Opinion and Order*, FCC 97-417 (released December 24, 1997).

¹⁶³ *Second Report and Order*, 12 FCC Rcd at 16,448 para. 22; *see also Further Notice*, 12 FCC Rcd at 16,474 para. 84.

¹⁶⁴ *Second Report and Order*, 12 FCC Rcd at 16,457, 16,470 paras. 42, 69.

¹⁶⁵ *Id.*, 12 FCC Rcd at 16,457 para. 42; *see also id.*, 12 FCC Rcd at 16,470 para. 69.

¹⁶⁶ *Id.*, 12 FCC Rcd at 16,462 para. 54.

¹⁶⁷ Comment is sought on this issue in the *Further Notice*, 12 FCC Rcd at 16,474 para. 84.

structures to determine financial size in the C block, as well as in all auctionable services.¹⁶⁸ We note that, in its comments filed in response to the *Further Notice*, Nextel Communications, Inc. challenges the Commission's ruling in the *Second Report and Order* that participation in the C block reauction is limited to qualified entrepreneurs.¹⁶⁹ In their petitions for reconsideration, Cellexis and RFW respond to Nextel's arguments and urge the Commission not to reconsider its decision.¹⁷⁰ We address Nextel's challenge here, notwithstanding the fact that Nextel's request was not filed as a petition for reconsideration of the *Second Report and Order*. We conclude that Nextel has not provided a convincing rationale for deviating from the public interest goals articulated by the Commission in the *Second Report and Order*.¹⁷¹ Consequently, we affirm the Commission's earlier ruling to limit eligibility for participation in the reauction to applicants meeting the current definition of "entrepreneur."¹⁷²

70. On reconsideration, we make a change to the eligibility requirements, which already has been discussed above, and also a clarification. As we stated previously, a licensee that elects the amnesty option for an MTA and opts to receive partial credit for down payments on its returned licenses in that MTA will not be eligible to reacquire those licenses through either reauction or any secondary market transaction for a period of two years from the start date of the reauction. This restriction also applies to the licensee's affiliates. Likewise, if a licensee disaggregates an MTA, neither it nor its affiliates may bid on the returned spectrum in the reauction or reacquire it through a secondary market transaction for two years after the start date of the reauction. Licensees that return licenses under the amnesty option or spectrum under the disaggregation option are not precluded from bidding in the reauction on licenses or spectrum returned by other non-affiliated licensees (or from later reacquiring those licenses or spectrum in post-auction transactions). We clarify that the term "affiliate" is defined by our competitive bidding rules in the *Part 1 Third Report and Order*.¹⁷³

¹⁶⁸ NextWave Petition at 20; *accord* Duluth PCS, et al. Opposition at 4-5; Polycell Opposition at 4-5; *cf.* AmeriCall Opposition at 7-8 (arguing that the 10 percent control group institutional investor rule, 47 C.F.R. § 24.709(b)(5)(i)(C), and the 25 percent nonattributable ownership limit, 47 C.F.R. § 24.709(b)(3)(i), should be eliminated because they unnecessarily restrict access to capital from noncontrolling investors). Comment is sought on this issue in *Part 1 Third Report and Order*; *see also* Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Proceeding, WT Docket No. 97-82, *Order, Memorandum Opinion and Order and Notice of Proposed Rule Making*, 12 FCC Rcd 5686, 5693 n.17, 5703 paras. 11, 28 (1997).

¹⁶⁹ *See* Comments filed by Nextel Communications, Inc. on November 13, 1997 at 7-9.

¹⁷⁰ *See* Cellexis Petition at 7-8; RFW Petition at 6-7. *See also* MFRI Reply at 6-7 (expressing concern that large incumbents advocate opening the C block reauction to all bidders); Wireless Ventures Reply at 4 (same).

¹⁷¹ *See Second Report and Order*, 12 FCC Rcd at 16,448 para. 22.

¹⁷² *Id.*

¹⁷³ 47 C.F.R. § 1.2110(b)(4); *Part 1 Third Report and Order* at paras. 29-30.

71. Several parties believe that we should revise our bidding eligibility requirements.¹⁷⁴ Sprint, for example, agrees with the Commission's decision to exclude C block licensees that choose disaggregation or prepayment from bidding on their surrendered spectrum at reauction, but contends that the Commission undermines the integrity of the auction process by not similarly limiting the ability of licensees that select the amnesty option.¹⁷⁵ Sprint believes that the lack of such a restriction will unjustly enrich licensees that select the amnesty option and then bid for the same spectrum at a likely discount.¹⁷⁶ NextWave, on the other hand, claims it is unreasonably discriminatory to preclude entities choosing disaggregation or prepayment from reacquiring their surrendered spectrum for two years while allowing entities choosing the amnesty option to reacquire their spectrum immediately either by reauction or through secondary markets.¹⁷⁷

72. We believe our modified approach addresses both these arguments. In response to NextWave, we note that licensees electing disaggregation and/or prepayment for one MTA now can choose to return licenses in other MTAs and bid on those licenses in the reauction. However, in response to Sprint, we point out that licensees electing amnesty for an MTA must forgo their entire down payment if they wish to bid on their returned licenses for that MTA. We believe that this cost sufficiently mitigates any concern of unjust enrichment.

XI. MISCELLANEOUS MATTERS

A. Cross Defaults

73. The *Second Report and Order* provided that if a licensee defaulted on a C block license, the Commission would not pursue cross default remedies with regard to the licensee's other licenses in the C or F blocks.¹⁷⁸ In other words, if a licensee defaulted on a given C block license but was meeting its payment obligations on its other C or F block licenses, the Commission would not declare the licensee to be in default with respect to those other C or F block licenses.¹⁷⁹ We disagree with CIRI that, by not imposing cross default remedies, we encourage auction participants to bid speculatively and then "cherry-pick" among the licenses they ultimately decide to keep by simply defaulting on the ones they no longer desire.¹⁸⁰ As explained earlier, we have implemented numerous procedures to safeguard against "cherry-picking." Moreover, we believe that by not imposing cross default remedies, we encourage regional financing. Even if a licensee's holdings in one region have proven unattractive to the financial market, the same licensee's holdings in other markets may be financially

¹⁷⁴ Compare Northern Michigan Petition at 6 (licensees electing disaggregation should be allowed to participate in the reauction) and Cellexis Petition at 6 (the C block reauction should be open to all non-defaulting C block licensees, irrespective of the chosen option) with Antigone/Devco Opposition at 5-6 (bidders electing any of the special relief options should be barred from participating in any future C block reauctions).

¹⁷⁵ Sprint Petition at 3-4.

¹⁷⁶ *Id.* at 2-3; Sprint Opposition at 3.

¹⁷⁷ NextWave Petition at 18-19; accord Polycell Opposition at 8-9; Duluth PCS, et al. Opposition at 8-9.

¹⁷⁸ *Second Report and Order*, 12 FCC Rcd at 16,472-73 para. 79.

¹⁷⁹ *Id.*

¹⁸⁰ See CIRI Petition at 6-8. But see AmeriCall Opposition at 8-11 ("Suffering default penalties is not an encouragement to 'cherry-pick.'").

sound. Therefore, we will not depart from the decision in the *Second Report and Order*. We note that licensees that ultimately default will continue to be subject to debt collection procedures.¹⁸¹

B. No Extension of C Block Relief to Other Licensees

74. We reject various requests to grant F block licensees the same relief provided to C block licensees.¹⁸² Cellular Holding contends that C and F block licensees should be treated similarly because: (1) both are licensed to provide broadband PCS; (2) they were granted their licenses within 7.5 months of one another; (3) Section 24.709 of the Commission's rules governs bidder eligibility for both blocks; (4) their market boundaries are identical; (5) they will have nearly the same amount of spectrum if C block licensees choose disaggregation; and (6) they both compete with larger, more experienced competitors that received a head-start.¹⁸³ Cellular Holding, however, ignores the fact that C and F block licensees are not similarly situated with respect to the most relevant factor -- the need for financial relief.

75. After careful review, the Commission determined in the *Second Report and Order* that "the nature and extent of any financing difficulties faced by the C block licensees appear to be different from any such problems facing entrepreneurs in the F block."¹⁸⁴ C block prices were higher, on average, than F block prices.¹⁸⁵ We disagree with several parties that argue that the Commission's explanation in the *Second Report and Order* fails to justify disparate treatment.¹⁸⁶ The difficulties in financing the unexpectedly high prices bid in the C block auctions is a sufficiently distinguishing basis for limiting relief to C block licensees. As further justification, we agree with AmeriCall that the C block situation was the result of a unique set of mostly unpredictable events, including litigation and resulting licensing delays and the lack of a simultaneous non-entrepreneur auction that could have been used to ease price pressures.¹⁸⁷

76. The need for C block relief was due to exceptional and urgent circumstances, and because it is essential to maintain the integrity of the auction process, only the most exigent situation would cause us to offer such relief. Even in addressing the C block financing situation, the Commission provided options that offered only limited relief so as to be fair to bidders that withdrew from the auction. We therefore are not persuaded by Central Oregon's claim that F block licensees should be granted relief because A, B, and C block licensees have a competitive advantage given their earlier licensing date and their larger amounts of spectrum.¹⁸⁸ We also reject

¹⁸¹ 47 C.F.R. § 1.2110(f)(4)(iv).

¹⁸² Central Oregon Petition at 2-4; Cellular Holding Petition at 2-5; Duluth PCS, et al. Opposition at 10; Polycell Opposition at 10; Eldorado Reply at 2-4.

¹⁸³ Cellular Holding Petition at 2-3.

¹⁸⁴ *Second Report and Order*, 12 FCC Rcd at 16,447 para. 20.

¹⁸⁵ See "D/E/F Band PCS Auction Results in Lower Spectrum Prices But Another Win for CDMA Proponents," U.S. Telecommunications, SBC Warburg Inc. (January 28, 1997) (D, E, and F spectrum prices 75 percent lower than C band auction); Donaldson, Lufkin & Jenrette, *The Wireless Communications Industry* (Spring 1997) at 20 ("D, E and F Auction Prices Surprisingly Low").

¹⁸⁶ See Central Oregon Petition at 2-4; Omnipoint Opposition at 12; Eldorado Reply at 3-4.

¹⁸⁷ AmeriCall Opposition at 3-4. See also NextWave Reply at 3.

¹⁸⁸ Central Oregon Petition at 2-4.

Omnipoint's argument that C block options should be available to entrepreneurs with D, E, and F block licenses because C block relief will change the relative values of those licenses.¹⁸⁹ These arguments do not present sufficiently compelling reasons to apply the "extraordinary procedures" we adopted for C block licensees to D, E, and F block licensees.¹⁹⁰ In addition, CONXUS, the only party to address this issue, argues that narrowband PCS entities should receive relief comparable to that afforded C block licensees because they compete in the same consumer and financial markets and face similar circumstances.¹⁹¹ The record in this reconsideration proceeding is insufficient to adopt global changes affecting narrowband PCS entities, but we note that payment matters for these entities are currently being examined in another proceeding before the Commission.¹⁹²

C. Issues Addressed in Other Proceedings or Requiring Action by Congress

77. A number of parties make requests involving issues either that will be, or have been, addressed in other proceedings or that require action by Congress. For example, several petitioners urge the Commission to reduce the interest rate for C block installment payments.¹⁹³ The Bureau will address this issue in a forthcoming order. With respect to Northern Michigan's request that we allow commercial lenders to acquire a security interest in licenses, we note that we previously resolved the issue in another proceeding.¹⁹⁴

78. TAP encourages the Commission to seek Congressional authority to award tax certificates to entities that provide investment capital to C block licensees.¹⁹⁵ Section 309(j)(4)(D) of the Communications Act mandates that, in seeking to ensure that designated entities are "given the opportunity to participate in the provision of spectrum-based services," the Commission shall "consider the use of tax certificates."¹⁹⁶ By allowing a tax deferral of the gain realized on an investment, tax certificates provide a significant means of enhancing the value of an investment in an enterprise, and we believe that a tax certificate program for spectrum-based services would be as beneficial to the wireless industry as the Commission's tax certificate programs were for the

¹⁸⁹ Omnipoint Petition at 9-10; Omnipoint Opposition at 11-12.

¹⁹⁰ *Second Report and Order*, 12 FCC Rcd at 16,437-38 para. 2.

¹⁹¹ CONXUS Petition at 3-5; CONXUS Opposition at 2-8; CONXUS Reply at 4-10. CONXUS claims its experience is similar to the C block situation, including delays in market entry, its problems in raising capital, high bid amounts, a post-auction rule change, and the lack of a simultaneous non-entrepreneur auction.

¹⁹² *Se*Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Narrowband PCS, PP Docket No. 93-253, *Report and Order and Further Notice of Proposed Rulemaking*, 12 FCC Rcd 12,972 (1997).

¹⁹³ Northern Michigan Petition at 8-9 (interest rate for C block licensees should be standardized at 6.5 percent); Alpine Petition at 11-12 and Alpine Reply at 6-8 (interest rate should be reduced to 5.56 percent); McBride Petition at 4 (the Commission should set the interest rate uniformly at 5.75 percent).

¹⁹⁴ Northern Michigan Petition at 8. *See also* McBride Petition at 4. Our position on this issue was addressed in Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Proceeding, WT Docket No. 97-82, *Order, Memorandum Opinion and Order and Notice of Proposed Rule Making*, FCC 97-60 (released February 28, 1997) at para. 12 ("debtors may grant to other parties a subordinated security interest in the proceeds of an authorized assignment or transfer of the license to a third party, provided however that any such security interest shall be subordinated to and in no way inconsistent with the Commission's security interest in the license").

¹⁹⁵ TAP Reply at 4-10. *See also* McBride Petition at 5.

¹⁹⁶ Communications Act § 309(j)(4)(D), 47 U.S.C. § 309(j)(4)(D).

broadcast and cable industries.¹⁹⁷ However, in view of Congress' repeal in 1995 of Section 1071 of the IRS Code,¹⁹⁸ which granted the Commission authority to use tax certificates to promote Commission policies, we believe that legislative action would be necessary before we could provide such tax relief. Accordingly, we urge Congress to review the positive impact of the Commission's previous tax certificate programs and to grant us the authority to establish a similar program for wireless enterprises, which we believe would promote competition in the telecommunications industry by encouraging investment in new services.

XII. PROCEDURAL MATTERS AND ORDERING CLAUSES

A. Supplemental Final Regulatory Flexibility Analysis

79. The Supplemental Final Regulatory Flexibility Analysis, pursuant to the Regulatory Flexibility Act, 5 U.S.C. § 604, is attached at Appendix C.

B. Paperwork Reduction Act Analysis

80. This Order contains a modified information collection that was submitted to the Office of Management and Budget requesting emergency clearance under the Paperwork Reduction Act of 1995.

C. Ordering Clauses

81. Accordingly, IT IS ORDERED that, pursuant to the authority granted in 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), the petitions for reconsideration filed in response to the *Second Report and Order* are GRANTED IN PART and DENIED IN PART, as provided herein.

82. IT IS FURTHER ORDERED that, pursuant to the authority granted in 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), the modifications to the Commission's rules, as described herein and in Appendix B, ARE HEREBY ADOPTED. These modifications shall become effective 60 days after publication of this *Order on Reconsideration of the Second Report and Order* in the *Federal Register*.

83. IT IS FURTHER ORDERED that, pursuant to 47 U.S.C. § 155(c) and 47 C.F.R. § 0.331, the Chief of the Wireless Telecommunications Bureau IS GRANTED DELEGATED AUTHORITY to prescribe and set forth procedures for the implementation of the provisions adopted herein.

84. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this *Order on Reconsideration of the Second Report and Order*, including the Supplemental Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

¹⁹⁷ See TAP Reply at 5-6 (citing Erwin G. Krasnow, "A Case for Minority Tax Certificates," *Broadcasting & Cable*, December 15, 1997, at 80) (the Commission's tax certificate program greatly increased minority ownership of broadcast and cable entities and "gave minority entrepreneurs increased access to the market for broadcast and cable properties, gave them a chip at the bargaining table and opened doors at financial institutions that had been closed").

¹⁹⁸ Pub. L. No. 104-7, § 2, 109 Stat. 93, 93-94 (1995).

Magalie Roman Salas
Secretary

APPENDIX A

Petitions for Reconsideration

1. Airtel Communications, Inc. ("Airtel")
2. Alpine PCS, Inc. ("Alpine")
3. AmeriCall International, L.L.C. ("AmeriCall")
4. Carolina PCS I Limited Partnership ("CPCSI")
5. Cellexis International, Inc. ("Cellexis")
6. Cellnet ("Cellnet")
7. Cellular Holding, Inc. ("Cellular Holding")
8. Central Oregon Cellular, Inc. ("Central Oregon")
9. Christensen Engineering & Surveying ("Christensen")
10. ClearComm, L.P. ("ClearComm")
11. CONXUS Communications, Inc. ("CONXUS")
12. Cook Inlet Region, Inc. ("CIRI")
13. CVI Wireless
14. DiGiPH PCS, Inc. ("DiGiPH")
15. Federal Network
16. Fox Communications
17. General Wireless, Inc. ("GWI")
18. Horizon Personal Communications, Inc. ("Horizon")
19. Hyundai Electronics America ("Hyundai")
20. Koll Telecommunication Services ("Koll")
21. Leifer, Marter Architects ("Leifer, Marter")
22. McBride, Vincent ("McBride")
23. Meretel Communications, L.P. ("Meretel")
24. MFRI Incorporated ("MFRI")
25. NextWave Telecom Inc. ("NextWave")
26. New Wave Inc. ("New Wave")
27. Northern Michigan PCS Consortium L.L.C. and Wireless 2000, Inc. ("Northern Michigan")
28. Omnipoint Corporation ("Omnipoint")
29. One Stop Wireless of America, Inc. ("One Stop Wireless")
30. OnQue Communications, Inc. ("OnQue")
31. Prime Matrix Wireless Communications ("Prime Matrix")
32. RFW PCS Inc. ("RFW")
33. Sprint Corporation ("Sprint")
34. United Calling Network, Inc. ("UCNI")
35. Urban Communicators PCS Limited Partnership ("Urban Communicators")
36. URS Greiner, Inc. ("URS Greiner")
37. Wireless Nation, Inc. ("Wireless Nation")

Oppositions

1. AirGate Wireless, L.L.C. ("AirGate")
2. ALLTEL Communications, Inc. ("ALLTEL")
3. AmeriCall International, L.L.C. ("AmeriCall")
4. Antigone Communications Limited Partnership and PCS Devco, Inc. ("Antigone/Devco")
5. AT&T Wireless Services, Inc. ("AT&T")
6. ClearComm, L.P. ("ClearComm")
7. CONXUS Communications, Inc. ("CONXUS")
8. Duluth PCS, Inc., St. Joseph PCS, Inc., and West Virginia PCS, Inc. ("Duluth PCS, et al.")
9. Fidelity Capital
10. MFRI Incorporated ("MFRI")
11. NextWave Telecom Inc. ("NextWave")
12. Northcoast Communications, L.L.C. ("Northcoast")
13. Omnipoint Corporation ("Omnipoint")
14. Polycell Communications, Inc. ("Polycell")
15. PrimeCo Personal Communications, L.P. ("PrimeCo")
16. Sprint Corporation ("Sprint")
17. Third Kentucky PCS "Third Kentucky")

Replies to Oppositions

1. Alpine PCS, Inc. ("Alpine")
2. Cellexis International, Inc. ("Cellexis")
3. ClearComm, L.P. ("ClearComm")
4. CONXUS Communications, Inc. ("CONXUS")
5. CX Systems Int'l, Inc. ("CX Systems")
6. Eldorado Communications, L.L.C. ("Eldorado")
7. Federal Network
8. Frontier Corporation ("Frontier")
9. Hyundai Electronics America ("Hyundai")
10. MFRI Incorporated ("MFRI")
11. NextWave Telecom Inc. ("NextWave")
12. Omnipoint Corporation ("Omnipoint")
13. RFW PCS Inc. ("RFW")
14. Telecommunications Advocacy Project ("TAP")
15. Third Kentucky Cellular Corp. ("Third Kentucky")
16. Wireless Ventures, Inc. ("Wireless Ventures")

Ex Parte Filings

1. AirGate Wireless, L.L.C. ("AirGate"), February 9, 1998
2. AmeriCall International, L.L.C. ("AmeriCall"), March 12, 1998
3. Christensen Engineering & Surveying ("Christensen"), December 19, 1997
4. ClearComm, L.P. ("ClearComm"), February 23, 1998
5. ClearComm, L.P. ("ClearComm"), March 13, 1998
6. Congressman Gary L. Ackerman, January 15, 1998
7. Congressman Xavier Becerra, February 3, 1998
8. Congresswoman Sue W. Kelly, December 31, 1997
9. Congressman Albert R. Wynn, February 9, 1998
10. CX Systems Int'l, Inc. ("CX Systems"), December 10, 1997
11. Cyber Sites, L.L.C. ("Cyber Sites"), December 1, 1997
12. Datacomm Research Company, February 20, 1998
13. Dorne & Margolin, December 1, 1997
14. Florida Power Corporation ("Florida Power"), December 19, 1997
15. Gilder Technology Group, Inc., February 16, 1998
16. Joint filing by 43 companies, February 20, 1998
17. Kabbara Engineering ("Kabbara"), December 26, 1997
18. LaBarge Clayco Wireless, L.L.C. ("LaBarge Clayco"), December 24, 1997
19. Leifer, Marter Architects ("Leifer, Marter"), December 17, 1997
20. Members of the Congressional Hispanic Caucus, February 5, 1998
21. MJA Communications Corp. ("MJA"), December 22, 1997
22. New Wave Inc. ("New Wave"), January 20, 1998
23. New Wave Inc. ("New Wave"), February 17, 1998
24. NextWave Telecom Inc. ("NextWave"), January 21, 1998
25. OPM USA, Inc. ("OPM"), December 23, 1997
26. Praxis Telecom, January 26, 1998
27. Prudential Securities Inc., February 26, 1998
28. R&S PCS, Inc., February 11, 1998
29. RFW PCS Inc. ("RFW"), December 23, 1997
30. Senator Barbara Boxer, February 13, 1998
31. Senators Richard H. Bryan and Harry Reid, January 29, 1998
32. Senator Thomas Daschle, February 11, 1998
33. Senator J. Robert Kerrey, February 12, 1998
34. Specialty Teleconstructors Inc. ("Specialty Teleconstructors"), December 19, 1997
35. Structure Consulting Group ("Structure Consulting"), December 22, 1997
36. Wireless Nation, Inc. ("Wireless Nation"), January 23, 1998
37. Xway, Inc. ("Xway"), December 16, 1997
38. 2001 Personal Communication, Inc., January 8, 1998

APPENDIX B**Revised Rules**

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

PART 1 – PRACTICE AND PROCEDURE

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

Authority: 15 U.S.C. 79 *et seq.*; 47 U.S.C. 151, 154(i), 154(j), 155, 225, and 303(r), unless otherwise noted.

2. Section 1.2110 is amended by revising paragraph (f)(4)(ii), (iii), (iv) to read as follows:

§ 1.2110 Designated Entities

* * * * *

(f) * * *

(4) * * *

(i) * * *

(ii) If any licensee fails to make the required payment at the close of the 90-day period set forth in subsection (i) above, the licensee will automatically be provided with a subsequent 90-day grace period, except that no subsequent automatic grace period will be provided for payments from C or F block licensees that are not made within 90 days of the payment resumption date for those licensees, as explained in Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, *Order on Reconsideration of the Second Report and Order*, WT Docket No. 97-82, FCC 98-46 (rel. Mar. 24, 1998). * * *

(iii) If an eligible entity making installment payments is more than one hundred and eighty (180) days delinquent in any payment, it shall be in default, except that C and F block licensees shall be in default if their payment due on the payment resumption date, referenced in subsection (ii) above, is more than ninety (90) days delinquent.

(iv) Any eligible entity that submits an installment payment after the due date but fails to pay any late fee, interest or principal at the close of the 90-day non-delinquency period and subsequent automatic grace period, if such a grace period is available, will be declared in default, its license will automatically cancel, and will be subject to debt collection procedures.

* * * * *

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

PART 24 – PERSONAL COMMUNICATIONS SERVICES

3. The authority citation for Part 24 continues to read as follows:

Authority: 47 U.S.C. 154, 301, 302, 303, 309 and 332, unless otherwise noted.

4. Section 24.709 is amended by revising paragraph (b)(9)(i), (ii) (A) - (B) to read as follows:

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

(a) * * *

(b) * * *

(9) *Special rule for licensees disaggregating or returning certain spectrum in frequency block C.*

(i) In addition to entities qualifying under this section, any entity that was eligible for and participated in the auctions for frequency block C, which began on December 18, 1995, and July 3, 1996, will be eligible to bid in a reauction of block C spectrum surrendered pursuant to Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, *Second Report and Order and Further Notice of Proposed Rule Making*, WT Docket No. 97-82, 12 FCC Rcd 16,436 (1997), as modified by the *Order on Reconsideration of the Second Report and Order*, WT Docket No. 97-82, FCC 98-46 (rel. Mar. 24, 1998).

(ii) The following restrictions will apply for any reauction of frequency block C spectrum conducted after March 24, 1998:

(A) Applicants that elected to disaggregate and surrender to the Commission 15 MHz of spectrum from any or all of their frequency block C licenses, as provided in Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, *Second Report and Order and Further Notice of Proposed Rule Making*, WT Docket No. 97-82, 12 FCC Rcd 16,436 (1997), as modified by the *Order on Reconsideration of the Second Report and Order*, WT Docket No. 97-82, FCC 98-46 (rel. Mar. 24, 1998), will not be eligible to apply for such disaggregated spectrum until 2 years from the start of the reauction of that spectrum.

(B) Applicants that surrendered to the Commission any of their frequency block C licenses, as provided in Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, *Second Report and Order and Further Notice of Proposed Rule Making*, WT Docket No. 97-82, 12 FCC Rcd 16,436 (1997), as modified by the *Order on Reconsideration of the Second Report and Order*, WT Docket No. 97-82, FCC 98-46 (rel. Mar. 24, 1998), will not be eligible to apply for the licenses that they surrendered to the Commission until 2 years from the start of the reauction of those licenses if they elected to apply a credit of 70% of the down payment they made on those licenses toward the prepayment of licenses they did not surrender.

(C) * * *

* * * * *

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

In the Matter of)
)

Amendment of the Commission's) WT Docket No. 97-82
Rules Regarding Installment Payment)
Financing For Personal Communications)
Services (PCS) Licensees)

SECOND REPORT AND ORDER AND
FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: September 25, 1997

Released: October 16, 1997

Comments Due: November 13, 1997

Reply Comments Due: November 24, 1997

By the Commission: Chairman Hundt affirming and dissenting in part and issuing a statement;
Commissioner Quello issuing a separate statement at a later date,
Commissioners Ness and Chong issuing separate statements.

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I. INTRODUCTION

1. By this *Second Report and Order*, we order resumption of installment payments for the broadband Personal Communications Services (PCS) C and F blocks, with the payment deadline reinstated as of March 31, 1998. We adopt disaggregation, amnesty, and prepayment options designed to assist C block licensees experiencing financial difficulties to build systems that will promote competition or surrender spectrum to the Commission for reauction. These provisions will create opportunities to provide service to the public while maintaining the fairness and integrity of our auctions program. We seek comment on proposed changes to our C block rules to govern the reauction of surrendered spectrum in the C block in the accompanying *Further Notice of Proposed Rule Making*.

II. EXECUTIVE SUMMARY

2. The extraordinary procedures we adopt today apply to all C block licensees. In considering the many options presented, which range from merely enforcing our existing rules to completely rewriting our rules after the auction closed, we have considered and balanced the following policy goals.

- Maintaining the integrity of the Commission's rules and auction processes.

- Ensuring fairness to all participants in our auctions, including those who won licenses in the auctions and those who did not, as well as licensees in competing services.
- Resolving issues now in a manner that does not merely postpone the problem.
- Complying with the mandate of our auction authority in Section 309(j) of the Communications Act of 1934, as amended ("Communications Act"), that we ensure "that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses . . ." ¹
- Promoting economic opportunity and competition in the marketplace. ²

3. Maintaining the integrity of our rules and auction processes is an essential goal. As Senator John McCain observed on September 18, the Balanced Budget Act mandates a series of future spectrum auctions, and the Commission's decisions on C block must not "adversely impact the integrity of the auction process or the confidence that parties would have in the stability of the Commission's auction rules." ³ We are not looking to maximize revenues, but to maintain the integrity for all of our future auctions and to ensure that all participants are treated fairly and impartially. These elements are essential if the financial community is to have the stability it requires to fund the new communications enterprises and services for which this spectrum should be used.

4. We conclude that it is in the public interest to immediately adopt provisions to facilitate use of C block licenses without further regulatory or marketplace delay. Certainty is beneficial to all C block licensees and will foster the increased competition we expect in the marketplace. Many small licensees bid amounts comparable to those of other PCS spectrum, yet are being delayed in acquiring financing for their construction while these matters are pending before the Commission. Some of the larger licensees also find that they can move forward only when we settle the regulatory issues. Our actions today are intended to restore regulatory certainty to the marketplace.

5. Consistent with our goals, we have rejected a number of restructuring proposals that would have dramatically changed the amount bid for licenses, and instead offer relief that is more modest in nature. Our menu approach is intended to provide options to facilitate the rapid

¹ See 47 U.S.C. § 309(j)(3)(B). See also 47 U.S.C. § 309(j)(4)(D).

² See 47 U.S.C. §§ 309(j)(3)(A), (B).

³ The Honorable John McCain, *ex parte* letter, September 18, 1997.

introduction of service to the public, while recognizing that ultimately the decisions concerning competition and services appropriately are marketplace decisions and should not be determined by government intervention. Our decisions are intended to be fair to current C block licensees, to bidders who were not successful in their attempts to obtain licenses in this spectrum, and to the public desiring new and innovative competitive services.

6. On March 31, 1997, in response to a joint request from several C block licensees seeking to modify their existing installment payment obligations, and because of other debt collection issues, the Wireless Telecommunications Bureau ("Bureau") suspended the deadline for payment of all C block installment payments.⁴ On April 28, 1997, the Bureau extended the suspension to F block licensees.⁵ We rescind the suspension of payments, effective March 31, 1998. On that date, all F block licensees must resume payments under their original Installment Payment Plan Note (hereinafter in the singular, "Note" and in the plural, "Notes"). Any C block licensee may elect to continue making payments under its Note(s) or may elect one of three options described below. These three options are designed to provide limited relief for C block licensees having difficulty meeting their financial obligations to the Commission while maintaining the fairness and integrity of our auctions program. The election must be made no later than January 15, 1998. Any C block licensee that fails to elect on a timely basis either to continue under its existing Note or one of the available options, will be held to strict adherence with the terms of its existing Note(s). The options are as follows:

- **Disaggregation.** Any C block licensee may elect to disaggregate one-half of its spectrum (15 MHz of its 30 MHz) and surrender such spectrum to the Commission for reauction. A licensee must disaggregate spectrum for *all* of the Basic Trading Area (BTA) licenses it holds within any Major Trading Area (MTA), but need not disaggregate the licenses it holds in other MTAs. In return, the licensee will have the proportionate amount, *i.e.*, 50%, of its down payment on such licenses forgiven. Fifty percent of the down payment for those licenses will be applied towards the debt for the retained spectrum; the licensee will not get a refund or credit of the other 50% of its deposit. The licensee will be prohibited from rebidding for this spectrum, or otherwise acquiring it in the secondary market, for two years from the date of the start of the reauction. C block licensees electing this option will repay over eight equal payments (beginning with the payment due on March 31, 1998) all interest that has accrued and was unpaid due to the payment suspension, adjusted to reflect the reduction in debt obligation. Any prior installment payments made will be credited in full against those amounts.

⁴ See Installment Payments for PCS Licenses, *Order*, DA 97-649 (rel. March 31, 1997).

⁵ See "FCC Announces Grant of Broadband Personal Communications Services D, E, and F Block Licenses," *Public Notice*, DA 97-883 (rel. April 28, 1997) at 2.

● **Amnesty.** Any C block licensee may surrender *all* of its licenses, and in return will have all of its outstanding C block debt forgiven. The single exception to the "all-or-nothing" requirement for a grant of amnesty applies to licensees that met or exceeded the five-year build-out requirement by September 25, 1997. Those licensees meeting this build-out exception may retain their built-out BTAs, but must also keep the other BTAs in the MTA where the build-out requirement has been met. The licensee choosing the amnesty option will not have its down payment amounts returned. All installment payments made will be refunded or applied to previously accrued interest for retained markets, subject to applicable federal debt collection laws. The licensee may bid on any of its surrendered licenses or any other licenses in the reauction, and there is no restriction on after-market acquisitions.

● **Prepayment.** Any C block licensee may use an amount equal to 70% of its total down payments for the licenses that it wishes to surrender as a credit toward the prepayment of any of its licenses, at face value of the Note. Subject to the amounts available for license prepayment, a licensee must pay off the outstanding principal debt obligations for all BTA licenses it holds within any single MTA, up to the amount of funds it has available. A licensee may also use additional monies (hereinafter referred to as "new money"), to prepay as many of its Notes as it desires. Installment payments made will be available to the licensee as a credit towards prepaying any of its Notes. Interest accrued from the date of the conditional license grant through the Election Date will be forgiven. Licenses that are not prepaid in accordance with this option must be surrendered to the Commission for reauction, in exchange for the Commission's forgiveness of the corresponding debt and permitting prepayment on other licenses under these terms. The remaining 30% of the down payments plus any unapplied portions of the first 70% of the down payments will not be returned or available to licensees. The licensee may not rebid in the reauction for any of the licenses that the licensee relinquishes, and for a period of two years from the start date of the reauction may not otherwise acquire any such licenses in the secondary market.

7. These options will lead to a reauction of C block spectrum that will be open to all entrepreneurs, all applicants to the original C block auction,⁶ and, with the exceptions we outline under the disaggregation and prepayment options, all current C block licensees. In the *Further Notice of Proposed Rule Making*, the Commission seeks comment on proposed rules and procedures for the reauction of any available C block licenses, including auction design, activity requirements, minimum opening bids for each license, application and payment procedures, procedures for filing petitions to deny, and proposals regarding the use of bidding credits.

⁶ *But see*, paragraph 84, *infra* (where we seek comment on restricting participation in the reauction by any entity that has defaulted on any FCC auction payment).

III. BACKGROUND

8. Incentives to ensure participation by small businesses and other "designated entities" were required by Congress when enacting our authority to conduct auctions, as set forth in Section 309(j) of the Communications Act.⁷ In accordance with its statutory mandate, in the *Competitive Bidding Fifth Report and Order*, the Commission established a variety of incentives to encourage small businesses to participate in the auction of C block 30 MHz and F block 10 MHz broadband PCS licenses.⁸ Provisions to promote participation by small businesses in broadband PCS included limiting eligibility in the initial C and F block auctions to entrepreneurs and small businesses, offering varying bidding credits, and offering installment payment plans. The installment payment plan for C block permitted licensees that qualified as small businesses to pay 90% of the bid price over a period of ten years, with interest only paid for the first six years and interest and principal for the remaining four.⁹ Installment payments for small business F block licensees were limited to 80% of the bid price over ten years, and payments consist of interest only for the first two years, then interest and principal for the remaining eight years.¹⁰

9. On May 6, 1996 and July 16, 1996, the Commission concluded its broadband PCS C block auctions. Ninety bidders (including the C block reauction¹¹ winners) won 493 C block licenses. The broadband PCS D, E, and F block auction concluded on January 14, 1997, and

⁷ 47 U.S.C. §§ 309(j)(4)(A), (D).

⁸ See Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Fifth Report and Order*, 9 FCC Rcd 5532 (1994) (" *Competitive Bidding Fifth Report and Order* "). Rules were amended in: Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Order on Reconsideration*, 9 FCC Rcd 4493 (1994); Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Fifth Memorandum Opinion and Order*, 10 FCC Rcd 403 (1994) (" *Competitive Bidding Fifth Memorandum Opinion and Order* "); Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Sixth Report and Order*, 10 FCC Rcd 136 (1995). See also Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS, Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, WT Docket No. 96-59, *Report and Order*, 11 FCC Rcd 7824 (1996); Amendment of the Commission's Cellular/PCS Cross Ownership Rule, GN Docket No. 90-314, *Report and Order*, 11 FCC Rcd 7824 (1996).

⁹ 47 C.F.R. § 24.711(b)(3). In addition, there were other installment payment options available for bidders qualifying as entrepreneurs. See 47 C.F.R. §§ 24.711(b)(1)-(3). All bidders in the C block auction, however, qualified as small businesses.

¹⁰ 47 C.F.R. § 24.716(b)(3). Entrepreneurs were also eligible for less favorable installment payment terms. See 47 C.F.R. §§ 24.711(b)(1)-(2).

¹¹ See "18 Defaulted Licenses to be Reauctioned; Reauction to Begin July 3," *Public Notice*, DA 96-872 (rel. May 30, 1996).

88 bidders won 491 F block licenses.¹² Net high bids¹³ received for C block 30 MHz licenses, including C block reauction bids, totalled approximately \$10.2 billion; net high bids received for F block 10 MHz licenses totalled \$642.3 million.¹⁴

10. While many C block licenses were purchased for prices below or comparable to those for the A or B blocks, a handful of large bidders bid extremely high prices per pop for major markets, even adjusted for the value of the government financing we provide. The aggregate results of the C block auction, when measured in average price per pop paid, are markedly higher than the other PCS bands, even after adjusting for financing, and even though many individual small licensees bid prices comparable to those paid for the A and B block PCS licenses.¹⁵

11. Earlier this year, the Commission received several requests, from both C and F block licensees, for relief associated with the installment payment program.¹⁶ Some licensees sought relatively modest relief (*e.g.*, changing from quarterly to annual payments).¹⁷ Other licensees sought more dramatic restructuring.¹⁸ These requests described a range of apparent difficulties in accessing the capital markets, which many licensees argue were exacerbated by the relatively high prices per MHz per population ("per pop") paid for some of the C block licenses.

12. When formulating its original auction rules in 1994, the Commission considered the possibility of debt restructuring and observed that "if we allow a grace period or restructuring of the payment plan, we would follow our procedures . . . under the Commission's existing

¹² Bids were not submitted for two F block licenses, the Kokomo-Logansport, IN, BTA (B233) and the Kennewick-Pasco, MT, BTA (B228).

¹³ "Net high bid" means the total amount bid less any bidding credit.

¹⁴ Total bids received for all three 10 MHz licenses in the D, E and F block auction were \$2.5 billion.

¹⁵ See June 23, 1997, BT Wolfensohn Report in " *NextWave TeleCom Inc., Overview of Telecommunications Financing Considerations* ", attached to NextWave *ex parte* letter, June 23, 1997, and May 6, 1997, *Merrill Lynch High Yield Telecommunications Industry Update*.

¹⁶ See "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 Public Notice* "). See also Letter from Thomas Gutierrez, Esq., *et al* to Michele C. Farquhar, Esq., Chief, Wireless Telecommunications Bureau (March 13, 1997).

¹⁷ See, *e.g.*, NextWave Comments at 4.

¹⁸ See, *e.g.*, Fortunet Reply Comments at 9.

debt collection rules and procedures." ¹⁹ We also said that in deciding whether to grant grace period requests "or to pursue other measures," we would consider a variety of factors, including payment history, how far into the license term the default occurs, and the level of build-out. ²⁰ We noted that if a grace period was granted, a licensee could use that time to "maintain its construction efforts and/or operations while seeking funds to continue payments or seek from the Commission a restructured payment plan." ²¹ When we later revisited the issue of licensee default, we stated that we would approve debt restructuring whereby a licensee and its lenders agree that in the event of licensee default on its installment payments, the lenders will cure the default by assuming the payments (barring assumption of license control). ²² Aside from these statements, the Commission has not discussed debt restructuring. ²³

13. *The Notice of Proposed Rule Making* to revise our Part 1 auction rules sought comment on several topics related to auction installment debt. ²⁴ For example, we asked whether we should offer higher bidder credits in lieu of installment payments, or whether we should require, in an effort to reduce the likelihood of defaults, supplementation of the upfront payment during an auction when the cumulative high bids exceed some multiple of the upfront payment. ²⁵ We sought comment on (1) imposing late payment fees on installment payments;

¹⁹ Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Second Report and Order*, 9 FCC Rcd 2346, 2389 (1994) (" *Competitive Bidding Second Report and Order* "). The Commission's current rules provide that any licensee whose installment payment is more than 90 days past due shall be in default, unless a "grace period" request is filed. See 47 C.F.R. § 1.2110(e)(4). In anticipation of default on one or more installment payments, a licensee may request that the Commission permit a three to six month grace period, during which no installment payments need be made. To obtain such relief, licensees may file financial information (e.g., income statements or balance sheets) to demonstrate financial distress. Interest that accrues during the pendency of a grace period is amortized over the remaining term of the license. 47 C.F.R. § 1.2110(e)(4)(ii). Finally, these rules provide that following the expiration of any grace period without successful resumption of payment, or upon denial of a grace period request, or upon default with no such request submitted, the license of an entity paying on an installment basis is cancelled automatically and the Commission will initiate debt collection procedures. 47 C.F.R. § 1.2110(e)(4)(iii).

²⁰ *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2391. In considering whether to grant a request for a grace period, the Commission may consider, among other things, the licensee's payment history, including whether the licensee has defaulted before, how far into the license term the default occurs, the reasons for default, whether the licensee has met construction build-out requirements, the licensee's financial condition, and whether the licensee is seeking a buyer under an authorized distress sale policy. 47 C.F.R. § 1.2110(e)(4).

²¹ *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2391.

²² See *Competitive Bidding Fifth Memorandum Opinion and Order*, 10 FCC Rcd at 471.

²³ But see "Wireless Telecommunications Bureau Staff Responds to Questions About Broadband PCS C Block Auction," *Public Notice* (rel. June 8, 1995) (addressing grace periods and other default questions).

²⁴ Amendment of Part 1 of the Commission's Rules -- Competitive Bidding Proceeding, *Order, Memorandum Opinion and Order, and Notice of Proposed Rule Making*, WT Docket No. 97-82, FCC 97-60 (rel. Feb. 28, 1997) (" *Part 1 Proceeding* ").

²⁵ *Part 1 Proceeding* at ¶¶ 34, 35.

(2) the default provisions of Section 1.2104(g) in the event of installment payment defaults; and (3) revised procedures for granting grace period requests.²⁶ Many commenters opposed any new fees for late submission of installment payments, and many favored simplified grace period procedures.²⁷

14. On March 31, 1997, in response to a joint request from several C block licensees seeking to modify their installment payment obligations, and because of other debt collection issues, the Bureau suspended the deadline for payment of installment payments for all C block licensees.²⁸ On April 28, 1997, the Bureau extended the suspension to F block licensees.²⁹

15. On June 2, 1997, the Bureau, explaining that it had received several proposals from C block licensees regarding alternative financing arrangements and a petition for rule making regarding the issue of broadband PCS C block installment payments, issued the *Installment Public Notice* seeking comment on these proposals and invited any "additional proposals for addressing the C and F block broadband PCS financing terms."³⁰ The Bureau also sought comment on whether C block licensees should be permitted to prepay their installment debt. In response to the *Installment Public Notice*, the Commission received over 160 filings.³¹ The majority of commenters favor some type of relief, including debt restructuring, spectrum disaggregation, or a penalty-free license surrender ("amnesty"), followed by a reauction.³²

²⁶ *Id.* at ¶¶ 70, 74, 77.

²⁷ See Comments filed in the *Part 1 Proceeding*, including: Interactive Video Data Trade Association ("ISTA") Comments at 1 and Reply Comments at 4-5; Pocket Comments at 7-8; Merlin Reply Comments at 4. Part 1 grace period comments: AMTA Comments at 12-13; Cook Inlet Region, Inc. ("CIRI") Comments at 16; Pocket Comments at 7-8; AirTouch Comments at 8; Merlin Reply Comments at 4; Airadigm Reply Comments at 2; ISTA Reply Comments at 5-6.

²⁸ See *Installment Payments for PCS Licenses*, Order, DA 97-649 (rel. March 31, 1997).

²⁹ See "FCC Announces Grant of Broadband Personal Communications Services D, E, and F Block Licenses," *Public Notice*, DA 97-883 (rel. April 28, 1997) at 2.

³⁰ *Installment Public Notice*.

³¹ Appendix A contains a list of parties filing comments, reply comments, and *ex parte* comments, and the abbreviated names of the commenters.

³² See, e.g., NextWave Comments at 16-19; Fortunet Comments at 4-6; GWI Comments at 7-12; Horizon Comments at 13-15; Chase *ex parte* letter, August 11, 1997 at 1-2.

Other commenters express disapproval of any relief, and urge the Commission to strictly enforce its rules.³³ These comments were incorporated into the record in this docket.³⁴

16. On June 30, 1997, the Bureau conducted a public forum in Washington, D.C. ("FCC Public Forum") to discuss broadband PCS C and F block installment payment issues, including the alternative financing arrangements proposed in connection with the Public Notices issued on June 2, 1997. The FCC Public Forum consisted of two panels. The first discussed whether the Commission should consider modification of its installment payment program,³⁵ and the second discussed alternative financing arrangements and debt restructuring.³⁶ FCC staff members and the public audience also participated throughout the discussions.³⁷ An FCC Task Force also was established which included representatives from the Bureau, the Office of Plans and Policy, the Office of General Counsel, and the Office of Communications Business Opportunities. This Task Force was charged with evaluating proposals for alternative financing arrangements submitted by PCS C and F block licensees and recommending to the Commission how to respond to those proposals.

17. Both before and after the FCC Public Forum, numerous comments, reply comments, and *ex parte* letters and presentations were submitted to the Commission as part of this proceeding. Some commenters argue both for and against various proposals for licensee relief, while others argue that the Commission should enforce its rules as they currently exist to preserve the integrity of the auction program. The Commission thus has before it a wide range of proposals from entrepreneur block licensees, financial institutions and investors,

³³ See, e.g., Airadigm Comments at 2-3; ALLTEL Comments at 2; CIRI Comments at 2-3.

³⁴ We also note that several requests for an extension of the deadline for making payments have been filed with the Bureau pursuant to 47 C.F.R. § 1.2110(e)(4)(ii). In addition, two parties have filed requests for the restructuring of installment payment schedules, and several parties have filed requests for annual, as opposed to quarterly payment schedules. These requests will be addressed separately by the Bureau in accordance with our decision today. Several parties also have filed requests for waiver of the 7 percent interest rate applicable to eligible broadband PCS C block licensees whose licenses were conditionally granted on September 17, 1996, and who elected to utilize the Commission's installment payment plan. See Comment Requested on 7 Percent Interest Rate Imposed on C Block Installment Payment Plan Notes, *Public Notice*, DA 97-1152 (rel. June 2, 1997). These requests also will be addressed separately by the Bureau in accordance with our decision today.

³⁵ See Cook Inlet Region, Inc., Petition for Rulemaking (filed May 7, 1997). Panelists were Michael Roberts, President, National Association of PCS Entrepreneurs; Roger Linqvist, CEO, General Wireless Inc.; Stephen Hillard, CEO, Cook Inlet Communications Inc.; Karen Johnson, President, Fortunet Communications, L.P.; and Shelley Spencer, General Counsel, AirGate Wireless.

³⁶ See Gutierrez Letter, Sawicki Letter, Barker Letter, and GWO informal proposal (attached to *Installment Public Notice*). Panelists were Norman Frost, Managing Director, Communications Group, Bear Stearns & Co.; John Bensch, Vice President/Senior Wireless Service Analyst, Lehman Brothers; Brian O'Reilly, managing Director-Communications Finance, Toronto Dominion Bank; Gregg E. Johnson, President, BIA Capital Corporation; and Mark Lowenstein, VP-Wireless/Mobile Communications, The Yankee Group.

³⁷ A videotape of the FCC Public Forum was placed in the record in this docket.

equipment vendors, and other interested parties. We also have received a number of letters from individual Senators and Congressmen suggesting various approaches to resolving these issues and urging this Commission to act swiftly.³⁸ After consideration of the extensive record in this proceeding, we conclude that the options presented in this *Second Report and Order* offer the most appropriate and fair method of resolving C and F block financial concerns.

18. Although some commenters in this proceeding recommend deferral of the C block debt, the Commission declines to further explore these proposals.³⁹ We do not wish to adopt temporary solutions such as those that might only postpone these difficulties and further prolong uncertainty. Although these approaches would not necessarily result in a reduction of the current nominal debt owed to the Commission, there is no certainty the long term financial outlook facing many licensees would be improved. Finally, we believe that any further deferral of payments would be unfair to unsuccessful bidders who may have withdrawn from the C block when prices became too high, but might have remained had deferral opportunities been known.

19. Similarly, we do not wish to adopt proposals that result in a dramatic forgiveness of the debt owed. Although such an approach would not defer the problem, we believe that is would be very unfair to other bidders, and would gravely undermine the credibility and integrity of our rules. In fact, in his remarks at the Senate Hearing on High-Definition Television, Senator Hollings stated, ". . . [r]ules are rules If they cannot comply with their particular auction bid, out they go, and we will start over again. But this is not welfare. This is business."⁴⁰ Other Senators also urged the Commission to maintain the integrity of its

³⁸ See The Honorable Christopher S. Bond, *ex parte* letter, July 14, 1997; The Honorable Pete V. Domenici, *ex parte* letter, September 10, 1997; The Honorable James M. Inhofe, Don Nickles, and Conrad Burns, *ex parte* letter, August 7, 1997; The Honorable John McCain, *ex parte* letter, August 19, 1997; The Honorable John McCain, *ex parte* letter, September 18, 1997; The Honorable Daniel Patrick Moynihan, *ex parte* letter, August 4, 1997; The Honorable Rick Boucher, *ex parte* letter, July 25, 1997; The Honorable Richard Burr, *ex parte* letter, August 11, 1997; The Honorable Thomas Davis, *ex parte* letter, July 30, 1997; The Honorable John D. Dingell, *ex parte* letter, September 16, 1997; The Honorable Steny H. Hoyer, *ex parte* letter, August 7, 1997; The Honorable Sue W. Kelly, *ex parte* letter, August 11, 1997; The Honorable W.J. "Billy" Tauzin, *ex parte* letter, August 13, 1997; The Honorable W. J. "Billy" Tauzin and Edward J. Markey, *ex parte* letter, September 16, 1997.

³⁹ Suggestions in the record addressing "deferral/restructuring" propose that the Commission provide for some period (ranging from 2-20 years) during which installment payments would be deferred. Some of these plans explicitly reduce the "net present value" of the debt (*i.e.*, the discounted value of future cash flows less initial investment), while others leave it unchanged, assuming the government interest rate as the discount rate. See, *e.g.*, BMU Comments at 2; ClearComm Comments at 3 and Reply Comments at 3; Chase Comments at 3; Alpine Comments at 9 and Reply Comments at 11; Horizon Comments at 13; SBC Comments at 9; R&S Comments at 21; Indus Comments at 3; MFRI Comments at 3; Magnacom Comments at 1-2; NABOB Comments at 3-4; RFW Comments at 2; KPCS Comments at 2; Urban Comm Comments at 9 and Reply Comments at 4; PCS Plus Comments at 2; Holland Comments at 3; Eldorado Comments at 2; MCI Comments at 2; Bear Stearns Comments at 3; Fortunet Comments at 4 and Reply Comments at 8; RTFC Reply Comments at 2; NextWave Reply Comments at 20; TRA Reply Comments at 5; The Honorable Thomas Davis *ex parte* letter, July 30, 1997; The Honorable Rick Boucher *ex parte* letter of July 25, 1997.

⁴⁰ Transition to Digital Television Hearing Before the U.S. Senate Committee on Commerce, Science and Transportation, 105th Cong., 1st Session (September 17, 1997) (Statement of Senator Hollings).

rules for benefit of its overall auction program.⁴¹ Other commenters assert that lowering the effective price after the auction unfairly advantages those who bid too high compared with those who withdrew.⁴² In effect, the result could be interpreted as the Commission picking winners and losers on an unsupportable basis, instead of the marketplace determining winners based upon an auction. This concern was also expressed by Senator McCain.⁴³ Such a result would be contrary to our long-held goal to put licenses into the hands of those who value them the most.

20. In addition, we decline to make the disaggregation, amnesty, or prepayment options available to F block licensees. We believe that the nature and extent of any financing difficulties faced by the C block licensees appear to be different from any such problems facing entrepreneurs in the F block. We note that even after considering the difference in the spectrum block size and providing a discount for the government financing, C block prices were higher than F block prices on average. We therefore conclude that the options we adopt today will not apply to F block licensees.

IV. SECOND REPORT AND ORDER

21. As discussed above, we require that C and F block licensees resume their Note payments on March 31, 1998. They will also be required to pay on that date one-eighth of the Suspension Interest, and thereafter, pay one-eighth of the Suspension Interest with each regular installment payment made until the Suspension Interest is paid in full. As used herein, "Suspension Interest" means the entire amount of the unpaid simple interest that was accrued at the rate set forth in each licensee's Note(s) during the period beginning with the date on which each license was conditionally granted through and including March 31, 1998 ("Suspension Period"). After March 31, 1998, payment due dates will conform to those indicated in the Notes executed by the licensees. We believe that there are C block licensees who will elect to continue making payments under their original C block Notes, as described above, which they will be entitled to do. In addition, we adopt three options relating to the rules governing installment payments for the C block. These are designed to help to resolve the financing issues facing C block licensees and restore certainty to the marketplace, while at

⁴¹ See The Honorable John McCain, *ex parte* letter, September 18, 1997; The Honorable Paul D. Coverdell *ex parte* letter, September 24, 1997.

⁴² See, e.g., AirGate *ex parte* letter, July 22, 1997, attachment at 3; Conestoga Comments at 2-3; Point Comments at 2-3.

⁴³ See The Honorable John McCain, *ex parte* letter, August 19, 1997. In his letter Senator McCain states, "[t]he law does not, and indeed could not, require the Commission to substantially revise the rules that govern these entities solely for the purpose of guaranteeing their ability to retain licenses. . . . To do so would be to unjustly enrich defaulting bidders. . . [and] unjustly penalize the rest of the bidders in all the PCS auctions who bid reasonably and in reliance on the existing rules."

the same time helping the Commission meet its statutorily mandated public interest considerations set forth under Section 309(j) of the Communications Act.⁴⁴

22. These goals will also be furthered by generally applying the same rules regarding eligibility that were used in the C block auction to the reauction of C block licenses.⁴⁵ Thus, all applicants meeting the current definition of "entrepreneur" will be eligible to bid in the reauction. We also will allow all entities that were eligible for and participated in the original C block auction to bid in the reauction. Further, with the exception of incumbent licensees who choose to disaggregate portions of spectrum they currently hold (*see* Section IV.B., *infra*), and those licensees who surrender licenses under the prepayment option (*see* Section IV.D., *infra*), all C block licensees who return licenses to the Commission will be eligible to bid on all markets in the reauction.

⁴⁴ *See* 47 U.S.C. § 309(j)(3)(A)-(E). Any party holding a C block license as of the January 15, 1998 election deadline will be permitted to elect any of the options we adopt.

⁴⁵ *See* 47 C.F.R. § 24.709.

A. Resumption of Payments

23. Background. On March 31, 1997, the Bureau suspended the deadline for payment of all broadband PCS C block installment payments until further notice.⁴⁶ By Public Notice issued on April 28, 1997, the Bureau extended the suspension to F block licensees.⁴⁷ (The March 31, 1997 Order and April 28, 1997 Public Notice will be referred to collectively as the "*Suspension Order*"). In the *Suspension Order*, we indicated that the suspension would remain in effect until further action to reinstate payment deadlines, and that interest would continue to accrue until such action was taken.

24. Discussion. The majority of commenters in this proceeding, including many members of Congress, agree that the Commission must act quickly to make a decision on what course of action to take.⁴⁸ Those favoring restructuring suggest that any further delay will make any relief ineffective because further delay to market puts C block licensees at a competitive disadvantage and makes attracting investment capital to support their build-out even more difficult.⁴⁹ In addition, many commenters opposed to restructuring also support a timely decision, believing that a cloud of uncertainty hangs over the wireless sector until the Commission decides what action to take.⁵⁰ We therefore believe that it is necessary to remove any uncertainties surrounding the installment payment program by announcing a date certain for the resumption of installment payments.

25. Accordingly, effective March 31, 1998, we rescind the *Suspension Order* and reinstate the installment payment plans for all C and F block licensees. We also direct that all payments due and owing on and after March 31, 1998 be made in accordance with the terms of each licensee's Note, associated Security Agreement, and the Commission Orders and regulations. All Suspension Interest will become due and payable over a two-year period as discussed in paragraph 27, *infra*. With the exception of the modifications provided in this

⁴⁶ See n.28, *supra*. See also Letter from Daniel B. Phythyon, Acting Chief, Wireless Telecommunications Bureau to Mark J. Tauber, Piper & Marbury (April 30, 1997) ("Tauber Letter").

⁴⁷ See n.29, *supra*.

⁴⁸ See, e.g., ClearComm Comments at 3; Chase Comments at 2; Alpine Comments at 11 and Reply Comments at iii, 9; AmeriCall Comments at 10; MCI Comments at 2 and Reply Comments at 7-8; Cellexis Reply Comments at 2-3; OnQue Reply Comments at 10; NextWave Reply Comments at 5-6; The Honorable W. J. "Billy" Tauzin and the Honorable Edward J. Markey *ex parte* letter, September 16, 1997; The Honorable John Dingell, *ex parte* letter, September 16, 1997; The Honorable John McCain *ex parte* letters of August 19, 1997 and September 18, 1997.

⁴⁹ See, e.g., MCI Reply Comments at 7-8 (quoting "Bensche Marks" July 1, 1997, summary of panel discussions at the FCC Public Forum of June 30, 1997).

⁵⁰ See, e.g., U.S. Airwaves Reply Comments at 3; Nokia *ex parte* letter, September 15, 1997 at 1; AmeriCall, ClearComm, and Chase, *ex parte* letter, September 17, 1997 at 1.

Second Report and Order, all Commission rules regarding installment payments and defaults for the broadband PCS C and F blocks will remain in effect. Any licensee that fails to remit the payment due on March 31, 1998, and remains delinquent for more than 60 days (*i.e.*, fails to make the March 31, 1998, payment on or before May 30, 1998), will be in default on its license.⁵¹ Given the one year suspension, we believe that providing a shorter automatic grace period is justified. *See* paragraph 30, *infra*.

26. We conclude that any licensee that continues under its original Note(s), will be required to pay on March 31, 1998, one-eighth of the Suspension Interest in accordance with the provision of paragraph 27, *infra*. Thereafter, regular payments will become due and payable in accordance with the provisions of the licensee's original Note. ⁵²

27. We conclude that it could place a significant burden on licensees to require payment of the entire amount of the Suspension Interest on March 31, 1998. We therefore require that broadband PCS C and F block licensees submit one-eighth of the Suspension Interest on March 31, 1998, and one-eighth of the Suspension Interest with each regular installment payment made thereafter until the Suspension Interest is paid in full. After March 31, 1998, payment due dates will conform to those indicated in the Note(s) executed by the licensees. While the first regular installment payment next made after March 31, 1998, will be pro-rated to account for the resumption of payments on March 31, 1998, all regular installment payments thereafter will be in the amounts shown on the amortization schedule attached to and made a part of each Note, as amended, plus the applicable payments of Suspension Interest. For example, for those licensees granted in September, 1996 whose regular installments occur on March 31, June 30, September 30, and December 31 of each year, the next regular payment due after March 31, 1998, will be due on June 30, 1998, and will include the amount of interest accrued from April 1, 1998, through and including June 30, 1998, plus one-eighth of the Suspension Interest. The next regular payment will be due on September 30, 1998, and will be due in the amount shown on the amortization schedule attached to the Note (*i.e.*, interest from July 1, 1998, through and including September 30, 1998), plus one-eighth of the Suspension Interest. Regular payments will continue on each and every December 31, March 31, June 30, and September 30 thereafter until the Note is paid in full. For these licensees, the payment due on December 31, 1999, will be the last payment due that includes any amortized Suspension Interest. ⁵³ All payments after that date will continue in

⁵¹ *See* 47 C.F.R. § 1.2110(e)(4)(i). The 60-day period is an exception to our existing rules that provide for an automatic 90-day non-default period.

⁵² *See* the provisions of paragraph 27, *infra*.

⁵³ For those licenses granted in November, 1996 whose regular installments occur on the last day of May, August, November, and February of each year, the next regular payment due after March 31, 1998, will be due on May 31, 1998, and will include the amount of interest accrued from April 1, 1998 through and including May 31, 1998, plus one-eighth of the Suspension Interest. The next regular payment will be due on August 31, 1998, and will be due in the amount

accordance with the terms of the amortization schedule attached to the Note executed by the licensee. All installment payments previously made by licensees who elect one of the three options will be applied in accordance with the provisions set forth under the discussion of each option, *see* Section IV., *infra*.⁵⁴

28. We delegate to the Bureau authority to set forth all procedures for implementing the resumption of payments.

29. Broadband PCS C block licensees choosing to surrender their licenses pursuant to the amnesty option described in Section IV.C., *infra* and those surrendering licenses that are not prepaid pursuant to the prepayment option described in Section IV.D., *infra*, will be required to return to the Commission each original Note and Security Agreement for cancellation by the Commission.

30. We will not entertain any requests for an extension of the March 31, 1998 deadline beyond the automatic 60-day non-default period set forth in paragraph 25, *supra*. The *Suspension Order* already has afforded a significant period to licensees during which payments were not required. Therefore, we intend to deny any requests for a grace period beyond the automatic 60-day non-default period we adopt herein, including any requests made pursuant to Section 1.2110 of the Commission's rules.⁵⁵

31. C block licensees may resume payments under their current Note or elect one of the three options described below.

shown on the amortization schedule attached to the Note (*i.e.*, interest from June 1, 1998, through and including August 31, 1998), plus one-eighth of the Suspension Interest. Regular payments will continue on the last day of the month of November, February, May and August thereafter until the Note is paid in full. For these licensees, the payment due in February, 2000 will be the last payment due that includes any amortized Suspension Interest. Any payments after this date would continue in accordance with the terms of the amortization schedule attached to the Note executed by the licensee.

For those licenses granted in January, 1997 whose regular installments occur on the last day of April, July, October and January of each year, the next regular payment due after March 31, 1998, will be due on April 30, 1998, and will include the amount of interest accrued from April 1, 1998 through and including April 30, 1998, plus one-eighth of the Suspension Interest. The next regular payment will be due on July 31, 1998, and will be due in the amount shown on the amortization schedule attached to the Note (*i.e.*, interest from May 1, 1998, through and including July 31, 1998), plus one-eighth of the Suspension Interest. Regular payments will continue on the last day of the month of October, January, April and July thereafter until the Note is paid in full. For these licensees, the payment due in January, 2000 will be the last payment due that includes any amortized Suspension Interest. Any payments after this date would continue in accordance with the terms of the amortization schedule attached to the Note executed by the licensee.

⁵⁴ For example, for a licensee electing to continue making payments under its existing Note, if a licensee had accrued \$100,000 in Suspension Interest during this period and had previously made installment payments totaling \$20,000, then the amount of Suspension Interest would be \$80,000 (no additional interest will be assessed against this amount) and would be payable in eight equal payments of \$10,000.

⁵⁵ 47 C.F.R. § 1.2110(e)(4)(ii).

B. Disaggregation of Spectrum for Reauction

32. Background. Existing Commission rules permit broadband PCS licensees to disaggregate their spectrum.⁵⁶ Under these rules, a broadband PCS licensee in the A, B, D, or E block may file an application with the Commission requesting permission to disaggregate any portion of its spectrum to other eligible entities at any time following the issuance of its license.⁵⁷ The existing rules also permit a C or F entrepreneur block licensee to disaggregate spectrum to other C and F block eligible entities for the first five years following the issuance of a license.⁵⁸ After the first five years of holding a license, an entrepreneur block licensee also may disaggregate to any qualified non-entrepreneur, provided that the non-entrepreneur compensates the federal government through an unjust enrichment payment proportionate to the amount of spectrum disaggregated.⁵⁹ If the entrepreneur block licensee has elected to pay using installment payments, the qualified entity receiving the disaggregated spectrum will also be permitted to make installment payments equaling its *pro rata* portion of the remaining government obligation.⁶⁰ The rules require that new notes and security agreements be executed by both the former and the new licensee.⁶¹

33. A number of C block licensees, as well as several financial advisors and equipment manufacturers, have requested that the Commission permit licensees to disaggregate spectrum and surrender it to the Commission for reauction in exchange for a *pro rata* reduction in debt.⁶² Generally, these proposals differ in: (1) the amount of spectrum that could be surrendered to the Commission; (2) the amount and form of credit for the spectrum surrendered; and (3) the terms and eligibility requirements for reauction of the disaggregated spectrum.

⁵⁶ Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees, *Report and Order and Further Notice of Proposed Rule Making*, 11 FCC Rcd 21831 (1996) (partitioning and disaggregation rules now codified at 47 C.F.R. § 24.714) (hereinafter "*Disaggregation Order*").

⁵⁷ See 47 C.F.R. § 24.714(a)(1) (parties "shall request an authorization for partial assignment of a license pursuant to Section 24.839").

⁵⁸ 47 C.F.R. § 24.714(a)(3).

⁵⁹ 47 C.F.R. § 24.714(c)(1).

⁶⁰ 47 C.F.R. § 24.714(d)(1).

⁶¹ 47 C.F.R. § 24.714(d)(3)(ii).

⁶² See, e.g., AmeriCall *ex parte* letter, August 5, 1997 at 1 ; GWI *ex parte* letter, August 15, 1997 at 1; Magnacom *ex parte* letter, August 13, 1997 at 1; BIA Capital *ex parte* letter, August 4, 1997 at 1-2; Nokia *ex parte* letter, September 16, 1997 at 1; Horizon Comments at 5-6 (all seeking a liberalization of the Commission's current rules for disaggregation to private parties).

34. AmeriCall proposes "amnesty by thirds," which would permit each licensee to disaggregate its C block license into three 10 MHz portions, any one of which the licensee could surrender to the Commission for forgiveness of its related installment debt.⁶³ Under this proposal, surrendered spectrum would be reauctioned and the Commission would retain the down payments made by the initial licensee.⁶⁴ AmeriCall suggests allowing a licensee to participate in reauctions of C block spectrum, but only reauctions for spectrum other than that surrendered by the licensee.⁶⁵ AmeriCall also suggests that a licensee be required to wait two years before being allowed to reacquire spectrum that it has surrendered to the Commission.⁶⁶ AmeriCall proposes that C block licensees continue operating under the terms and conditions of the initial payment obligation, but that the Note be reduced in proportion to the amount of spectrum surrendered and the associated Security Agreements and Uniform Commercial Code ("UCC") filings modified accordingly.⁶⁷

35. A number of other commenters propose that the Commission adopt variations of AmeriCall's disaggregation proposal. BIA Capital's disaggregation proposal generally tracks AmeriCall's proposal, but would allow licensees to surrender 10, 20 or 30 MHz of spectrum.⁶⁸ Magnacom proposes that parties be allowed to disaggregate up to 15 MHz of spectrum and that all payments be applied to the portion of the license retained.⁶⁹ Urban Comm advocates that parties be allowed to disaggregate up to 10 MHz of spectrum.⁷⁰ In a recent joint filing, AmeriCall, Clearcomm, and Chase support a disaggregation option that would allow a licensee to disaggregate 15 MHz from one or more of the C block licenses it now holds, on a license-by-license basis, and to have its indebtedness reduced proportionately (*i.e.*, by 50%). The disaggregated spectrum would be reauctioned expeditiously and the disaggregating licensee would be precluded from rebidding on spectrum it has disaggregated.⁷¹

⁶³ AmeriCall *ex parte* letter, August 5, 1997 at 2.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ BIA Capital *ex parte* letter, August 4, 1997 at 1-2.

⁶⁹ Magnacom, *ex parte* letter, August 13, 1997 at 1; *see also* Northern Michigan PCS Consortium, L.L.C. *ex parte* letter, August 14, 1997 (supporting the application of all payments to the debt owed to the FCC).

⁷⁰ Urban Comm *ex parte* letter, September 17, 1997 at 4-5.

⁷¹ AmeriCall, ClearComm, and Chase *ex parte* letter, September 17, 1997.

36. Parties advocating a disaggregation option cite a number of benefits. AmeriCall contends its "amnesty by thirds" proposal would help the Commission avoid both wide scale bankruptcies as well as the need for a "bail-out" in the form of radical debt restructuring.⁷² It contends that by requiring licensees to forfeit all down payments for the surrendered spectrum, disaggregation imposes a *penalty* on C and F block licensees who choose this option.⁷³ AmeriCall argues further that spectrum disaggregation benefits participating licensees by allowing them to reduce their debt, which would in turn increase their access to capital markets.⁷⁴ AmeriCall contends that because it avoids the "more substantial financial fixes" advocated by other debtors, disaggregation is a fairer proposal, and one less prone to subsequent litigation.⁷⁵ Finally, AmeriCall contends that the "amnesty by thirds" proposal is pro-competitive in that it will introduce numerous new competitors, including licensees from other spectrum blocks.⁷⁶ GWI indicates that spectrum disaggregation "works well" for C block licensees in small markets where a full 30 MHz of spectrum is not required.⁷⁷ Urban Comm cites several public interest benefits deriving from spectrum disaggregation. According to Urban Comm, disaggregation provides spectrum to qualified designated entities without delay, decreases time to market for existing licensees, and injects new competition into the marketplace.

37. In opposition to the disaggregation option, CONXUS, a narrowband PCS licensee, argues that the option does not confer on narrowband licensees benefits comparable to those accorded to broadband licensees since there is insufficient bandwidth in narrowband to allow disaggregation to occur without interfering with nationwide programs.⁷⁸ Omnipoint argues that any type of "amnesty solution," including spectrum disaggregation, would require the Commission to adopt rules protecting companies that have substantially built-out their networks.⁷⁹

⁷² AmeriCall *ex parte* letter, August 5, 1997 at 3-4.

⁷³ *Id.* at 3.

⁷⁴ *Id.* at 4. *See also* GWI *ex parte* letter, August 15, 1997 at 1.

⁷⁵ AmeriCall *ex parte* letter, August 5, 1997 at 4.

⁷⁶ *Id.* at 5.

⁷⁷ GWI *ex parte* letter, August 15, 1997 at 1.

⁷⁸ CONXUS *ex parte* letter, August 27, 1997 at 1-2.

⁷⁹ Omnipoint *ex parte* letter, September 5, 1997 at 2.

38. Discussion. In view of the substantial support and public interest benefits accruing from an alternative that would permit a voluntary surrender of spectrum to the Commission while maintaining the fairness and integrity of the auction, we adopt a disaggregation option. Under the disaggregation option we adopt today, any C block licensee may disaggregate a portion of its spectrum from each of its licenses and surrender it to the Commission for reauction.⁸⁰ The licensee must disaggregate 15 MHz of spectrum it holds across all BTAs in an MTA. These provisions prevent licensees from selectively surrendering spectrum for which they may believe they paid too much, or otherwise discarding spectrum in markets that may be more difficult to serve (commonly referred to as "cherry-picking" of licenses or spectrum).⁸¹ We limit the ability of licensees to selectively disaggregate spectrum within an MTA also to facilitate attempts by new bidders to aggregate spectrum and initiate service. Because we are allowing disaggregation on an MTA-by-MTA basis, special exemptions for built-out systems -- such as the one we adopt under the amnesty option discussed below in paragraphs 53-58 -- are unnecessary. In cases where a licensee has built-out a BTA, it can choose either to retain all 30 MHz in each of the BTAs it has licenses for in an MTA, or it can operate its built-out system with 15 MHz. We believe that this flexibility, compared to the "all-or-nothing" approach, mitigates the need for a build-out exception for this option.

39. Licensees electing this option will be required to return half of their spectrum at 1895 - 1902.5 MHz paired with 1975 - 1982.5 MHz, which is spectrum contiguous to the PCS F block. The surrender of spectrum adjacent to the F block will provide sufficient contiguous spectrum for both the incumbent and new licensees to offer competitive PCS services.

40. Under the disaggregation option, the Commission will reduce the amount of the debt owed by an amount equal to the *pro rata* portion of the spectrum returned to the Commission, *i.e.*, by 50%, subject to coordination with the Department of Justice pursuant to applicable federal claims collection standards.⁸² The Commission will retain the *pro rata* portion of the down payments applicable to the spectrum. The following illustrates how this proposal would operate in practice:

*Company X holds a 30 MHz license in a BTA market; paid the Commission \$100,000 in its down payment; and owes the Commission \$900,000 on a net bid of \$1,000,000.
Company X could disaggregate 15 MHz and surrender it to the Commission for*

⁸⁰ See Section V., *infra* (Further Notice of Proposed Rule Making requesting comment on rules and procedures for reauction).

⁸¹ For example, if a licensee holds four BTA licenses in MTA No. 4 (comprising Northern California and Northern Nevada), the licensee must choose to disaggregate 15 MHz from each or none of the four BTA markets.

⁸² See 4 C.F.R. Parts 101-105.

reauction, and the Commission would retain \$50,000 of the down payment. In return, the Commission would reduce the licensee's obligation to the government to \$450,000.

The face amount of the licensee's Note will be adjusted to reflect the new principal, and the Note will then be amortized from the original date of execution to calculate the payments at the new face amount of the Note. All installment payments made as of March 31, 1997,⁸³ will be applied to reduce the amount of the Suspension Interest calculated on the new principal balance to be made in eight equal payments beginning March 31, 1998.

41. Where applicable, the existing disaggregation rules will govern this option.⁸⁴ However, the broadband disaggregation rules were not designed for the surrender of spectrum to the Commission.⁸⁵ Thus, existing rule provisions on designated entity transfer restrictions,⁸⁶ unjust enrichment,⁸⁷ installment payments, abbreviated license terms⁸⁸ and construction requirements,⁸⁹ restrictions on the amount of spectrum that can be disaggregated,⁹⁰ and similar rules will not apply to disaggregation to the Commission authorized by this option. In order to take advantage of the disaggregation option, licensees will be required to make an election consistent with the procedures specified in Section IV.E., *infra*.

42. In order to avoid unjust enrichment, licensees (defined as qualifying members of the licensee's control group, and their affiliates) will be prohibited from bidding in the subsequent reauction for spectrum the incumbent licensee has disaggregated. However, they will be permitted to acquire spectrum for any BTA for which the incumbent licensee has not disaggregated spectrum. We do not believe that it would be fair for these entities to benefit from a reauction after taking advantage of the disaggregation option. This prohibition against subsequent participation in the reauction for the spectrum disaggregated by the same party is

⁸³ This includes any payments due prior to and on March 31, 1997.

⁸⁴ See 47 C.F.R. § 24.714 (broadband PCS partitioning and disaggregation rules).

⁸⁵ See *Disaggregation Order*, 11 FCC Rcd 21831.

⁸⁶ 47 C.F.R. § 24.714(a)(3).

⁸⁷ 47 C.F.R. § 24.714 (c)(1), (2), (3).

⁸⁸ 47 C.F.R. § 24.714(e).

⁸⁹ 47 C.F.R. § 24.714(f). Thus, a licensee that disaggregates spectrum to the Commission must still fully fulfill its original construction requirements with regard to the 15 MHz that it retains.

⁹⁰ 47 C.F.R. § 24.714(b)(3) ("Spectrum may be disaggregated in any amount").

supported by a number of commenters.⁹¹ To ensure further against unjust enrichment, these entities will also be barred from reacquiring the spectrum they have surrendered to the Commission through a secondary market transaction for a period of two years from the start of a reauction.⁹²

43. We believe that the disaggregation option set forth above is consistent with our goals in this proceeding and serves the public interest. First, this option preserves the credibility and integrity of the Commission's rules. The relief we provide is another means of making more efficient use of the spectrum. It does not provide a windfall or unfair advantage to the C block licensees availing themselves of the disaggregation option. The disaggregating licensee continues to pay for spectrum at its net high bid price,⁹³ and the Commission receives full payment for the spectrum retained by the licensee. In addition, the Commission will retain 50% of the down payment consistent with the amount of spectrum being surrendered to the Commission. Moreover, disaggregation with a *pro rata* adjustment in debt is consistent with the Commission's rules with regard to private party disaggregation.⁹⁴

44. Second, the disaggregation option is fair and equitable to all interested parties. Losing bidders and other eligible parties will have an opportunity to bid on the disaggregated spectrum in the reauction. Also, by limiting disaggregation of spectrum to 15 MHz blocks on a BTA within an MTA basis, we increase the likelihood that the licenses available for reauction will be in quantities and geographic clusters that are commercially viable. In addition, by providing this limited opportunity to "pick and choose" which licenses to disaggregate, and not requiring the surrender of all 30 MHz of the spectrum it holds in an MTA, we make this option fair to those who have built-out some of their markets.⁹⁵ Although this option is not being made available to the narrowband or F block licensees, we do not believe that it is unfair to these parties or to other Commercial Mobile Radio Service ("CMRS") providers. This option does not materially alter the competitive landscape for CMRS services. Given the current state of the market and the Commission's existing rules, it is reasonable to expect that some C block spectrum will be transferred to competitors through reauction or private sale. Our actions here facilitate this process, by reducing the amount of spectrum that would otherwise be marketed in a piecemeal fashion. Moreover, as noted

⁹¹ See Horizon Comments at 14; AmeriCall *ex parte* letter, July 11, 1997; AirGate Wireless, *ex parte* letter, Sept. 9, 1997.

⁹² See AmeriCall *ex parte* letter, August 5, 1997 at 2.

⁹³ See n.13, *supra*.

⁹⁴ 47 C.F.R. § 24.714.

⁹⁵ See, e.g., Omnipoint *ex parte* letters, August 18, 1997, September 3, 1997, and September 5, 1997 at 2.

above, other parties will have an opportunity to bid on this spectrum in the reauction and, because of the spectrum's proximity to the F block, the spectrum may be particularly attractive to prospective licensees.

45. Third, the disaggregation option is consistent with our Section 309(j) obligation to promote opportunities for designated entities, including small businesses. According to a number of commenters, including those in the financial community, a reduced government debt burden and the resulting lower cost per MHz pop will enhance prospects for existing small business licensees to attract debt and equity capital.⁹⁶ This, in turn, should assist current C block licensees in moving forward with the deployment of their service offerings. Disaggregation will also provide opportunities for other small businesses to enter the PCS market in the future. Finally, by requiring C block licensees to disaggregate the 15 MHz of spectrum adjacent to the F block, we provide opportunities for existing F block licensees to aggregate spectrum in a manner that could benefit their planned or prospective service offerings.

C. Surrender Licenses for Reauction (Amnesty)

46. Background. In response to our *Installment Public Notice* seeking comment on broadband PCS installment payment issues, a number of commenters express support for an option that would permit C block licensees to surrender their licenses to the Commission for reauction in exchange for forgiveness of the related debt and any interest and penalties⁹⁷ (generally referred to as "amnesty").⁹⁸ Commenters have submitted a variety of proposals for the terms of an amnesty option. Horizon states that an amnesty program should be designed to prevent a large scale surrender of licenses, and should encourage return of a license only in advance of a business failure. Horizon would permit a licensee to be selective in surrendering licenses, but would prohibit a licensee from rebidding on any license it surrendered and would prohibit a licensee's participation in the reauction entirely if it surrendered a total of more than five licenses. To facilitate this plan, Horizon asks that we waive our current cross default policies so that a licensee able to construct some, but not all, of its licenses will be able to return those licenses it cannot construct without placing all of its licenses in default. Horizon

⁹⁶ BIA Capital, *ex parte* letter, August 4, 1997 at 1.

⁹⁷ See 47 C.F.R. §§ 24.708(b), 1.2109(c), 1.2104(g)(2).

⁹⁸ See, e.g., R&S *ex parte* letter, August 11, 1997 at 1; MCI *ex parte* letter, August 14, 1997 at 2; Urban Comm *ex parte* letter, August 21, 1997; GWI *ex parte* letter, August 4, 1997; NextWave *ex parte* letter, July 29, 1997; El Dorado *ex parte* letter, August 13, 1997 at 2-3.

concludes that adopting such an amnesty plan would serve the public interest by getting licenses in the hands of companies willing and able to provide service to the public.⁹⁹

47. R&S¹⁰⁰ and Cyber Sites¹⁰¹ propose that the Commission permit C block licensees to surrender their licenses and obtain a full refund of all payments without penalty. GWI suggests that the Commission allow licensees to exchange all licenses in return for a "store credit" equal to 100% of the original down payment, which could be applied to licenses won in a "cash upfront" reauction. GWI contends that there should be no restriction on the licensee's bidding in the reauction.¹⁰² NextWave, too, supports an "amnesty day" for the surrender of licenses and a subsequent reauction, but stresses that licensees should be allowed to retain their most desirable licenses.¹⁰³ NextWave submits that the total amount of the original down payments should be credited toward reauction bids "with a reasonable penalty."¹⁰⁴

48. Other commenters, including C block licensees AmeriCall¹⁰⁵ and Chase,¹⁰⁶ endorse a "simple amnesty" program pursuant to which a licensee would be obliged to surrender all of its C block licenses in return for forgiveness of its debt and an opportunity to participate in any reauction of the returned licenses or other licenses. Equipment manufacturer Nokia also endorses an amnesty program that would permit a licensee to surrender all of its C block licenses in return for forgiveness of all associated debt and an opportunity to bid at the reauction.¹⁰⁷

49. Fortunet states that a simple amnesty program does not provide sufficient relief, and asks that licensees receive a refund of their down payments and interest payments made on

⁹⁹ Horizon Comments at 13-15.

¹⁰⁰ R&S Comments at 13-15.

¹⁰¹ Cyber Sites Comments at 3.

¹⁰² GWI *ex parte* letter, August 4, 1997.

¹⁰³ NextWave *ex parte* letter, July 29, 1997.

¹⁰⁴ NextWave *ex parte* letter, August 5, 1997.

¹⁰⁵ AmeriCall *ex parte* letter, July 11, 1997; AmeriCall, ClearComm, and Chase *ex parte* letter, September 17, 1997.

¹⁰⁶ Chase *ex parte* letter, August 11, 1997.

¹⁰⁷ Nokia *ex parte* letter, September 16, 1997.

those licenses surrendered.¹⁰⁸ MCI also supports permitting licensees to surrender all of their C block licenses with no further financial obligation, but suggests that a licensee be permitted to receive only "a fraction" of the down payment already made.¹⁰⁹

50. In addition to the many commenters who oppose any rule changes, including a grant of amnesty,¹¹⁰ a number of commenters have resisted implementation of an amnesty plan and have identified various problems specific to the amnesty option. Cook Inlet recommends that the Commission strictly enforce its rules as they currently exist, and take aggressive measures to collect all debt,¹¹¹ noting that other alternatives, including an amnesty plan, invite litigation and threaten the auction program's integrity.¹¹² However, Cook Inlet states that, if an amnesty program is adopted, certain limitations should be imposed, including prohibitions against participation in the reauction of their licenses by those who participate in amnesty (principals and control group members), against participation by any entity in bankruptcy, and against cherry picking among those licenses to be surrendered. In order to expedite reauction, Cook Inlet suggests that the Commission refund 25% of their down payments to licensees who surrender their licenses -- as "walk away" money.¹¹³

51. Omnipoint opposes amnesty because "operational" C block companies would be left with no recourse under any of the amnesty proposals, and would face a significant relative disadvantage in accessing capital markets. Omnipoint points out that this might deprive the public of the service that such licensees are providing.¹¹⁴ Omnipoint states that it and other operational C block licensees have "operating businesses [that] are completely tied to specific C block licenses"¹¹⁵ and do not have the same flexibility to cancel licenses voluntarily. Omnipoint asserts that these licensees' access to public capital markets will be hampered by

¹⁰⁸ Fortunet Reply Comments at 5.

¹⁰⁹ MCI *ex parte* letter, August 14, 1997. *See also* Chase *ex parte* letter, August 11, 1997.

¹¹⁰ *See, e.g.*, ClearComm *ex parte* letter, August 7, 1997, opposing "any substantially penalty-free amnesty" and advocating, *inter alia*, penalties such as denial of future designated entity status.

¹¹¹ Cook Inlet *ex parte* letter, August 5, 1997 at 1.

¹¹² Cook Inlet *ex parte* letter, August 15, 1997.

¹¹³ Cook Inlet *ex parte* letter, August 5, 1997 at 2-3. Cook Inlet argues that the Commission would also have to provide compensatory compliance benefit and transition rules for control group parties who are meeting debt obligations and are not subject to bankruptcy (*e.g.*, an additional 10 percent bidding credit in any reauction and relaxed control group and transfer rules). *Id.*

¹¹⁴ Omnipoint *ex parte* letter, September 5, 1997.

¹¹⁵ *Id.* at 2.

policies that would, in effect, reduce per pop prices paid for similar properties *i.e.*, the surrendered C block licenses, and will strand those licensees that have been significantly built-out with licenses that have "artificially higher prices" per pop. ¹¹⁶

52. Like Omnipoint, Alpine argues that entities like itself, which bid in good faith and intend to construct their markets, will not be helped by an amnesty program. ¹¹⁷ However, Alpine supports an amnesty plan structured to encourage overextended licensees to take prompt remedial action and free up the C block for reauction and subsequent development. Alpine explains that the ability to roam is essential to the viability of its system and to that of other operational C block systems, but cannot be offered to potential customers if significant portions of the C block have not been developed. Therefore, Alpine endorses an amnesty option that would encourage speedy surrender and reauction by permitting licensees to turn in one or more of their licenses and to receive credit for the down payments, to be applied against other obligations. ¹¹⁸

53. Discussion. We conclude that it serves the public interest as articulated in our goals, Section II, *supra*, to adopt an amnesty option that permits any C block licensee to surrender all of its licenses in exchange for relief from its outstanding debt and waive any applicable default payments, subject to coordination with the Department of Justice pursuant to applicable federal claims collections standards. ¹¹⁹ We adopt the amnesty option for purposes of speeding use of the C block spectrum to provide services to the American public. The surrender of licenses under this option will provide qualified parties with an opportunity to obtain C block licenses at the market value of the licenses prevailing at the time of the reauction. The amnesty option we adopt today is equitable to all parties because, while amnesty relieves a licensee from further debt obligations and any applicable default payments, a coordinated surrender of licenses facilitates expeditious reauctioning of the spectrum and will provide new market opportunities for all eligible entities. In addition, we note that rapid reauction of those licenses surrendered will also comply with the Congressional directive that we promote competition and participation in the telecommunications industry by small businesses.

54. A C block licensee must make the amnesty election in accordance with the procedures set forth in Section E, *infra*. The Commission will reauction those licenses surrendered on an expedited basis under the reauction rules discussed in the *Further Notice of Proposed Rule*

¹¹⁶ *Id.* at 3.

¹¹⁷ Alpine Reply Comments at 9-11.

¹¹⁸ Alpine *ex parte* letter, September 17, 1997 at 2.

¹¹⁹ See 4 C.F.R. Parts 101-105.

Making adopted with this *Second Report and Order*. See Section V., *infra*. Licensees electing the amnesty option will be eligible to bid for any and all licenses at the reauction.

55. Licensees electing the amnesty option will not have their down payment returned. This will discourage speculation and ensure that all bidders, new entrants as well as existing licensees, participate in the reauction without undue advantage. Retention of the down payments -- 10% of the bid price for most licensees -- is consistent with our previous decisions and actions affecting C block bidders in that we have retained any payments made by those C block bidders who have failed to make their first or second down payments.¹²⁰ We believe that by not finding these licensees in default and assessing any applicable default payments, we are according them a substantial benefit. In forgiving the outstanding debt we afford significant relief to the licensees by allowing them to avoid anticipated defaults. In addition, these licensees will not be deemed in default or delinquent in meeting government debt obligations. Nor will they be subject to any applicable default payments or in violation of any FCC rules or license conditions. Thus, their creditworthiness, financial qualifications, and other qualifications are preserved should they wish to take part in other federal loan programs¹²¹ or apply for any future spectrum auctions or licenses.¹²²

56. Subject to one exception identified below, licensees choosing to take advantage of the amnesty option will be required to surrender *all* of their licenses to the Commission. The requirement that all licenses be surrendered precludes licensees from "cherry picking." The simultaneous multiple-round auction design enables bidders to place bids on many licenses at once and to aggregate desired licenses in a manner that facilitates workable business plans. If we were to permit licensees to "cherry pick" which licenses to surrender, the interdependency of the licenses would be harmed. Licenses surrendered pursuant to such a "cherry picking" scheme might lack the potential for beneficial aggregation within MTAs, and therefore would likely be less valuable to potential bidders and impair business plans of new investors.

¹²⁰ See, Mountain Solutions LTD, Inc., Request for Waiver of Section 24.711(a)(2) of the Commission's Rules Regarding Market Nos. B053, B168, B172, B187, B188, B224, B247, B275, B366, and B381, *Order*, 12 FCC Rcd 5904 (1997) (*application for review filed May 28, 1997 pending*); Carolina PCS I Limited Partnership, Request for Waiver of Section 24.711(a)(2) of the Commission's Rules Regarding Market Nos. B016, B072, B091, B147, B177, B178, B312, B335, and B436, *Order*, DA 97-890 (rel. April 28, 1997) (*application for review filed May 28, 1997 pending*); C.H. PCS, Inc., Request for Waiver of Section 24.711(a)(2) of the Commission's Rules, *Order*, 11 FCC Rcd 9343 (1996); BDPCS, Inc., Emergency Petition for Waiver of Section 24.711(a)(2) of the Commission's Rules, *Memorandum Opinion and Order*, 12 FCC Rcd 3230 (1997), petition for reconsideration granted in part and denied in part, *Memorandum Opinion and Order*, FCC 97-300 (rel. Sept. 29, 1997).

¹²¹ Under the Debt Collection Improvement Act ("DCIA"), no person may obtain any federal financial assistance if the person has an outstanding debt with any federal agency which is in a delinquent status. Pub. L. No. 104-134, § 3100(j)(1), 110 Stat. 1321 (1996), codified at 31 U.S.C. § 3720B. In addition, in the *Part I Proceeding*, the Commission adopted a certification procedure as part of changes to the application procedures whereby applicants must certify that the applicant is not in default on any payment for Commission licenses (including down payments) and that it is not delinquent on any non-tax debt owed to any federal agency. Bidders who cannot make this certification may be ineligible for installment payment plans. *Part I Proceeding* at ¶ 8.

¹²² See 47 U.S.C. §§ 308(b), 309(j)(5).

57. As an exception to the "all-or-nothing" requirement, licensees that have met or exceeded the five year build-out requirements by September 25, 1997, the date of adoption of this *Second Report and Order*, will not be required to surrender licenses for built-out markets. In addition, these licensees will be permitted to retain those BTA licenses in which such build-out has occurred. However, licensees availing themselves of this exception may not pick and choose BTAs within an MTA but will be required, instead, to keep all of the other BTAs in the MTA in which the build-out requirement has been met and to pay for those licenses under the terms of their Notes. The build-out exception facilitates the achievement of the statutory goal set forth in Section 309(j) that we encourage the rapid provision of service to the public, and responds to the needs of licensees that have already commenced operations or have otherwise invested significantly in certain of their C block licenses. The Commission has an interest in minimizing the competitive impact of the changes that it makes to the auction rules, consistent with its broader policy objectives. The exception we adopt today is one method by which we can ensure that the menu of options available to the C block is fair to those licensees that have rapidly built-out their markets and initiated provision of competitive service.

58. Although the Bureau suspended installment payments on C block licenses on March 31, 1997, some licensees made their installment payments (*i.e.*, installments due on that date, and amounts due on December 31, 1996, but not paid until March 31, 1997, based on our automatic 90-day non-default rule) after the suspension. In addition, prior to the suspension of payments, many C block licensees made their regularly scheduled installment payments. We believe that due to the actions we take in this *Second Report and Order*, it would be unjust and inequitable for C block licensees to be treated differently merely because some C block licensees made prior payments while others did not. Consequently, we direct the Wireless Telecommunications Bureau to refund any installment payments made (whether due on or before March 31, 1997) on any license that is surrendered pursuant to this *Second Report and Order*. In addition, we will forgive payment of any due, but unpaid, installment payments for any surrendered license.¹²³ For licensees exercising the build-out exception and retaining certain licenses, all previously made installment payments will be applied first to reduce the Suspension Interest applicable to those licenses, and any amounts remaining will be refunded.

D. Prepayment

59. Background. In the *Installment Public Notice*, the Bureau sought comment on whether PCS licensees should be permitted to prepay their installment debt at a discount, and

¹²³ Forgiveness of this obligation will be subject to coordination with the Department of Justice pursuant to applicable federal claims collections standards. See 4 C.F.R. Parts 101-105.

on proposals for calculating the net present value of the debt.¹²⁴ In his presentation at the FCC Public Forum held on this issue, John Bensché of Lehman Brothers recommended prepayment by bidders as a way to avoid further restructuring in the future and to remove the government from its role as creditor to the wireless industry.¹²⁵ Bear Stearns also indicates that a prepayment option will improve the financial flexibility of C block licenses by eliminating the uncertainty surrounding the threat that a license will be revoked for financial reasons because lenders could collateralize their obligations with the licenses, at least indirectly, using the shares of the license-holding entity.¹²⁶

60. Other commenters also support some form of prepayment option for C block licensees.¹²⁷ In a letter dated September 16, 1997, Representatives Edward J. Markey and W.J. "Billy" Tauzin urged the Commission to consider a "full price buy-out" proposal as part of a menu of options approach. Under this proposal, licensees could purchase at "full price" as many of their existing licenses as they desire with cash up front, for the net present value of the net bid prices for such licenses. They suggested that the licensees be allowed to use any monies on deposit with the Commission and any "new money" that the licensee may immediately muster. They agreed that this option had the benefit of allowing licensees to proceed with build-outs immediately, thereby bringing service to the public as quickly as possible, while also providing a meaningful opportunity for all interested parties to participate in an auction for the bulk of the licenses.¹²⁸

61. Many commenters argue that a prepayment option should include a discount to lower the net high bid price of the licenses below A and B block prices.¹²⁹ For example, NextWave believes that a discount to A and B block prices is necessary due to the headstart that A and B block licensees have experienced in time to market, coupled with the restraints of the C block control group rules and the deterioration of the financial market conditions for wireless companies.¹³⁰ Other commenters believe that a prepayment discount should reflect the

¹²⁴ See *Installment Public Notice* at n.6.

¹²⁵ Presentation by John Bensché of Lehman Brothers at June 30, 1997, FCC Public Forum on Installment Payment Issues at 3. See also NextWave Comments at 9; GWI Reply Comments at 13-14.

¹²⁶ See Bear Stearns Comments at 4.

¹²⁷ See, e.g., ClearComm Comments at 3.

¹²⁸ See The Honorable W.J. "Billy" Tauzin and the Honorable Edward J. Markey, *ex parte* letter, September 16, 1997.

¹²⁹ See, e.g., ClearComm Comments at 3; Horizon Comments at 10-12; RTFC Comments at 3; Holland Comments at 3-4; Duluth PCS Comments at 1-2; GWI Comments at 8-10; NextWave Comments at 9-10. See also Alpine *ex parte* letter, September 23, 1997.

¹³⁰ NextWave Comments at 9-10 and Reply Comments at 22.

average of D and E block winning bids, with a multiplier of 2.25 applied to secondary and tertiary markets and 3.0 for top 100 markets.¹³¹ In its *ex parte* letter, Triumph Capital suggests that the Commission apply a discount ranging from 15 percent to 30 percent to determine the present value of C block debt to the FCC.¹³² GWI proposes to scale the C block bid using the ratio of the A/B block average cash bid to C block average bid. This scale factor would then be multiplied by the actual C block bid for that license to determine the scaled C block cash bid.¹³³ This scaled C block bid would then be discounted at a 14 percent discount rate for the government debt to determine the prepayment price.¹³⁴ NextWave suggests that a two-year period would be necessary for licensees to fund this prepayment as well as sustain operating expenses.¹³⁵

62. Cook Inlet Region argues that any discounting of the net high bid price for purposes of prepayment would be unfair to the losing bidders in the C block auction and investors and creditors of the bidders in the auction.¹³⁶ Omnipoint also believes that a prepayment option is discriminatory against all of the winning bidders except the very large.¹³⁷ AirGate Wireless believes that permitting licensees to pay the net present value of their license costs at a discount would have the effect of rewriting the outcome of the C block auction, denying licenses to bidders who expressed through their bids a willingness to pay more than a discounted bid, and thereby arbitrarily choosing winners and losers.¹³⁸ Additionally, the SBA does not support a discount in the net bid amounts.¹³⁹ The SBA indicates that absent a detailed analysis of the bidders, the bidding process, round activity, financial environment and marketplace circumstances during each of the auctions, including a regression analysis to isolate individual factors, it cannot be determined that the adjusted marketplace value of C

¹³¹ Duluth PCS Reply Comments at 1-2.

¹³² See Frederick W. McCarthy, Chairman, Triumph Capital to The Honorable Reed E. Hundt, Chairman, Federal Communications Commission *ex parte* letter, September 23, 1997 ("McCarthy Letter").

¹³³ GWI Comments at 10-12.

¹³⁴ GWI Comments at 9. See also Bear Stearns Comments at 3.

¹³⁵ NextWave Comments at 10.

¹³⁶ Cook Inlet Region *ex parte* letter, September 23, 1997 at 2.

¹³⁷ Omnipoint *ex parte* letter, September 23, 1997 at 2.

¹³⁸ See AirGate Wireless *ex parte* letter, July 18, 1997 at 3.

¹³⁹ See Jere W. Glover, Chief Counsel, U.S. Small Business Administration and Jenell S. Trigg, Assistant Chief Counsel, Telecommunications, to The Honorable Reed E. Hundt, Chairman, Federal Communications Commission, *ex parte* letter, September 8, 1997 ("Glover Letter").

block should be based on either A and B block or D-F block bid amounts.¹⁴⁰ The SBA also indicates that "a reduction in principal would seriously undermine the integrity of the auction as well as set a dangerous precedent for small business participation in future auctions."¹⁴¹

63. Other commenters argue that a prepayment option is not viable for small businesses, or that it is otherwise inappropriate. BIA Capital contends that a prepayment option is not feasible because it would require small businesses to trade in debt capital from the government, which costs 7%, for private equity, which has a capital cost ranging from 30% to 40%.¹⁴²

64. Discussion. Under the prepayment option we adopt, any C block licensee may prepay selective licenses subject to the restrictions described in this Subsection IV.D. All licenses that are not prepaid in accordance with this option must be surrendered to the Commission in exchange for a forgiveness of the corresponding debt and any penalties. A licensee selecting this option may apply 70% of the total of all down payments it made on the licenses that it elects to surrender to the Commission ("Available Down Payments"), to a prepayment of the Notes for as many of its licenses it wishes to keep.¹⁴³ The remaining down payments not applied to prepayment will be retained by the Commission. Additionally, an incumbent may use any "new money" to prepay as many of its own licenses as it desires. Any installment payments previously made by the licensee for all its licenses will be added to the Available Down Payments to increase the funds available to prepay its Notes. Interest accrued from the date of the conditional license grant through the Election Date will be forgiven. For purposes of this option, the down payment associated with licenses that are transferred as of the Election Date to subsidiaries or affiliates will be considered transferred with the licenses and the corresponding debt.¹⁴⁴

¹⁴⁰ *Id.* at 5.

¹⁴¹ *Id.*

¹⁴² BIA Capital Comments at 2-3.

¹⁴³ For example, if a licensee held two licenses with net high bids of \$100 and \$200, then the total down payments would equal \$30 (\$10 + \$20). If the licensee elected to keep the \$200 license, the licensee would have \$7 (\$10 x 70 percent) of its down payment from the \$100 license to apply towards the prepayment of the \$200 license's Note. If, on the other hand, the licensee elected to prepay the \$100 license, then the licensee would have \$14 (\$20 x 70 percent) of its down payment from the \$200 license to apply towards the prepayment of the \$100 license's Note.

¹⁴⁴ For example, if ABC Company paid \$100,000 each for two licenses and submitted \$10,000 in down payments for each license, the total down payments submitted by ABC Company would be \$20,000. However, if ABC had subsequently transferred one of its licenses to XYZ Company, a wholly-owned subsidiary, ABC Company would not have any additional money available to purchase its license, and XYZ Company would not have any additional money available to purchase its license. This option, however, is not intended to prohibit additional license transfers consistent with existing Commission rules.

65. We believe that this prepayment option fairly balances competing interests, while maintaining the fairness and integrity of our rules and auctions. We note that 30% of the down payments is equal to 3% of the net high bids and is consistent with the approach adopted previously for down payments.¹⁴⁵ Under our existing rules, an applicant is subject to a 3% payment if it fails to make the required down payment.¹⁴⁶ Furthermore, previously we have indicated that these payments will discourage default and ensure that bidders have adequate financing and that they meet all eligibility and qualification requirements.¹⁴⁷ In this manner, we believe it to be most fair to apply this provision to those licensees who seek the relief provided by this option. If licensees were able to use all of their down payment, they would recoup in full what they paid, and there would be no deterrent effect against bidding excessively in the auction or otherwise gaming the process. Thus, in the next auction to which our default payments apply, these rules could be ignored with impunity. Such a result would severely harm our market-based auction program. It would make it impossible to impose the charges we already have imposed in past cases, including in C block cases.¹⁴⁸ Further, we emphasize that permitting C block licensees access to the down payments they previously made for licenses they no longer wish to retain is a substantial benefit and fair to these licensees. To allow them to use 100% of those funds would be unfair to other C block licensees who choose to continue to pay under their existing obligations, and to bidders who were unsuccessful in the auction.

66. While some have argued that C block licensee loan payoffs made under a prepayment plan should be determined using a net present value formula, we decline to discount the Notes. We believe it is fair to other bidders and to the credibility and integrity of our rules for the prepayment to be in the amount of the outstanding debt for the net high bid. In other words, licensees should pay what they bid. To offer deep discounts off the amount of the debt is outside normal commercial practices and otherwise appears to be a "bail-out" of C block licensees who have encountered financial difficulties long after the auction was completed and the financial commitments were made. Debt paid off in advance of the maturity date allows

¹⁴⁵ See BDPCS, Inc., BTA Nos. B008, B036, B055, B089, B110, B133, B149, B261, B298, B331, B347, B358, B391, B395, B407, B413, and B447, *Order*, 11 FCC Rcd 14399 (1996) (assessing a \$67,695,653.23 default payment for failure to submit the required down payment for licenses won in the C block auction), *reconsideration denied*, *Order*, 12 FCC Rcd 6606 (1997); and C. H. PCS, Inc., BTA No. B347 Frequency Block C, *Order*, 11 FCC Rcd 22430 (1996) (assessing a \$5,031,232.50 default payment for failure to submit the required down payment for one license won in the C block reauction).

¹⁴⁶ See 47 C.F.R. §§ 1.2104(g)(2), 24.704(a)(2). The defaulted bidder in this instance is subject to a payment equal to the difference between the amount bid and the amount of the winning bid the next time the license is offered by the Commission, plus a payment equal to three percent of the defaulted bid price. See 47 C.F.R. § 24.704(a)(1), (2). See also, *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd 4495 at n.51.

¹⁴⁷ *Competitive Bidding Second Report and Order*, 9 FCC Rcd. at 2383.

¹⁴⁸ See n.145, *supra*.

the debtor to reap the benefit of not incurring additional interest due on the principal amount owed. To discount the amount of the principal, as has been suggested, would unfairly permit a windfall to the licensee electing this option. While we are cognizant of the financial difficulties for some C block licensees, we are also mindful of our duty to the other C block licensees who are successfully meeting their obligations and continuing build-out efforts for wireless services. Therefore, we believe that we strike the proper balance by allowing a licensee the benefit of prepaying its debt obligations, thereby reducing the amount of interest that would be payable over the full term of the Note, while avoiding fundamental changes to our rules that unfairly harm other licensees who followed our rules and who continue to meet their payment obligations.

67. Under this prepayment option, an incumbent must prepay all of the BTA licenses in a particular MTA and cannot arbitrarily select individual BTA licenses in a given MTA to prepay while surrendering other licenses in that MTA, with one exception. We conclude that while a licensee must prepay the debt on all of the BTAs for which it holds licenses in an MTA, we recognize that a licensee may not have sufficient funds available to it to prepay all of its Notes for the BTA licenses in a given MTA. Therefore, any licensee that has enough funds on hand to prepay one or more BTAs within an MTA, but not enough for the entire MTA, must prepay all of those BTAs within that MTA that it can afford. We conclude that a requirement that all licenses in a given MTA be prepaid precludes licensees from "cherry picking." The simultaneous multiple-round auction design discussed in paragraphs 86-89, *infra*, enables bidders to place bids on many licenses at once. If we were to permit licensees to "cherry pick" which licenses in an MTA to prepay and which to surrender under this option, the interdependency of the licenses would be threatened. Licenses surrendered pursuant to such a "cherry picking" scheme would lack the potential for aggregation, and consequently would hold much less value to other bidders in the subsequent reaction.

68. We decline to provide an exception for markets in which the five-year build-out requirement has been met as provided under the amnesty option. Under the prepayment option, licensees have the flexibility to select which markets they will retain subject to the restrictions in paragraph 67, *supra*. For this reason, licensees have the option of selecting and prepaying for licenses where they have invested capital to meet the build-out requirements and not prepaying in an MTA where they have not. We believe that this flexibility, compared to the all or nothing approach of simple amnesty, mitigates the need for this exception.

69. Finally, for a period of two years from the start date of the reaction, licensees (defined as qualifying members of the licensee's control group, and their affiliates) will be prohibited from reacquiring the licenses surrendered pursuant to this option either through a reaction or any other secondary market transaction. We do not believe that it would be fair to other licensees and bidders for these licensees to benefit from a reaction of those licenses after taking advantage of this option. Furthermore, we do not believe that this option should

provide opportunities for licensees to "selectively" reduce their license obligations by surrendering a license in hopes of re-obtaining it in a reauction at a lower price.

E. Election Procedures

70. We conclude that a licensee electing to continue under its existing installment payment plan or electing one of the options set forth in this *Second Report and Order*, must file a written notice of such election with the Wireless Telecommunications Bureau on or before the Election Date ("Election Notice") as specified in this section. As used herein, "Election Date" means January 15, 1998.¹⁴⁹

71. We require that those licensees electing (i) to continue making payments under their original C block Notes, (ii) the disaggregation option, or (iii) the amnesty option who elect to take advantage of the build-out exception and retain certain of their licenses make the appropriate payment by March 31, 1998 (or by the end of the 60-day grace period allowed, *see* paragraph 25, *supra*), and execute any necessary financing documents pursuant to appropriate requirements and time frames established by the Bureau in order to continue to be eligible under the option chosen.

72. Continuation Under Existing Note(s). Any licensee that wishes to continue making installment payments in accordance with the terms of its original C block Note, must elect to do so by submitting the Election Notice of such election.

73. Disaggregation. For licensees electing the disaggregation option, the Election Notice must include (i) a list of all licenses being disaggregated, (ii) the original of all licenses being disaggregated, and (iii) all originals of the Notes and Security Agreements for those licenses being disaggregated for cancellation by the Commission. Upon acceptance of the Election Notice, the disaggregated spectrum will be deemed returned to the Commission.

74. Amnesty. For licensees electing the amnesty option, the Election Notice must include (i) a list of all licenses being surrendered, (ii) if applicable, a statement indicating that it intends to avail itself of the build-out exception together with a list of those BTA licenses it intends to

¹⁴⁹ *See* paragraph 110, *infra*. The Wireless Telecommunications Bureau will provide more information concerning filing procedures in a subsequent public notice.

retain¹⁵⁰ and pertinent information concerning build-out pursuant to the Commission's rules,¹⁵¹ (iii) the original of all licenses being surrendered, and (iv) all originals of the Notes and Security Agreements for those licenses being surrendered for cancellation by the Commission.

75. Prepayment. For licensees electing the prepayment option, the Election Notice must include (i) a list of all licenses being prepaid, (ii) a payment in the amount of any additional "new money" a licensee desires to apply to the prepayment of its licenses, (iii) the original of all licenses not being prepaid in accordance with this option, and (iv) all originals of the Notes and Security Agreements for those licenses not being prepaid for cancellation by the Commission. Notes which are prepaid will be marked "Paid-In-Full" and returned to the licensee.

76. We further conclude that any C block licensee that (i) fails to elect one of the options set forth, Section IV.A.-D., *supra* on or before the Election Date, or (ii) fails to elect on or before the Election Date to continue making payments under its original C block Note(s), or (iii) fails to fully and timely execute and deliver to the Commission (or its agent) any required financing documents within the period of time specified by the Bureau, will not be afforded the opportunity granted to licensees who do make a timely election to repay the Suspension Interest over a period of eight equal payments. In such event, the licensee will be required, on or before March 31, 1998, to make all payments that would have been due under its Note(s) but for the effect of the *Suspension Order*. For example, a licensee whose regular installment due date was March 31, 1997, who did not make payment on that date because of the *Suspension Order*, will owe on March 31, 1998, all payments that were due and payable earlier, but unpaid due to the *Suspension Order*, in addition to the regularly scheduled March 31, 1998, payment.

F. Cross Defaults

77. Background. In the *Notice of Proposed Rule Making* in this proceeding, we sought comment on whether the Commission should cross default its installment payment plan loans with other installment payment plan loans to the same licensee.¹⁵² We asked if we should cross default licensees across services or blocks (*e.g.*, from PCS licenses to SMR licenses, or from PCS C and F block licenses), whether we should pursue default remedies against single

¹⁵⁰ Those licensees electing to proceed under the build-out exception will be required to adhere to the specific obligations set forth in their Notes and Security Agreements, as modified for those licenses not being surrendered to the Commission. See discussion in Section IV.E., *supra*.

¹⁵¹ 47 C.F.R. § 24.203(c).

¹⁵² See *Part 1 Proceeding* at ¶¶ 76-78.

licenses only (*e.g.*, from C block to C block licenses only), and what factors should influence our decision to pursue cross defaults. In response, several commenters specifically requested that the Commission clarify its rules regarding cross default in the context of defaults on installment payments if licenses are held by licensees with the same or overlapping control groups.¹⁵³

78. Further, several commenters request the Commission to affirmatively decide that there will be no cross default.¹⁵⁴ BIA Capital states that one perceived disincentive to providing financing to C block licensees is cross default.¹⁵⁵ In this regard, BIA Capital suggests that the Commission quickly clarify its position on cross defaults, and recommends that a default on payments for some licenses not result in cross default on other licenses which the company is using successfully.¹⁵⁶ ClearComm agrees and urges the Commission to allow licensees to place their licenses in separate entities so that potential financiers may invest in specific markets that meet their investment criteria.¹⁵⁷ AmeriCall and Hughes Network Systems state the effectiveness of the disaggregation option can be assured if the Commission clarifies that it will not pursue cross defaults.¹⁵⁸ AmeriCall and Hughes Network Systems state most regional equity funds are unwilling to look at this sector until they are reassured that their investment in one state is sheltered from events in other states that would impact licenses in those different markets.¹⁵⁹

79. Discussion. We will not pursue cross default remedies against C block licensees who default on installment payments with regard to other licenses in the C or F blocks. For example, if a licensee defaults on a C block license and that licensee holds other C block licenses on which it is making its payments, we will not declare it to be in default on its debt associated with the other C block licenses. Similarly, if a licensee defaults on a C block license, and also holds F block licenses on which it is making its payments, we will not declare it to be in default on its F block debt.

¹⁵³ See, *e.g.*, ClearComm Reply Comments at 4; BIA Capital Comments at 4.

¹⁵⁴ See *e.g.*, AmeriCall *ex parte* letter, July 11, 1997; Magnacom *ex parte* letter, August 13, 1997.

¹⁵⁵ BIA Capital Comments at 4.

¹⁵⁶ *Id.*

¹⁵⁷ ClearComm Reply Comments at 4.

¹⁵⁸ AmeriCall and Hughes Network Systems, Inc., *ex parte* letter, September 16, 1997 at 2.

¹⁵⁹ *Id.*

80. This decision is warranted in light of our efforts to provide current C block licensees who are experiencing financing difficulties with options for meeting their financial obligations to the Commission.¹⁶⁰ We emphasize that our decision only addresses the context of a licensee's default on an installment payment for a C block license upon other licenses held by that licensee in the C or F blocks. We defer to completion of the Part 1 Rule Making our decision on whether to amend more comprehensively our policy of cross defaults. We also emphasize that existing installment payment default rules and license conditions will continue to apply for those particular licenses in default after March 31, 1998. Accordingly, upon default, a license will automatically cancel and the Commission will initiate debt collection procedures against the licensee and accountable affiliates.¹⁶¹

V. FURTHER NOTICE OF PROPOSED RULE MAKING

A. Proposals Regarding the Reauction of Surrendered Licenses

81. Background. Several commenters suggest that a reauction of C block licenses is the best method by which the Commission can place C block licenses in the hands of licensees capable of constructing systems and offering service to the public rapidly. Triumph Capital, MCI, and Cook Inlet Communications all support a reauction within four to six months.¹⁶²

82. Discussion. Under the options adopted above, licensees have three options for the surrender of licenses or spectrum to the Commission. A reauction of licenses will assure rapid provision of service to the public. A reauction also will ensure that these licenses are available to all applicants in a rapid and fair fashion. A simultaneous reauction of all the licenses turned in to the Commission will benefit all bidders because they will be able to bid for a number of licenses in a single reauction, instead of a series of piecemeal auctions after defaults and revocations, in which opportunities for aggregation might be less favorable.

1. Licenses to be reauctioned

¹⁶⁰ This decision does not affect our policy with regard to defaults on first or second down payments. See Letter to Kenneth Hobbs from Michele C. Farquhar, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, DA 97-260 (rel. February 4, 1997). See also BDPCS, Inc. Emergency Petition for Waiver of Section 24.711(a)(2) of the Commission's Rules, *Memorandum Opinion and Order*, 12 FCC Rcd 3230 (1997).

¹⁶¹ 47 C.F.R. § 1.2110(e)(4)(iii). See also 31 U.S.C. Chapter 37; 4 C.F.R. Parts 101-105; 47 C.F.R. Part 1, Subpart O.

¹⁶² Triumph Capital *ex parte* letter, August 7, 1997 at 1; MCI *ex parte* letter, August 14, 1997 at 2-3; Cook Inlet Communications *ex parte* letter, August 5, 1997 at 3.

83. We propose that the reauction include the following licenses: (1) all licenses representing the disaggregated spectrum surrendered to the Commission under the disaggregation option; (2) all licenses surrendered to the Commission on or before January 15, 1998, by incumbent licensees who choose to take advantage of the Commission's prepayment or amnesty options; and (3) all PCS C block licenses currently held by the Commission as a result of previous defaults. By including all available licenses in the reauction, the Commission can efficiently and fairly speed service to the public. In addition, offering all available licenses will allow for the most efficient aggregation of licenses. We seek comment on this proposal.

2. Eligibility for Participation

84. As we stated in the *Second Report and Order*, all entrepreneurs, all entities that applied for the original C block auction, and all current C block licensees with exceptions, are eligible to bid in the reauction. We seek comment on whether we should restrict participation in the reauction to entities that have not defaulted on any FCC payments.¹⁶³ Should we presume that an entity's prior default on payments for an FCC license or authorization makes that entity not financially or otherwise fit to acquire a reauctioned C block license? Alternatively, we could review financial qualifications through several other means. For instance, we could allow such entity to participate in an auction, but if the applicant is a winning bidder, set for expedited hearing the financial qualifications of the bidder, and allow the applicant to rebut a presumption that it is not financially qualified.¹⁶⁴ Another alternative would be to request that the entity submit more detailed financial information at the application stage, or require that the entity submit a higher upfront payment amount (e.g., a 50% upfront payment requirement) to participate in the reauction. With regard to C block licensees who elect the disaggregation, amnesty, or prepayment options adopted in the *Second Report and Order*, we observe that by making such election and related payments they are not in default on their C block licenses and, thus, would not be restricted from participation in the reauction (except as otherwise set forth in the *Second Report and Order*).

3. Reauction Procedures

85. We propose below auction design and application procedures for the reauction of C block licenses.

a. Competitive Bidding Design

86. We propose that all licenses and spectrum surrendered to the Commission be awarded by means of a simultaneous multiple-round electronic auction. We base this proposal on our desire to quickly auction available licenses and thereby to promote the most efficient

¹⁶³ See 47 U.S.C. § 309(j)(5).

¹⁶⁴ See 47 C.F.R. §§ 24.832(e), 1.2108(d)(3).

assignment of the spectrum. Consistent with our normal practice, the specific procedural requirements of the auction would be set out by Public Notice prior to the auction. In general, we have indicated that the auction procedures chosen for each service should be those that will best promote the policy objectives identified by Congress.¹⁶⁵ We further concluded in the *Competitive Bidding Second Report and Order* that in most cases the goals set forth in Section 309(j) will be best achieved by designing auctions that award authorizations to the parties that value them most highly. As we explained, such parties are most likely to deploy new technologies and services rapidly, and to promote the development of competition for the provision of those and other services.¹⁶⁶

87. Also, multiple-round bidding during the auction will provide more information to bidders about the value of licenses than single round bidding. With better information, bidders have less incentive to shade their bids downward in order to avoid the "winner's curse," that is, the tendency for the winner to be the bidder who most overestimates the value of the item being auctioned.¹⁶⁷ Finally, multiple-round bidding is likely to be fairer than single-round bidding. Every bidder has the opportunity to win if it is willing to pay the most for it. Thus, we tentatively conclude that multiple-round bidding would be the best method of auctioning all available licenses and we seek comment on this tentative conclusion.

88. We also tentatively conclude that all surrendered C block licenses should be awarded in a single simultaneous multiple-round auction. A single simultaneous auction will facilitate any aggregation strategies that bidders may have, and it would provide the most information to bidders about license values at a time that they can best put that information to use. We seek comment on this tentative conclusion.

89. Finally, if we adopt simultaneous multiple-round bidding as our method of auctioning all available licenses, we tentatively conclude that bidding should be allowed only by electronic means, rather than by telephone. Given our desire to conduct the reaction quickly, as well as recent improvements in our electronic bidding software, we tentatively conclude that telephonic bidding should be permitted only in exceptional circumstances, to be determined by the Wireless Telecommunications Bureau in each instance.

b. Bidding Procedures

90. Subject to the exceptions discussed below, which are designed to speed the reaction process, we tentatively conclude that the reaction should be conducted in conformity with the general competitive bidding rules set forth in Part 1, Subpart Q of the Commission's

¹⁶⁵ 47 U.S.C. § 309(j)(3).

¹⁶⁶ *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2360.

¹⁶⁷ *Id.* at 2362.

rules,¹⁶⁸ as revised,¹⁶⁹ and substantially consistent with the auctions that have been employed in other wireless services. We also propose to use our Part 24 rules applicable to the C block to the extent that such rules do not conflict with our Part 1 rules or rules specifically adopted or proposed in this *Second Report and Order and Notice of Proposed Rule Making* for the reauction of C block licenses. Specifically, except as set forth herein, we propose to apply the Part 1 rules regarding competitive bidding mechanisms,¹⁷⁰ bidding application and certification procedures and prohibition of collusion,¹⁷¹ submission of upfront payment, down payment and filing of long-form applications,¹⁷² procedures for filing long form applications,¹⁷³ and procedures regarding license grant, denial and default.¹⁷⁴ We seek comment on this proposal.

91. Activity Rules. We tentatively conclude that, as we have done in other simultaneous multiple-round auctions, we will conduct the reauction in three stages. Three stages, with bidders required to be more active in each stage, serves to provide bidders with the flexibility to pursue backup strategies as the auction progresses. However, because we believe that efficiently assigning these licenses for rapid service to the public and increased competition in the CMRS marketplace requires a swift reauction of the licenses, we propose to use high activity requirements in the reauction. In recent auctions, for example, we have required bidders to be active on 80% of their eligible licenses in Stage I, 90% in Stage II, and 98% in Stage III. We propose to use similar activity levels in the C block reauction and, to further expedite the auction, require the Bureau to use its delegated authority to aggressively schedule bidding rounds, quickly transition into the next stage of the auction when bidding activity falls, and use higher minimum bid increments for very active licenses. We seek comment on these proposals and tentative conclusions.

92. Reserve Price, Minimum Opening Bid, and Minimum Bid Increments. Section 1.2104 of our rules provides that the Commission may establish reserve prices or suggested minimum opening bids.¹⁷⁵ The Balanced Budget Act directed the Commission to prescribe methods by which a reasonable reserve price will be required or a minimum opening bid will be established, unless the Commission determines that a reserve price or a minimum opening bid

¹⁶⁸ 47 C.F.R. Part 1, Subpart Q.

¹⁶⁹ We initiated a proceeding last February to revise our Part 1 rules. *See Part 1 Proceeding*.

¹⁷⁰ 47 C.F.R. § 1.2104.

¹⁷¹ 47 C.F.R. § 1.2105.

¹⁷² 47 C.F.R. §§ 1.2106, 1.2107.

¹⁷³ 47 C.F.R. § 1.2108.

¹⁷⁴ 47 C.F.R. § 1.2109.

¹⁷⁵ 47 C.F.R. § 1.2104(d).

is not in the public interest.¹⁷⁶ This legislative directive establishes a presumption in favor of reserve prices or minimum opening bids in the reauction. A minimum opening bid is the minimum bid price set at the beginning of the auction below which no bids are accepted. Customarily, an auctioneer has the discretion to lower a minimum opening bid in the course of the auction. A minimum opening bid in the C block reauction, more than a reserve price, will help make certain that the public is fairly compensated for spectrum surrendered to the Commission, expedite the auction and give us the flexibility to make adjustments based on the competitiveness of the auction. We seek comment on this proposal. We also seek comment on the methodology we should use to establish minimum opening bids and what factors we should consider in doing so. We propose minimum opening bids for each market equal to 10% of the corresponding high bid for the market in the original C block auction. Such an approach will scale the minimum opening bids in a way that reflects the relative value of the licenses. We also ask that commenters address whether the amount of the minimum opening bid should be capped to ensure that bidding is not deterred on high valuation markets, in particular. Finally, if commenters believe that a minimum opening bid equal to 10% of the high bid in the original C block auction will result in substantial unsold licenses, or is not a reasonable amount, they should explain why this is so, and comment on the desirability of a higher or lower minimum opening bid.

c. Procedural and Payment Issues

93. Pre-Auction Application Procedures . Auction applicants are required to file a short-form application, FCC Form 175, prior to the start of each auction.¹⁷⁷ Although we have previously allowed both electronic and manual filing of such applications, we tentatively conclude that we should require electronic filing of all short-form applications for the reauction. We believe that electronic filing of applications would serve the best interests of auction participants as well as the members of the public monitoring the reauction. We also believe that an electronic filing requirement will help ensure that the reauction will be completed within the time frame contemplated by this *Further Notice of Proposed Rule Making*. We have developed user-friendly electronic filing software and Internet World Wide Web forms to give applicants the ability to easily and inexpensively file and review applications. This software helps applicants ensure the accuracy of their applications as they are filling them out, and assists them in avoiding errors and omissions. In addition, by shortening the time required for the Commission to process applications before the auction, electronic filing will increase the lead time available to applicants to pursue business plans and arrange necessary financing before the short-form deadline. Our experiences from recent auctions show that bidders are confident that the electronic filing system is reliable. For example, in the broadband PCS D, E, and F block auction, 94% of the qualified bidders filed their short-form applications electronically. In the recently completed WCS auction, all

¹⁷⁶ Balanced Budget Act of 1997, P.L. 105-33, 111 Stat. 251 (1997) (to be codified at 47 U.S.C. § 309(j)(4)(F)) ("Balanced Budget Act").

¹⁷⁷ See 47 C.F.R. § 1.2105(a).

winning bidders filed their long-form applications electronically. In addition, we note that in the *Part 1 Proceeding*, we tentatively concluded that Sections 1.2105(a) and 1.2107(c) of our rules should be amended to require electronic filing of all short-form and long-form applications.¹⁷⁸ We seek comment on this tentative conclusion.

94. Upfront Payment. The Part 1 rules require the submission of an upfront payment as a prerequisite to participation in spectrum auctions.¹⁷⁹ We propose to set the amount of the upfront payment for the reauction at \$.06 per MHz per pop. We adopted the same upfront payment amount for our most recent broadband PCS auction, the D, E, and F block auction, in which all applicants for all blocks made a \$.06 per MHz per pop upfront payment.¹⁸⁰ In the *Competitive Bidding Second Report and Order*, we indicated that the upfront payment should be set using a formula based upon the amount of spectrum and population (or "pops") covered by the license or licenses for which parties intend to bid.¹⁸¹ We reasoned that this method of determining the required upfront payment would enable prospective bidders to tailor their upfront payment to their bidding strategies.¹⁸² At the same time, however, we noted that determining an appropriate upfront payment involved balancing the goal of encouraging bidders to submit serious, qualified bids with the desire to simplify the bidding process and minimize implementation costs imposed on bidders.¹⁸³ We concluded that the best approach would be to maintain the flexibility to determine the amount of the upfront payment on an auction-by-auction basis because this balancing may yield different results depending upon the particular licenses being auctioned.¹⁸⁴ In light of our desire that only serious, qualified applicants participate in the reauction, our proposal of a \$.06 per MHz per pop is appropriate. We seek comment on this proposal. We also seek comment on alternative methods of establishing an upfront payment, and in particular, on how the Commission may estimate the present market value of the spectrum to be auctioned.

95. Down Payment and Full Payment. Consistent with the procedures used in prior auctions, we tentatively conclude that every winning bidder in an auction should be required to tender a down payment sufficient to bring its total amount on deposit with the Commission up to 20% of its winning bid within 10 business days after the issuance of a public notice

¹⁷⁸ *Part 1 Proceeding* at ¶ 46.

¹⁷⁹ See 47 C.F.R. § 1.2106.

¹⁸⁰ 47 C.F.R. § 24.716(a)(1).

¹⁸¹ *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2377-78.

¹⁸² *Id.* at 2377.

¹⁸³ *Id.* at 2378.

¹⁸⁴ *Id.*

announcing the winning bidder for the license.¹⁸⁵ We seek comment on this tentative conclusion.

96. If a winning bidder makes its down payment in a timely manner, we propose that it file an FCC Form 600 long-form application and follow the long-form application procedures in Section 1.2107 of the Commission's rules.¹⁸⁶ After reviewing the winning bidder's long-form application, and after verifying receipt of the winning bidder's 20% down payment, the Commission would announce the application's acceptance for filing, thus triggering the filing window for petitions to deny. We note that the Balanced Budget Act of 1997 authorizes the Commission to establish a shortened period for the filing of petitions to deny.¹⁸⁷ In light of this authority, as well as our desire to conclude the reauction process as quickly as possible, we propose that parties then have 15 days following public notice that an application was accepted for filing to file a petition to deny. If, pursuant to Section 309(d) of the Communications Act, the Commission dismisses or denies any and all petitions to deny, the Commission would announce by public notice that it is prepared to award the license, and the winning bidder would then have 10 business days to submit the balance of its winning bid. If the bidder does so, the license would be granted. If the bidder fails to submit the required down payment or the balance of the winning bid or the license is otherwise denied, we would assess a default payment as discussed below. We seek comment on these proposals.

97. Amendments and Modifications of Applications. To encourage maximum bidder participation, we propose to allow applicants to amend or modify their short-form applications as provided in Section 1.2105.¹⁸⁸ In the broadband PCS context, we modified our rules to permit ownership changes that result when consortium investors drop out of bidding consortia, even if control of the consortium changes due to this restructuring.¹⁸⁹ We propose to adopt the same exception to our rule prohibiting major amendments in the reauction. We seek comment on these proposals.

98. Bid Withdrawal, Default and Disqualification. We tentatively conclude that the withdrawal, default, and disqualification rules for the reauction should be based upon the procedures established in our general competitive bidding rules. With regard to bids that are submitted in error, we propose to apply the guidelines that the Commission has fashioned to

¹⁸⁵ See 47 C.F.R. § 1.2107(b).

¹⁸⁶ See 47 C.F.R. § 1.2107. See also, 47 C.F.R. § 24.707.

¹⁸⁷ Balanced Budget Act.

¹⁸⁸ 47 C.F.R. § 1.2105.

¹⁸⁹ See Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, Fourth Memorandum Opinion and Order, 9 FCC Rcd 6858, 6868 (1994).

provide for relief from the bid withdrawal payment requirements under certain circumstances.¹⁹⁰ We seek comment on this approach.

d. Anti-Collusion Rules

99. In the *Competitive Bidding Second Report and Order*, we adopted rules to prevent collusion in connection with competitive bidding, explaining that these rules, which are codified at 47 C.F.R. § 1.2105, would enhance the competitiveness of both the auction process and the post-auction market structure.¹⁹¹ We propose to apply these same rules to the reauction of licenses surrendered to the Commission. We seek comment on this proposal.

¹⁹⁰ See Atlanta Trunking Associates, Inc. and MAP Wireless L.L.C. Requests to Waive Bid Withdrawal Payment Provisions, *Order*, FCC 96-203 (May 3, 1996), and Georgia Independent PCS Corporation Request to Waive Bid Withdrawal Payment Provision, *Order*, DA 96-706 (May 6, 1996). See also Atlanta Trunking Associates, Inc. and MAP Wireless, L.L.C., Petition for Reconsideration of Bid Withdrawal Payment and Georgia Independent PCS Corp., Application for Review of Request to Waive Bid Withdrawal Payment Provision, *Memorandum Opinion and Order*, 12 FCC Rcd 6382 (1997) (waiving the full bid withdrawal payments assessed against these parties after a finding that the Commission's remote bidding system may have contributed to some confusion leading to the submission of the erroneous bids).

¹⁹¹ See 47 C.F.R. § 1.2105(c). See also *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2386-88; Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Second Memorandum Opinion and Order*, PP Docket No. 93-253, 9 FCC Rcd 7245, 7253-7254 (1994); *Erratum*, Mimeo No. 50278, 1994 WL 575828 (October 19, 1994).

e. Designated Entity Provisions

100. We propose to provide small business bidders in the C block reauction with a two tiered bidding credit, which will provide a greater discount to very small businesses. In the C block auction, a winning bidder that qualified as a small business or a consortium of small businesses was able to use a bidding credit equal to 25% of its winning bid.¹⁹² For the reauction, however, we tentatively conclude that we should offer tiered bidding credits, as we did for F block and, more recently, Local Multipoint Distribution Service (LMDS) small business bidders.¹⁹³ We propose to define a second tier of small business, which we will refer to as "very small businesses," as entities that, together with their affiliates and persons or entities that hold interest in such entities and their affiliates, have average gross revenues of not more than \$15 million for the preceding three years. Creation of this subcategory of small business enables us to tailor a bidding credit to meet the needs of entities that may be interested in bidding on spectrum surrendered by C block licensees. Thus, we propose a 35% bidding credit for very small businesses and a 25% bidding credit for small businesses. We seek comment on our proposals and tentative conclusions.

101. We also tentatively conclude that an installment payment program will not be offered in the reauction.¹⁹⁴ We have conducted several auctions without installment payments. 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.¹⁹⁵ In assessing the public interest, we must try to ensure that all the objectives of Section 309(j) are considered. We have found, for example, that obligating licensees to pay for their licenses as a condition of receipt ensures greater financial accountability from

¹⁹² 47 C.F.R. § 24.712(a).

¹⁹³ See 47 C.F.R. §§ 24.717, 101.1107.

¹⁹⁴ Section 309(j)(4) of the Communications Act states that the Commission shall, in prescribing regulations pursuant to these objectives and others, "consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, or other schedules or methods that promote the objectives described in paragraph (3)(B) . . ." See 47 U.S.C. § 309(j)(4)(A) (*emphasis added*). See also Omnibus Budget Reconciliation Act of 1993, Report of the Committee on the Budget, House of Representatives, to Accompany H.R. 2264, A Bill to Provide for Reconciliation Pursuant to Section 7 of the Concurrent Resolution of the Budget for Fiscal Year 1994, May 25, 1993, at p. 255:

While it is clear that, in many instances, the objectives of section 309(j) will be best served by a traditional, "cash-on-the-barrelhead" auction, it is important that the Commission employ different methodologies as appropriate. Under this subsection, the Commission has the flexibility to utilize any combination of techniques that would serve the public interest.

H.R. Rep. No. 103-111 at 255 (1993).

¹⁹⁵ See 47 U.S.C. §§ 309(j)(3) and (4).

applicants.¹⁹⁶ Thus, we tentatively conclude that we should not extend installment payments to winners in the reauction, given the incentives to entrepreneurs established through the various proposals discussed above. We seek comment on these tentative conclusions.

VI. CONCLUSION

102. In this *Second Report and Order*, we order resumption of installment payments for the broadband PCS C and F blocks, with the payment deadline reinstated as of March 31, 1998. We also adopt options designed to assist C block licensees that are experiencing financial difficulties to build systems that will promote competition, or to surrender spectrum to the Commission for reauction. These options include disaggregation, amnesty, and prepayment. These provisions will create opportunities for C block licensees to provide service to the public while maintaining the fairness and integrity of our auctions program. We also adopt a *Further Notice of Proposed Rule Making* seeking comment on proposed changes to our C block rules to govern the reauction of surrendered spectrum in the C block.

VII. PROCEDURAL MATTERS AND ORDERING CLAUSES

A. Regulatory Flexibility Analysis

103. The Final Regulatory Flexibility Analysis, pursuant to the Regulatory Flexibility Act, 5 U.S.C. § 604, is contained in Appendix C. The Initial Regulatory Flexibility Analysis is contained in Appendix D.

B. Paperwork Reduction Act Analysis

104. This *Second Report and Order* contains a modified information collection. As part of its continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the information collections contained in this *Second Report and Order*, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due December 1, 1997. OMB comments are due December 1, 1997. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

¹⁹⁶ See 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, *Memorandum Opinion and Order on Reconsideration*, FCC 97-224, 62 Fed. Reg. 41225 (rel. July 10, 1997) ("800 MHz MO&O") at ¶ 130.

105. This *Further Notice of Proposed Rule Making* contains either a proposed or modified information collection. As part of its continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the information collections contained in this *Further Notice of Proposed Rule Making*, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due at the same time as other comments on this *Further Notice of Proposed Rule Making*; OMB comments are due 60 days from date of publication of this *Further Notice of Proposed Rule Making* in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

C. Paperwork Reduction Act Comment Filing Procedures

106. Written comments by the public on the modified information collections in this *Second Report and Order* are due on or before December 1, 1997. Written comments must be submitted by OMB on the modified information collections on or before December 1, 1997. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, DC 20554, or via the Internet to jboley@fcc.gov and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725 - 17th Street, N.W., Washington, DC 20503 or via the Internet to fain_t@al.eop.gov.

107. Written comments by the public on the modified information collections in this *Further Notice of Proposed Rule Making* are due November 13, 1997. Written comments must be submitted by OMB on the modified information collections on or before 60 days after date of publication in the Federal Register. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, DC 20554, or via the Internet to jboley@fcc.gov and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725 - 17th Street, N.W., Washington, DC 20503 or via the Internet to fain_t@al.eop.gov.

D. Ordering Clauses

108. 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), 156(c)(1), 303(r), and 309(j), this *Second Report and Order and Further Notice of Proposed Rule Making* is hereby ADOPTED, and Sections 1.2110 and 24.709 of the Commission's rules are amended as set forth in Appendix B, effective 60 days after publication in the *Federal Register*. The information collection contained in these rules becomes effective 60 days after publication in the Federal Register, following OMB approval, unless a notice is published in the Federal Register stating otherwise.

109. IT IS FURTHER ORDERED THAT the Wireless Telecommunications Bureau's *Suspension Order* dated March 31, 1997, suspending the installment payment obligations for Personal Communications Services (PCS) C block licensees, and the subsequent Public Notice dated April 28, 1997, suspending those obligations for PCS F block licensees are rescinded, effective March 31, 1998, and installment payments for C and F block PCS licensees are reinstated as of that date.

110. IT IS FURTHER ORDERED THAT on or before January 15, 1998, the Election Date, all C block broadband PCS licensees must elect either (1) to continue making payments under their original C block Notes, or (2) one of the options set forth in Section IV of this *Second Report and Order*. The Election Notice must be filed on or before January 15, 1998 with the Office of the Secretary, Federal Communications Commission, Washington, DC 20554 (Attn: Wireless Telecommunications Bureau, Auctions and Industry Analysis Division - Election Notice).

111. IT IS FURTHER ORDERED THAT the Secretary shall send a copy of this *Second Report and Order and Further Notice of Proposed Rule Making*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with Section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq.*

112. IT IS FURTHER ORDERED THAT, pursuant to 47 U.S.C. § 155(c) and 47 C.F.R. § 0.331, the Chief of the Wireless Telecommunications Bureau IS GRANTED DELEGATED AUTHORITY to prescribe and set forth procedures for the implementation of the provisions adopted herein.

E. Ex Parte Presentations

113. The *Further Notice of Proposed Rule Making* is a permit but disclose notice and comment rule making proceeding. *Ex parte* presentations are permitted, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a).

F. Comments

114. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **November 13, 1997**, and reply comments on or before **November 24, 1997**. In addition, a courtesy copy should be delivered to Mark Bollinger, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, 2025 M Street, Room 5202, Washington, DC 20554. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus ten copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, DC 20554.

G. Additional Information

115. For further information concerning the *Second Report and Order*, contact Jerome Fowlkes or Sandra Danner, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, Washington, DC 20554, (202) 418-0660. For further information concerning the *Further Notice of Proposed Rule Making*, contact Mark Bollinger, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, Washington, DC 20554, (202) 418-0660.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A
List of Commenters

Initial Comments

1. Airadigm Communications, Inc. (Airadigm)
2. ALLTEL Communications, Inc. (ALLTEL)
3. Alpine PCS, Inc. (Alpine)
4. AmeriCall International, L.L.C. (AmeriCall)
5. Bay Springs Telephone Company, Inc. (Bay Springs)
6. Bear Stearns
7. BellSouth Corporation
8. BIA Capital Corporation (BIA Capital)
9. Brookings Municipal Utilities (BMU)
10. Central Wireless Partnership (CWP)
11. Chase Telecommunications, Inc. (Chase)
12. ClearComm, L.P.
13. Comcast Corporation
14. Community Service Communications, Inc. (CSCI)
15. ComScape Telecommunications of Charleston License, Inc. (ComScape)
16. Conestoga Wireless Company (Conestoga)
17. CONXUS Communications, Inc. (CONXUS)
18. Cook Inlet Region, Inc., Cook Inlet Western Wireless, PV/SS PCS, L.P., Western Wireless Corporation, AirGate Wireless, L.L.C., Aerial Communications, Inc., TeleCorp, Inc., and Airadigm Communications, Inc. (collectively, CIRI)
19. Creative Airtime Services, L.L.C. (Creative)
20. Cyber Sites, L.L.C.
21. Dewey Ballantine
22. DiGiPH PCS, Inc. (DiGiPH)
23. Duluth PCS, Inc., St. Joseph PCS, Inc., and West Virginia PCS, Inc. (collectively, Duluth PCS)
24. Eldorado Communications, L.L.C. (Eldorado)
25. Fortunet Communications, L.P. (Fortunet)
26. General Wireless Inc. (GWI)
27. Holland Wireless, L.L.C., Wireless 2000, Inc., and Northern Michigan PCS Consortium, (collectively, Holland)
28. Horizon Personal Communications, Inc. (Horizon)
29. Indus, Inc.
30. Integrated Communications Group (Integrated)
31. Kansas Personal Communications Services, Ltd. (KPCS)
32. Ken W. Bray
33. Magnacom Wireless, L.L.C., PCSouth, Inc., and Communications Venture PCS Limited Partnership (collectively, Magnacom)
34. MCI Communications Corporation (MCI)

35. Meretel Communications Limited Partnership (Meretel)
36. MFRI, Inc.
37. Morris Communications, Inc. (Morris)
38. National Wireless Resellers Association (NWRA)
39. National Association of Black-Owned Broadcasters, Inc. (NABOB)
40. National Association of Black Telecommunications Professionals, Inc. (NABTP)
41. National Telephone Cooperative Association (NTCA)
42. Nextel Communications, Inc. (Nextel)
43. NextWave Telecom, Inc. (NextWave)
44. Northcoast Communications, L.L.C. (Northcoast)
45. Official Committee of Unsecured Creditors of Pocket Communications, Inc. (Pocket Creditors)
46. Omnipoint Corporation
47. OneStop Wireless
48. OnQue Communications, Inc. (OnQue)
49. PCS Plus L.L.C. and McKenzie Telecommunications Group, Inc. (collectively, PCS Plus)
50. Pioneer Telephone Association, Inc. (Pioneer)
51. Pocket Communications, Inc. (Pocket)
52. Point Enterprises, Inc. (Point)
53. R&S PCS, Inc. (R&S)
54. RFW, Inc.
55. Rural Telephone Finance Corporation (RTFC)
56. Small Business Coalition (SBC)
57. SouthEast Telephone Limited Partnership, Ltd. (SouthEast Telephone)
58. Southwestern Bell Mobile Systems (SBMS)
59. SpectrumWatch
60. Sprint Spectrum L.P.
61. Sprint Corporation
62. Tennessee L.P. 121 (Tennessee)
63. Toronto Dominion Bank and Toronto Dominion Securities (collectively, Toronto Dominion)
64. Urban Communicators PCS Limited Partnership (Urban Comm)

Reply Comments

1. Airtel Communications, Inc. (Airtel)
2. ALLTEL
3. Alpine
4. American Mobile Telecommunications Association, Inc. (AMTA)
5. Antigone Communications Limited Partnership and PCS Devco, Inc. (collectively, Antigone/Devco)
6. BellSouth Corporation
7. Carlson Technologies, Inc. (Carlson)

8. Cellexis International, Inc. (Cellexis)
9. ClearComm, L.P.
10. Comcast Corporation
11. Conestoga
12. CONXUS
13. CIRI
14. Duluth PCS
15. Fortunet
16. GWI
17. GTE Service Corporation (GTE)
18. Ken W. Bray
19. MCI
20. Millison Investment Management, Inc. (MIM)
21. Mountain Solutions LTD, Inc. (Mountain Solutions)
22. Nextel
23. NextWave
24. Northcoast
25. Omnipoint Corporation
26. OnQue
27. PCS Wisconsin, LLC
28. PrimeCo Personal Communications, L.P. (PrimeCo)
29. Radiofone PCS, L.L.C. (Radiofone)
30. R&S
31. RTFC
32. Sprint Spectrum L.P.
33. Stan P. Doyle
34. Telecommunications Resellers Association (TRA)
35. UniDial Communications (UniDial)
36. Urban Comm
37. U.S. Airwaves, Inc.
38. Wireless Nation, Inc.

Ex Parte Comments

1. AirGate Wireless, July 18, 1997
2. AirGate Wireless, July 22, 1997
3. AirGate Wireless, September 9, 1997
4. Alpine, September 17, 1997
5. Alpine, September 23, 1997
6. AmeriCall, July 11, 1997
7. AmeriCall, August 5, 1997
8. AmeriCall and Hughes Network Systems, Inc., September 16, 1997
9. AmeriCall, ClearComm, and Chase, September 17, 1997

10. BIA Capital, August 4, 1997
11. Chase, August 11, 1997
12. ClearComm, August 7, 1997
13. Congressman Rick Boucher, July 25, 1997
14. Congressman Richard Burr, August 11, 1997
15. Congressman Thomas Davis, July 30, 1997
16. Congressman John D. Dingell, September 16, 1997
17. Congressman Steny H. Hoyer, August 7, 1997
18. Congresswoman Sue W. Kelly, August 11, 1997
19. Congressman W.J. "Billy" Tauzin, August 13, 1997
20. Congressmen W.J. "Billy" Tauzin and Edward J. Markey, September 16, 1997
21. CONXUS, August 27, 1997
22. Cook Inlet Communications, August 5, 1997
23. Cook Inlet Communications, August 15, 1997
24. Cook Inlet Region, Inc., September 23, 1997
25. El Dorado, August 13, 1997
26. GWI, August 4, 1997
27. GWI, August 15, 1997
28. GWI, August 18, 1997
29. Magnacom Wireless, LLC, August 13, 1997
30. MCI, August 14, 1997
31. NextWave, June 23, 1997
32. NextWave, July 29, 1997
33. NextWave, August 5, 1997
34. Nokia, September 15, 1997
35. Nokia, September 16, 1997
36. Northern Michigan PCS Consortium, L.L.C., August 14, 1997
37. Omnipoint Corporation, August 18, 1997
38. Omnipoint Corporation, September 3, 1997
39. Omnipoint Corporation, September 5, 1997
40. Omnipoint Corporation, September 23, 1997
41. R&S, August 11, 1997
42. Senator Christopher S. Bond, July 14, 1997
43. Senator Paul D. Coverdell, September 24, 1997
44. Senator Pete V. Domenici, September 10, 1997
45. Senators James M. Inhofe, Don Nickles, and Conrad Burns, August 7, 1997
46. Senator John McCain, August 19, 1997
47. Senator John McCain, September 18, 1997
48. Senator Daniel Patrick Moynihan, August 4, 1997
49. Triumph Capital, August 7, 1997
50. Triumph Capital, September 23, 1997 ("McCarthy Letter")
51. Urban Comm, August 21, 1997
52. Urban Comm, September 17, 1997
53. U.S. Small Business Administration, September 8, 1997 ("Glover Letter")

**APPENDIX B
FINAL RULES**

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

PART 1 - PRACTICE AND PROCEDURE

1. Section 1.2110 is amended by amending paragraph (e)(4)(i) to read as follows.

§ 1.2110 Designated Entities

- (a) * * * *
- (b) * * * *
- (c) * * * *
- (d) * * * *
- (e) * * *
- (4) * * *

(i) If an eligible entity making installment payments is more than ninety (90) days delinquent in any payment, it shall be in default, except that broadband PCS frequency block C licensees making the March 31, 1998, interest payment pursuant to their elections under the Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services Licensees, *Second Report and Order*, WT Docket No. 97-82 (rel. Oct. 16, 1997), shall be in default if they are more than sixty (60) days delinquent on such payment.

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

PART 24 - PERSONAL COMMUNICATIONS SERVICES

2. The authority citation for Part 24 continues to read as follows:

AUTHORITY: Secs. 4, 301, 302, 303, 309 and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. §§ 154, 301, 302, 303, 309 and 332, unless otherwise noted.

3. Section 24.709 is amended by adding paragraph (b)(9) to read as follows.

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

- (a) * * * *
- (b) * * *

(9) *Special rule for licensees disaggregating or returning certain spectrum in frequency block C.*

(i) In addition to entities qualifying under this section, any entity that was eligible for and participated in the first auction for frequency block C, which began on December 18, 1995, will be eligible to bid in a reauction of licenses for frequency block C conducted after March 31, 1998.

(ii) The following restrictions will apply for any reauction of frequency block C licenses conducted after March 31, 1998:

(A) Applicants that elected to disaggregate 15 MHz of spectrum from any or all of their frequency block C licenses, as provided in subsection IV.B., Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services Licensees, *Second Report and Order*, WT Docket No. 97-82 (rel. Oct. 16, 1997), will not be eligible to apply for such disaggregated licenses until 2 years from the start of the reauction of those licenses.

(B) Applicants that surrendered any of their frequency block C licenses as provided in subsection IV.D. (the "prepayment option") Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services Licensees, *Second Report and Order*, WT Docket No. 97-82 (rel. Oct. 16, 1997), will not be eligible to apply for the licenses that they surrendered to the Commission until 2 years from the start of the reauction of those licenses.

(C) For purposes of this paragraph, *applicant* shall mean the applicant and its affiliates and any present or former qualifying member of a control group and their affiliates.

Federal Communications Commission

DA 98-12

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

In the Matter of)
)
Amendment of the Commission's) WT Docket No. 97-82
Rules Regarding Installment Payment)
Financing For Personal Communications)
Services (PCS) Licensees)

ERRATUM

Released: January 6, 1998

By the Chief, Wireless Telecommunications Bureau:

In paragraph six on page four of the *Second Report and Order and Further Notice of Proposed Rule Making*, WT Docket No. 97-82, FCC 97-342 (rel. October 16, 1997), the third sentence of the section entitled "Disaggregation" contained incorrect statements. The section is corrected to read as follows:

- **Disaggregation.** Any C block licensee may elect to disaggregate one-half of its spectrum (15 MHz of its 30 MHz) and surrender such spectrum to the Commission for reauction. A licensee must disaggregate spectrum for *all* of the Basic Trading Area (BTA) licenses it holds within any Major Trading Area (MTA), but need not disaggregate the licenses it holds in other MTAs. In return, the licensee will have the proportionate amount, i.e., 50%, of its outstanding debt on the disaggregated licenses forgiven. Fifty percent of the down payment for those licenses will be applied towards the debt for the retained spectrum; the licensee will not get a refund or credit of the other 50% of its deposit. The licensee will be prohibited from rebidding for this spectrum, or otherwise acquiring it in the secondary market, for two years from the date of the start of the reauction. C block licensees electing this option will repay over eight equal payments (beginning with the payment due on March 31, 1998) all interest that has accrued and was unpaid due to the payment suspension, adjusted to reflect the reduction in debt obligation. Any prior installment payments made will be credited in full against those amounts.

FEDERAL COMMUNICATIONS COMMISSION

Daniel B. Phythyon

Federal Communications Commission

Chief, Wireless Telecommunications Bureau

SELECTED FCC RULES

Following is an unofficial staff compilation of selected rules applicable to broadband Personal Communications Services, drawn from Parts 1 and 24 of the FCC's rules, which applicants may use until such time as the Government Printing Office publishes a current version in the Code of Federal Regulations (CFR). The rules compiled in this Bidder Information Package reflect rule changes effective February 12, 1999. Applicants should refer to the official version of the rules contained in FCC orders and in the Federal Register. The official rules govern in the event of conflicts. Relevant orders adopted to date by the FCC are also provided in this Tab. Applicants need to stay apprised of any rule changes that occur after release of this Bidder Information Package by checking the FCC website and the Federal Register.

PART 1--PRACTICE AND PROCEDURE
SUBPART Q--COMPETITIVE BIDDING PROCEEDINGS*

§ 1.2101 Purpose.

The provisions of this subpart implement Section 309(j) of the Communications Act of 1934, as added by the Omnibus Budget Reconciliation Act of 1993 (Pub.L. 103-66) and the Balanced Budget Act of 1997 (Pub.L. 105-33), authorizing the Commission to employ competitive bidding procedures to choose from among two or more mutually exclusive applications for certain initial licenses.

§ 1.2102 Eligibility of applications for competitive bidding.

- (a) Mutually exclusive initial applications are subject to competitive bidding.
- (b) The following types of license applications are not subject to competitive bidding procedures:
 - (1) Public safety radio services, including private internal radio services used by state and local governments and non-government entities and including emergency road services provided by not-for-profit organizations, that
 - (i) Are used to protect the safety of life, health, or property; and
 - (ii) Are not commercially available to the public;
 - (2) Initial licenses or construction permits for digital television service given to existing terrestrial broadcast licensees to replace their analog television service licenses; or
 - (3) Noncommercial educational and public broadcast stations described under 47 U.S.C. 397(6).

Note to § 1.2102: To determine the rules that apply to competitive bidding, specific service rules should also be consulted.

§ 1.2103 Competitive bidding design options.

- (a) The Commission will choose from one or more of the following types of auction designs for services or classes of services subject to competitive bidding:
 - (1) Simultaneous multiple-round auctions (using remote or on-site electronic bidding);
 - (2) Sequential multiple round auctions (using either oral ascending or remote and/or on-site electronic bidding);
 - (3) Sequential or simultaneous single-round auctions (using either sealed paper or remote and/or on-site electronic bidding); and
 - (4) Combinatorial (package/contingent) bidding auctions.
- (b) The Commission may use combinatorial bidding, which would allow bidders to submit all or nothing bids on combinations of licenses or authorizations, in addition to bids on individual licenses or authorizations. The Commission may require that to be declared the high bid, a combinatorial bid must exceed the sum of the individual bids by a specified amount. Combinatorial bidding may be used with any type of auction. The Commission may also allow bidders to submit contingent bids on individual and/or combinations of licenses.

* Rule Sections effective as of Feb. 12, 1999

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

(d) The Commission may use real time bidding in all electronic auction designs.

§ 1.2104 Competitive bidding mechanisms.

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

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

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

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

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

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

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

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

(2) Default or disqualification after close of auction. If a high bidder defaults or is disqualified after the close of such an auction, the defaulting bidder will be subject to the payment in paragraph (g)(1) of this section plus an additional payment equal to 3 percent of the subsequent winning bid. If the subsequent winning bid exceeds the defaulting bidder's bid amount, the 3 percent payment will be calculated based on the defaulting bidder's bid amount. If either bid amount is subject to a bidding credit, the 3 percent credit will be calculated using the same bid amounts and basis (net or gross bids) as in the calculation of the payment in paragraph (g)(1) of this section. Thus, for example, if gross bids are used to calculate the payment in paragraph (g)(1) of this section, the 3 percent will be applied to the gross amount of the subsequent winning bid, or the gross amount of the defaulting bid, whichever is less.

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

(i) The Commission may delay, suspend, or cancel an auction in the event of a natural disaster, technical obstacle,

evidence of security breach, unlawful bidding activity, administrative necessity, or for any other reason that affects the fair and efficient conduct of the competitive bidding. The Commission also has the authority, at its sole discretion, to resume the competitive bidding starting from the beginning of the current or some previous round or cancel the competitive bidding in its entirety.

§ 1.2105 Bidding application and certification procedures; prohibition of collusion.

(a) Submission of Short-Form Application (FCC Form 175). In order to be eligible to bid, an applicant must timely submit a short-form application (FCC Form 175), together with any appropriate upfront payment set forth by Public Notice. Beginning January 1, 1999, all short-form applications must be filed electronically.

(1) All short-form applications will be due:

(i) On the date(s) specified by public notice; or

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

(2) The short-form application must contain the following information:

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

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

(B) Applicant ownership information, as set forth in § 1.2112.

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

(iv) If the applicant applies as a designated entity pursuant to § 1.2110, a statement to that effect and a declaration, under penalty of perjury, that the applicant is qualified as a designated entity under § 1.2110.

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

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

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

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

structure.

(ix) Certification under penalty of perjury that it has not entered and will not enter into any explicit or implicit agreements, arrangements or understandings of any kind with any parties other than those identified pursuant to paragraph (a)(2)(viii) regarding the amount of their bids, bidding strategies or the particular licenses on which they will or will not bid.

(x) Certification that the applicant is not in default on any Commission licenses and that it is not delinquent on any non-tax debt owed to any Federal agency.

(xi) For C block applicants, an attached statement made under penalty of perjury indicating whether or not the applicant has ever been in default on any Commission licenses or has ever been delinquent on any non-tax debt owed to any Federal agency.

Note to paragraph (a): The Commission may also request applicants to submit additional information for informational purposes to aid in its preparation of required reports to Congress.

(b) Modification and Dismissal of Short-Form Application (FCC Form 175).

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

(2) The Commission will provide bidders a limited opportunity to cure defects specified herein (except for failure to sign the application and to make certifications) and to resubmit a corrected application. During the resubmission period for curing defects, a short-form application may be amended or modified to cure defects identified by the Commission or to make minor amendments or modifications. After the resubmission period has ended, a short-form application may be amended or modified to make minor changes or correct minor errors in the application. Major amendments cannot be made to a short-form application after the initial filing deadline. Major amendments include changes in ownership of the applicant that would constitute an assignment or transfer of control, changes in an applicant's size which would affect eligibility for designated entity provisions, and changes in the license service areas identified on the short-form application on which the applicant intends to bid. Minor amendments include, but are not limited to, the correction of typographical errors and other minor defects not identified as major. An application will be considered to be newly filed if it is amended by a major amendment and may not be resubmitted after applicable filing deadlines.

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

(c) Prohibition of collusion.

(1) Except as provided in paragraphs (c)(2), (c)(3) and (c)(4) of this section, after the filing of short-form applications, all applicants are prohibited from cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies, or discussing or negotiating settlement agreements, with other applicants until after the high bidder makes the required down payment, unless such applicants are members of a bidding consortium or other joint bidding arrangement identified on the bidder's short-form application pursuant to § 1.2105(a)(2)(viii).

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

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

(4) After the filing of short-form applications, a holder of a non-controlling attributable interest in an entity submitting a short-form application may acquire an ownership interest in, form a consortium with, or enter into a joint bidding arrangement with, other applicants for licenses in the same geographic license area, provided that:

(i) The attributable interest holder certifies to the Commission that it has not communicated and will not communicate with any party concerning the bids or bidding strategies of more than one of the applicants in which it holds an attributable interest, or with which it has a consortium or joint bidding arrangement, and which have applied for licenses in the same geographic license area(s); and

(ii) The arrangements do not result in any change in control of an applicant; or

(iii) When an applicant has withdrawn from the auction, is no longer placing bids and has no further eligibility, a holder of a non-controlling, attributable interest in such an applicant may obtain an ownership interest in or enter into a consortium with another applicant for a license in the same geographic service area, provided that the attributable interest holder certifies to the Commission that it did not communicate with the new applicant prior to the date that the original applicant withdrew from the auction.

(5) Applicants must modify their short-form applications to reflect any changes in ownership or in membership of consortia or joint bidding arrangements.

(6) For purposes of this paragraph:

(i) The term applicant shall include all controlling interests in the entity submitting a short-form application to participate in an auction (FCC Form 175), as well as all holders of partnership and other ownership interests and any stock interest amounting to 10 percent or more of the entity, or outstanding stock, or outstanding voting stock of the entity submitting a short-form application, and all officers and directors of that entity; and

(ii) The term bids or bidding strategies shall include capital calls or requests for additional funds in support of bids or bidding strategies.

Example: Company A is an applicant in area 1. Company B and Company C each own 10 percent of Company A. Company D is an applicant in area 1, area 2, and area 3. Company C is an applicant in area 3. Without violating the Commission's Rules, Company B can enter into a consortium arrangement with Company D or acquire an ownership interest in Company D if Company B certifies either (1) that it has communicated with and will communicate neither with Company A or anyone else concerning Company A's bids or bidding strategy, nor with Company C or anyone else concerning Company C's bids or bidding strategy, or (2) that it has not communicated with and will not communicate with Company D or anyone else concerning Company D's bids or bidding strategy.

§ 1.2106 Submission of upfront payments.

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

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

(c) If an upfront payment is not in compliance with the Commission's Rules, or if insufficient funds are tendered to constitute a valid upfront payment, the applicant shall have a limited opportunity to correct its submission to

bring it up to the minimum valid upfront payment prior to the auction. If the applicant does not submit at least the minimum upfront payment, it will be ineligible to bid, its application will be dismissed and any upfront payment it has made will be returned.

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

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

§ 1.2107 Submission of down payment and filing of long-form applications.

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

(b) Unless otherwise specified by public notice, within ten (10) business days after being notified that it is a high bidder on a particular license(s), a high bidder must submit to the Commission's lockbox bank such additional funds (the "down payment") as are necessary to bring its total deposits (not including upfront payments applied to satisfy bid withdrawal or default payments) up to twenty (20) percent of its high bid(s). (In single round sealed bid auctions conducted under § 1.2103, however, bidders may be required to submit their down payments with their bids.) Unless otherwise specified by public notice, this down payment must be made by wire transfer in U.S. dollars from a financial institution whose deposits are insured by the Federal Deposit Insurance Corporation and must be made payable to the Federal Communications Commission. Down payments will be held by the Commission until the high bidder has been awarded the license and has paid the remaining balance due on the license or authorization, in which case it will not be returned, or until the winning bidder is found unqualified to be a licensee or has defaulted, in which case it will be returned, less applicable payments. No interest on any down payment will be paid to the bidders.

(c) A high bidder that meets its down payment obligations in a timely manner must, within ten (10) business days after being notified that it is a high bidder, submit an additional application (the "long-form application") pursuant to the rules governing the service in which the applicant is the high bidder. Notwithstanding any other provision in title 47 of the Code of Federal Regulations to the contrary, high bidders need not submit an additional application filing fee with their long-form applications. Specific procedures for filing applications will be set out by Public Notice. Ownership disclosure requirements are set forth in § 1.2112. Beginning January 1, 1999, all long-form applications must be filed electronically. An applicant that fails to submit the required long-form application under this paragraph and fails to establish good cause for any late-filed submission, shall be deemed to have defaulted and will be subject to the payments set forth in § 1.2104.

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

(e) An applicant must also submit FCC Form 602 (see § 1.919 of this chapter) with its long form application (FCC Form 601).

§ 1.2108 Procedures for filing petitions to deny against long-form applications.

(a) Where petitions to deny are otherwise provided for under the Act or the commission's Rules, and unless other

service-specific procedures for the filing of such petitions are provided for elsewhere in the Commission's Rules, the procedures in this section shall apply to the filing of petitions to deny the long-form applications of winning bidders.

(b) Within a period specified by Public Notice, and after the Commission by public notice announces that long-form applications have been accepted for filing, petitions to deny such applications may be filed. In all cases, the period for filing petitions to deny shall be no shorter than five (5) days. Any such petitions must contain allegations of fact supported by affidavit of a person or persons with personal knowledge thereof.

(c) An applicant may file an opposition to any petition to deny, and the petitioner a reply to such opposition. Allegations of fact or denials thereof must be supported by affidavit of a person or persons with personal knowledge thereof. The time for filing such oppositions shall be at least five (5) days from the filing date for petitions to deny, and the time for filing replies shall be at least five (5) days from the filing date for oppositions. The Commission may grant a license based on any long-form application that has been accepted for filing. The Commission shall in no case grant licenses earlier than seven (7) days following issuance of a public notice announcing long-form applications have been accepted for filing.

(d) If the Commission determines that:

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

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

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

§ 1.2109 License grant, denial, default, and disqualification.

(a) Unless otherwise specified by public notice, auction winners are required to pay the balance of their winning bids in a lump sum within ten (10) business days following the release of a public notice establishing the payment deadline. If a winning bidder fails to pay the balance of its winning bids in a lump sum by the applicable deadline as specified by the Commission, it will be allowed to make payment within ten (10) business days after the payment deadline, provided that it also pays a late fee equal to five percent of the amount due. When a winning bidder fails to pay the balance of its winning bid by the late payment deadline, it is considered to be in default on its license(s) and subject to the applicable default payments. Licenses will be awarded upon the full and timely payment of winning bids and any applicable late fees.

(b) If a winning bidder withdraws its bid after the Commission has declared competitive bidding closed or fails to remit the required down payment within ten (10) business days after the Commission has declared competitive bidding closed, the bidder will be deemed to have defaulted, its application will be dismissed, and it will be liable for the default payment specified in § 1.2104(g)(2). In such event, the Commission, at its discretion, may either re-auction the license to existing or new applicants or offer it to the other highest bidders (in descending order) at their final bids. The down payment obligations set forth in § 1.2107(b) will apply.

(c) A winning bidder who is found unqualified to be a licensee, fails to remit the balance of its winning bid in a timely manner, or defaults or is disqualified for any reason after having made the required down payment, will be deemed to have defaulted and will be liable for the payment set forth in § 1.2104(g)(2). In such event, the Commission may either re-auction the license to existing or new applicants or offer it to the other highest bidders (in descending order) at their final bids.

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

§ 1.2110 Designated entities.

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

(b) Definitions.

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

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

(3) Rural telephone companies. A rural telephone company is any local exchange carrier 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.

(4) Affiliate.

(i) An individual or entity is an affiliate of an applicant or of a person holding an attributable interest in an applicant if such individual or entity--

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

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

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

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

(ii) Nature of control in determining affiliation.

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

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

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

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

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

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

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

(A) Spousal affiliation. Both spouses are deemed to own or control or have the power to control interests owned or controlled by either of them, unless they are subject to a legal separation recognized by a court of competent jurisdiction in the United States. In calculating their net worth, investors who are legally separated must include their share of interests in property held jointly with a spouse.

(B) Kinship affiliation. Immediate family members will be presumed to own or control or have the power to

control interests owned or controlled by other immediate family members. In this context "immediate family member" means father, mother, husband, wife, son, daughter, brother, sister, father- or mother-in-law, son- or daughter-in-law, brother- or sister-in-law, step-father or -mother, step-brother or -sister, step-son or -daughter, half brother or sister. This presumption may be rebutted by showing that the family members are estranged, the family ties are remote, or the family members are not closely involved with each other in business matters.

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

(iv) Affiliation through stock ownership.

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

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

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

(v) Affiliation arising under stock options, convertible debentures, and agreements to merge. Stock options, convertible debentures, and agreements to merge (including agreements in principle) are generally considered to have a present effect on the power to control the concern. Therefore, in making a size determination, such options, debentures, and agreements are generally treated as though the rights held thereunder had been exercised. However, an affiliate cannot use such options and debentures to appear to terminate its control over another concern before it actually does so.

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

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

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

(vi) Affiliation under voting trusts.

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

(B) If a trustee has a familial, personal or extra-trust business relationship to the grantor or the beneficiary, the

stock interests held in trust will be deemed controlled by the grantor or beneficiary, as appropriate.

(C) If the primary purpose of a voting trust, or similar agreement, is to separate voting power from beneficial ownership of voting stock for the purpose of shifting control of or the power to control a concern in order that such concern or another concern may meet the Commission's size standards, such voting trust shall not be considered valid for this purpose regardless of whether it is or is not recognized within the appropriate jurisdiction.

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

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

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

(x) Affiliation under joint venture arrangements.

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

(B) The parties to a joint venture are considered to be affiliated with each other. Nothing in this subsection shall be construed to define a small business consortium, for purposes of determining status as a designated entity, as a joint venture under attribution standards provided in this section.

(xi) Exclusion from affiliation coverage. For purposes of this section, Indian tribes or Alaska Regional or Village Corporations organized pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.), or entities owned and controlled by such tribes or corporations, are not considered affiliates of an applicant (or licensee) that is owned and controlled by such tribes, corporations or entities, and that otherwise complies with the requirements of this section, except that gross revenues derived from gaming activities conducted by affiliate entities pursuant to the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.) will be counted in determining such applicant's (or licensee's) compliance with the financial requirements of this section, unless such applicant establishes that it will not receive a substantial unfair competitive advantage because significant legal constraints restrict the applicant's ability to access such gross revenues.

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

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

(e) Bidding credits.

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

credits, the licenses for which bidding credits are available, the amounts of bidding credits and other procedures.

(2) Size of bidding credits. A winning bidder that qualifies as a small business or a consortium of small businesses may use the following bidding credits corresponding to their respective average gross revenues for the preceding 3 years:

(i) Businesses with average gross revenues for the preceding years, 3 years not exceeding \$3 million are eligible for bidding credits of 35 percent;

(ii) Businesses with average gross revenues for the preceding years, 3 years not exceeding \$15 million are eligible for bidding credits of 25 percent; and

(iii) Businesses with average gross revenues for the preceding years, 3 years not exceeding \$40 million are eligible for bidding credits of 15 percent.

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

(1) Unless otherwise specified by public notice, each eligible applicant paying for its license(s) on an installment basis must deposit by wire transfer in the manner specified in § 1.2107(b) sufficient additional funds as are necessary to bring its total deposits to ten (10) percent of its winning bid(s) within ten (10) days after the Commission has declared it the winning bidder and closed the bidding. Failure to remit the required payment will make the bidder liable to pay a default payment pursuant to § 1.2104(g)(2).

(2) Within ten (10) days of the conditional grant of the license application of a winning bidder eligible for installment payments, the licensee shall pay another ten (10) percent of the high bid, thereby commencing the eligible licensee's installment payment plan. If a winning bidder eligible for installment payments fails to submit this additional ten (10) percent of its high bid by the applicable deadline as specified by the Commission, it will be allowed to make payment within ten (10) business days after the payment deadline, provided that it also pays a late fee equal to five percent of the amount due. When a winning bidder eligible for installment payments fails to submit this additional ten (10) percent of its winning bid, plus the late fee, by the late payment deadline, it is considered to be in default on its license(s) and subject to the applicable default payments. Licenses will be awarded upon the full and timely payment of second down payments and any applicable late fees.

(3) Upon grant of the license, the Commission will notify each eligible licensee of the terms of its installment payment plan and that it must execute a promissory note and security agreement as a condition of the installment payment plan. Unless other terms are specified in the rules of particular services, such plans will:

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

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

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

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

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

(i) Any licensee that fails to submit payment on an installment obligation will automatically have an additional ninety (90) days in which to submit its required payment without being considered delinquent. Any licensee

making its required payment during this period will be assessed a late payment fee equal to five percent (5%) of the amount of the past due payment. Late fees assessed under this paragraph will accrue on the next business day following the payment due date. Payments made at the close of any grace period will first be applied to satisfy any lender advances as required under each licensee's "Note and Security Agreement." Afterwards, payments will be applied in the following order: late charges, interest charges, principal payments.

(ii) If any licensee fails to make the required payment at the close of the 90-day period set forth in paragraph (i) of this section, the licensee will automatically be provided with a subsequent 90-day grace period, except that no subsequent automatic grace period will be provided for payments from C or F block licensees that are not made within 90 days of the payment resumption date for those licensees, as explained in Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, Order on Reconsideration of the Second Report and Order, WT Docket No. 97-82, FCC 98-46 (rel. Mar. 24, 1998). Any licensee making a required payment during this subsequent period will be assessed a late payment fee equal to ten percent (10%) of the amount of the past due payment. Licensees shall not be required to submit any form of request in order to take advantage of the initial 90-day non-delinquency period and subsequent automatic 90-day grace period. All licensees that avail themselves of the automatic grace period must pay the required late fee(s), all interest accrued during the non-delinquency and grace periods, and the appropriate scheduled payment with the first payment made following the conclusion of the grace period.

(iii) If an eligible entity making installment payments is more than one hundred and eighty (180) days delinquent in any payment, it shall be in default, except that C and F block licensees shall be in default if their payment due on the payment resumption date, referenced in paragraph (f)(4)(ii) of this section, is more than ninety (90) days delinquent.

(iv) Any eligible entity that submits an installment payment after the due date but fails to pay any late fee, interest or principal at the close of the 90-day non-delinquency period and subsequent automatic grace period, if such a grace period is available, will be declared in default, its license will automatically cancel, and will be subject to debt collection procedures.

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

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

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

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

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

(l) Audits.

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

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

(m) Gross revenues. Gross revenues shall mean all income received by an entity, whether earned or passive, before any deductions are made for costs of doing business (e.g., cost of goods sold), as evidenced by audited financial statements for the relevant number of most recently completed calendar years or, if audited financial statements were not prepared on a calendar-year basis, for the most recently completed fiscal years preceding the filing of the applicant's short-form (FCC Form 175). If an entity was not in existence for all or part of the relevant period, gross revenues shall be evidenced by the audited financial statements of the entity's predecessor-in-interest or, if there is no identifiable predecessor-in-interest, unaudited financial statements certified by the applicant as accurate. When an applicant does not otherwise use audited financial statements, its gross revenues may be certified by its chief financial officer or its equivalent and must be prepared in accordance with Generally Accepted Accounting Principles.

§ 1.2111 Assignment or transfer of control: unjust enrichment.

(a) Reporting requirement. An applicant seeking approval for a transfer of control or assignment (otherwise permitted under the Commission's Rules) of a license within three years of receiving a new license through a competitive bidding procedure must, together with its application for transfer of control or assignment, file with the Commission's statement indicating that its license was obtained through competitive bidding. Such applicant must also file with the Commission the associated contracts for sale, option agreements, management agreements, or other documents disclosing the local consideration that the applicant would receive in return for the transfer or assignment of its license (see § 1.948 of this chapter). This information should include not only a monetary purchase price, but also any future, contingent, in-kind, or other consideration (e.g., management or consulting contracts either with or without an option to purchase; below market financing).

(b) Unjust enrichment payment: set-aside. As specified in this paragraph an applicant seeking approval for a transfer of control or assignment (otherwise permitted under the Commission's Rules) of a license acquired by the transferor or assignor pursuant to a set-aside for eligible designated entities under § 1.2110(c), or who proposes to take any other action relating to ownership or control that will result in loss of status as an eligible designated entity, must seek Commission approval and may be required to make an unjust enrichment payment (Payment) to the Commission by cashier's check or wire transfer before consent will be granted. The Payment will be based upon a schedule that will take account of the term of the license, any applicable construction benchmarks, and the estimated value of the set-aside benefit, which will be calculated as the difference between the amount paid by the designated entity for the license and the value of comparable non-set-aside license in the free market at the time of the auction. The Commission will establish the amount of the Payment and the burden will be on the applicants to disprove this amount. No payment will be required if:

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

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

(c) Unjust enrichment payment: installment financing.

(1) If a licensee that utilizes installment financing under this section seeks to assign or transfer control of its license to an entity not meeting the eligibility standards for installment payments, the licensee must make full

payment of the remaining unpaid principal and any unpaid interest accrued through the date of assignment or transfer as a condition of approval.

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

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

(d) Unjust enrichment payment: bidding credits.

(1) A licensee that utilizes a bidding credit, and that during the initial term seeks to assign or transfer control of a license to an entity that does not meet the eligibility criteria for a bidding credit, will be required to reimburse the U.S. Government for the amount of the bidding credit, plus interest based on the rate for ten year U.S. Treasury obligations applicable on the date the license was granted, as a condition of Commission approval of the assignment or transfer. If, within the initial term of the license, a licensee that utilizes a bidding credit seeks to assign or transfer control of a license to an entity that is eligible for a lower bidding credit, the difference between the bidding credit obtained by the assigning party and the bidding credit for which the acquiring party would qualify, plus interest based on the rate for ten year U.S. treasury obligations applicable on the date the license is granted, must be paid to the U.S. Government as a condition of Commission approval of the assignment or transfer. If, within the initial term of the license, a licensee that utilizes a bidding credit seeks to make any ownership change that would result in the licensee losing eligibility for a bidding credit (or qualifying for a lower bidding credit), the amount of the bidding credit (or the difference between the bidding credit originally obtained and the bidding credit for which the restructured licensee would qualify), plus interest based on the rate for ten year U.S. treasury obligations applicable on the date the license is granted, must be paid to the U.S. Government as a condition of Commission approval of the assignment or transfer.

(2) Payment schedule.

(i) The amount of payments made pursuant to paragraph (d)(1) of this section will be reduced over time as follows:

(A) A transfer in the first two years of the license term will result in a forfeiture of 100 percent of the value of the bidding credit (or in the case of very small businesses transferring to small businesses, 100 percent of the difference between the bidding credit received by the former and the bidding credit for which the latter is eligible);

(B) A transfer in year 3 of the license term will result in a forfeiture of 75 percent of the value of the bidding credit;

(C) A transfer in year 4 of the license term will result in a forfeiture of 50 percent of the value of the bidding credit;

(D) A transfer in year 5 of the license term will result in a forfeiture of 25 percent of the value of the bidding credit; and

(E) for a transfer in year 6 or thereafter, there will be no payment.

(ii) These payments will have to be paid to the United States Treasury as a condition of approval of the assignment, transfer, or ownership change.

(e) Unjust enrichment: partitioning and disaggregation.

(1) Installment payments. Licensees making installment payments, that partition their licenses or disaggregate their spectrum to entities not meeting the eligibility standards for installment payments, will be subject to the provisions concerning unjust enrichment as set forth in this section.

(2) Bidding credits. Licensees that received a bidding credit that partition their licenses or disaggregate their spectrum to entities not meeting the eligibility standards for such a bidding credit, will be subject to the provisions concerning unjust enrichment as set forth in this section.

(3) Apportioning unjust enrichment payments. Unjust enrichment payments for partitioned license areas shall be calculated based upon the ratio of the population of the partitioned license area to the overall population of the license area and by utilizing the most recent census data. Unjust enrichment payments for disaggregated spectrum shall be calculated based upon the ratio of the amount of spectrum disaggregated to the amount of spectrum held by the licensee.

§ 1.2112 Ownership disclosure requirements for short- and long-form applications.

(a) Each application for a license or authorization or for consent to assign or transfer control of a license or authorization shall disclose fully the real party or parties in interest and must include in an exhibit the following information:

(1) A list of any FCC-regulated business 10 percent or more of whose stock, warrants, options or debt securities are owned by the applicant or an officer, director, attributable stockholder or key management personnel of the applicant. This list must include a description of each such business's principal business and a description of each such business's relationship to the applicant;

(2) A list of any party holding a 10 percent or greater interest in the applicant, including the specific amount of the interest;

(3) A list of any party holding a 10 percent or greater interest in any entity holding or applying for any FCC-regulated business in which a 10 percent or more interest is held by another party which holds a 10 percent or more interest in the applicant (e.g., If company A owns 10 percent of Company B (the applicant) and 10 percent of Company C then Companies A and C must be listed on Company B's application;

(4) A list of the names, addresses, and citizenship of any party holding 10 percent or more of each class of stock, warrants, options or debt securities together with the amount and percentage held;

(5) A list of the names, addresses, and citizenship of all controlling interests of the applicants, as set forth in § 1.2110;

(6) In the case of a general partnerships, the name, address and citizenship of each partner, and the share or interest participation in the partnership;

(7) In the case of a limited partnerships, the name, address and citizenship of each limited partner whose interest in the applicant is equal to or greater than 10 percent (as calculated according to the percentage of equity paid in and the percentage of distribution of profits and losses);

(8) In the case of a limited liability corporation, the name, address and citizenship of each of its members; and

(9) A list of all parties holding indirect ownership interests in the applicant, as determined by successive

multiplication of the ownership percentages for each link in the vertical ownership chain, that equals 10 percent or more of the applicant, 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 and reported as if it were a 100 percent interest.

(b) In addition to the information required under paragraph (a) of this section, each applicant for a license or authorization claiming status as a small business shall, as an exhibit to its long-form application:

(1) Disclose separately and in the aggregate the gross revenues, computed in accordance with § 1.2110, for each of the following: the applicant and its affiliates, the applicant's attributable investors, affiliates of its attributable investors, and, if a consortium of small businesses, the members comprising the consortium;

(2) List and summarize all agreements or instruments (with appropriate references to specific provisions in the text of such agreements and instruments) that support the applicant's eligibility as a small business under the applicable designated entity provisions, including the establishment of de facto and de jure control; such agreements and instruments include articles of incorporation and bylaws, shareholder agreements, voting or other trust agreements, franchise agreements, and any other relevant agreements (including letters of intent), oral or written; and

(3) List and summarize any investor protection agreements, including rights of first refusal, supermajority clauses, options, veto rights, and rights to hire and fire employees and to appoint members to boards of directors or management committees.

§ 1.2113 Construction prior to grant of application.

Subject to the provisions of this section, applicants for licenses awarded by competitive bidding may construct facilities to provide service prior to grant of their applications, but must not operate such facilities until the FCC grants an authorization. If the conditions stated in this section are not met, applicants must not begin to construct facilities for licenses subject to competitive bidding.

(a) When applicants may begin construction. An applicant may begin construction of a facility upon release of the Public Notice listing the post- auction long-form application for that facility as acceptable for filing.

(b) Notification to stop. If the FCC for any reason determines that construction should not be started or should be stopped while an application is pending, and so notifies the applicant, orally (followed by written confirmation) or in writing, the applicant must not begin construction or, if construction has begun, must stop construction immediately.

(c) Assumption of risk. Applicants that begin construction pursuant to this section before receiving an authorization do so at their own risk and have no recourse against the United States for any losses resulting from:

(1) Applications that are not granted;

(2) Errors or delays in issuing public notices;

(3) Having to alter, relocate or dismantle the facility; or

(4) Incurring whatever costs may be necessary to bring the facility into compliance with applicable laws, or FCC rules and orders.

(d) Conditions. Except as indicated, all pre-grant construction is subject to the following conditions:

(1) The application does not include a request for a waiver of one or more FCC rules;

(2) For any construction or alteration that would exceed the requirements of § 17.7 of this chapter, the licensee has

notified the appropriate Regional Office of the Federal Aviation Administration (FAA Form 7460-1), filed a request for antenna height clearance and obstruction marking and lighting specifications (FCC Form 854) with the FCC, PRB, Support Services Branch, Gettysburg, PA 17325;

(3) The applicant has indicated in the application that the proposed facility would not have a significant environmental effect, in accordance with §§ 1.1301 through 1.1319;

(4) Under applicable international agreements and rules in this part, individual coordination of the proposed channel assignment(s) with a foreign administration is not required; and

(5) Any service-specific restrictions not listed herein.

PART 24--PERSONAL COMMUNICATIONS SERVICES
SUBPART A--GENERAL INFORMATION

§ 24.1 Basis and purpose.

This section contains the statutory basis for this part of the rules and provides the purpose for which this part is issued.

(a) Basis. The rules for the personal communications services (PCS) in this part are promulgated under the provisions of the Communications Act of 1934, as amended, that vests authority in the Federal Communications Commission to regulate radio transmission and to issue licenses for radio stations.

(b) Purpose. This part states the conditions under which portions of the radio spectrum are made available and licensed for PCS.

(c) Scope. The rules in this part apply only to stations authorized under this part. Rules in subparts D and E apply only to stations authorized under those subparts.

§ 24.2 Other applicable rule parts.

Other FCC rule parts applicable to licensees in the personal communications services include the following:

(a) Part 0. This part describes the Commission's organization and delegations of authority. Part 0 of this chapter also lists available Commission publications, standards and procedures for access to Commission records, and location of Commission Field Offices.

(b) Part 1. This part includes rules of practice and procedure for license applications, adjudicatory proceedings, procedures for reconsideration and review of the Commission's actions; provisions concerning violation notices and forfeiture proceedings; and the environmental requirements that, if applicable, must be complied with prior to the initiation of construction. Subpart F includes the rules for the Wireless Telecommunications Services and the procedures for filing electronically via the ULS.

(c) Part 2. This part contains the Table of Frequency Allocations and special requirements in international regulations, recommendations, agreements, and treaties. This part also contains standards and procedures concerning the marketing and importation of radio frequency devices, and for obtaining equipment authorization.

(d) Part 5. This part contains rules prescribing the manner in which parts of the radio frequency spectrum may be made available for experimentation.

(e) Part 15. This part contains rules setting out the regulations under which an intentional, unintentional, or incidental radiator may be operated without an individual license. It also contains the technical specifications, administrative requirements and other conditions relating to the marketing of part 15 devices. Unlicensed PCS devices operate under subpart D of part 15.

(f) Part 17. This part contains requirements for construction, marking and lighting of antenna towers.

(g) Part 20 of this chapter governs commercial mobile radio services.

(h) Part 21. This part contains rules concerning point-to-point microwave service authority relating to communications common carriers.

(i) Part 68. This part contains technical standards for connection of terminal equipment to the telephone network.

(j) Part 94. This part contains rules concerning the private microwave service relating to point-to-point communication requirements.

§ 24.3 Permissible communications.

PCS licensees may provide any mobile communications service on their assigned spectrum. Fixed services may be provided on a co-primary basis with mobile operations. Broadcasting as defined in the Communications Act is prohibited.

§ 24.5 Terms and definitions.

Assigned Frequency. The center of the frequency band assigned to a station.

Authorized Bandwidth. The maximum width of the band of frequencies permitted to be used by a station. This is normally considered to be the necessary or occupied bandwidth, whichever is greater.

Average Terrain. The average elevation of terrain between 3 and 16 kilometers from the antenna site.

Base Station. A land station in the land mobile service.

Broadband PCS. PCS services operating in the 1850-1890 MHz, 1930-1970 MHz, 2130-2150 MHz, and 2180-2200 MHz bands.

Effective Radiated Power (e.r.p.) (in a given direction). The product of the power supplied to the antenna and its gain relative to a half-wave dipole in a given direction.

Equivalent Isotropically Radiated Power (e.i.r.p.). The product of the power supplied to the antenna and the antenna gain in a given direction relative to an isotropic antenna.

Fixed Service. A radiocommunication service between specified fixed points.

Fixed Station. A station in the fixed service.

Land Mobile Service. A mobile service between base stations and land mobile stations, or between land mobile stations.

Land Mobile Station. A mobile station in the land mobile service capable of surface movement within the geographic limits of a country or continent.

Land Station. A station in the mobile service not intended to be used while in motion.

Mobile Service. A radiocommunication service between mobile and land stations, or between mobile stations.

Mobile Station. A station in the mobile service intended to be used while in motion or during halts at unspecified points.

Narrowband PCS. PCS services operating in the 901-902 MHz, 930-931 MHz, and 940-941 MHz bands.

National Geodetic Reference System (NGRS): The name given to all geodetic control data contained in the National Geodetic Survey (NGS) data base. (Source: National Geodetic Survey, U.S. Department of Commerce)

PCS Relocator. A PCS entity that pays to relocate a fixed microwave link from its existing 2 GHz facility to other media or other fixed channels.

Personal Communications Services (PCS). Radio communications that encompass mobile and ancillary fixed communication that provide services to individuals and businesses and can be integrated with a variety of competing networks.

Universal Licensing System. The Universal Licensing System (ULS) is the consolidated database, application filing system, and processing system for all Wireless Radio Services. ULS supports electronic filing of all applications and related documents by applicants and licensees in the Wireless Radio Services, and provides public access to licensing information.

UTAM. The Unlicensed PCS Ad Hoc Committee for 2 GHz Microwave Transition and Management, which coordinates relocation in the 1910-1930 MHz band.

Voluntarily Relocating Microwave Incumbent. A microwave incumbent that voluntarily relocates its licensed facilities to other media or fixed channels.

SUBPART B--APPLICATIONS AND LICENSES

§ 24.10 Scope.

This subpart contains some of the procedures and requirements for filing applications for licenses in the personal communications services. One also should consult Subparts F and G of this part. Other Commission rule parts of importance that may be referred to with respect to licensing and operation of radio services governed under this part include 47 CFR parts 0, 1, 2, 5, 15, 17 and 20.

§ 24.11 Initial authorization.

(a) An applicant must file a single application for an initial authorization for all markets won and frequency blocks desired.

(b) Blanket licenses are granted for each market and frequency block. Applications for individual sites are not required and will not be accepted.

§ 24.12 Eligibility.

Any entity, other than those precluded by section 310 of the Communications Act of 1934, as amended, 47 U.S.C. 310, or §§ 99.202(c) or 99.204, is eligible to hold a license under this part.

§ 24.15 License period.

Licenses for service areas will be granted for ten year terms from the date of original issuance or renewal.

§ 24.16 Criteria for comparative renewal proceedings.

A renewal applicant involved in a comparative renewal proceeding shall receive a preference, commonly referred to as a renewal expectancy, which is the most important comparative factor to be considered in the proceeding, if its past record for the relevant license period demonstrates that the renewal applicant:

(a) Has provided "substantial" service during its past license term. "Substantial" service is defined as service which is sound, favorable, and substantially above a level of mediocre service which might just minimally warrant renewal; and

(b) Has substantially complied with applicable Commission rules, policies and the Communications Act.

SUBPART C--TECHNICAL STANDARDS

§ 24.50 Scope.

This subpart sets forth the technical requirements for use of the spectrum and equipment in the personal communications services.

§ 24.51 Equipment authorization.

(a) Each transmitter utilized for operation under this part and each transmitter marketed, as set forth in § 2.803 of this chapter, must be of a type that has been authorized by the Commission under its certification procedure for use under this part.

(b) Any manufacturer of radio transmitting equipment to be used in these services may request equipment authorization following the procedures set forth in subpart J of part 2 of this chapter. Equipment authorization for an individual transmitter may be requested by an applicant for a station authorization by following the procedures set forth in part 2 of this chapter.

(c) Applicants for certification of transmitters that operate in these services must determine that the equipment complies with IEEE C95.1-1991, "IEEE Standards for Safety Levels with Respect to Human Exposure to Radio Frequency Electromagnetic Fields, 3 kHz to 300 GHz" as measured using methods specified in IEEE C95.3-1991, "Recommended Practice for the Measurement of Potentially Hazardous Electromagnetic Fields--RF and Microwave." The applicant for certification is required to submit a statement affirming that the equipment complies with these standards as measured by an approved method and to maintain a record showing the basis for the statement of compliance with IEEE C.95.1- 1991.

§ 24.52 RF hazards.

Licenses and manufacturers are subject to the radiofrequency radiation exposure requirements specified in § 1.1307(b), § 2.1091 and § 2.1093 of this chapter, as appropriate. Applications for equipment authorization of mobile or portable devices operating under this section must contain a statement confirming compliance with these requirements for both fundamental emissions and unwanted emissions. Technical information showing the basis for this statement must be submitted to the Commission upon request.

§ 24.53 Calculation of height above average terrain (HAAT).

(a) HAAT is determined by subtracting average terrain elevation from antenna height above mean sea level.

(b) Average terrain elevation shall be calculated using elevation data from a 30 arc second or better Digital Elevation Models (DEMs). DEM data is available from United States Geological Survey (USGS). The data file shall be identified. If 30 arc second data is used, the elevation data must be processed for intermediate points using interpolation techniques; otherwise, the nearest point may be used. If DEM data is not available, elevation data from the Defense Mapping Agency's Digital Chart of the World (DCW) may be used.

(c) Radial average terrain elevation is calculated as the average of the elevation along a straight line path from 3 to 16 kilometers extending radially from the antenna site. At least 50 evenly spaced data points for each radial shall be used in the computation.

(d) Average terrain elevation is the average of the eight radial average terrain elevations (for the eight cardinal radials).

(e) The position location of the antenna site shall be determined to an accuracy of no less than 5 meters in both the

horizontal (latitude and longitude) and vertical (ground elevation) dimensions with respect to the National Geodetic Reference System.

§ 24.55 Antenna structures; air navigation safety.

Licensees that own their antenna structures must not allow these antenna structures to become a hazard to air navigation. In general, antenna structure owners are responsible for registering antenna structures with the FCC if required by part 17 of this chapter, and for installing and maintaining any required marking and lighting. However, in the event of default of this responsibility by an antenna structure owner, each FCC permittee or licensee authorized to use an affected antenna structure will be held responsible by the FCC for ensuring that the antenna structure continues to meet the requirements of part 17 of this chapter. See § 17.6 of this chapter.

(a) Marking and lighting. Antenna structures must be marked, lighted and maintained in accordance with part 17 of this chapter and all applicable rules and requirements of the Federal Aviation Administration.

(b) Maintenance contracts. Antenna structure owners (or licensees and permittees, in the event of default by an antenna structure owner) may enter into contracts with other entities to monitor and carry out necessary maintenance of antenna structures. Antenna structure owners (or licensees and permittees, in the event of default by an antenna structure owner) that make such contractual arrangements continue to be responsible for the maintenance of antenna structures in regard to air navigation safety.

SUBPART E--BROADBAND PCS

§ 24.200 Scope.

This subpart sets out the regulations governing the licensing and operations of personal communications services authorized in the 1850-1910 and 1930-1990 MHz bands.

§ 24.202 Service areas.

Broadband PCS service areas are Major Trading Areas (MTAs) and Basic Trading Areas (BTAs) as defined below. MTAs and BTAs are based on the Rand McNally 1992 Commercial Atlas & Marketing Guide, 123rd Edition, at pages 38-39 ("BTA/MTA Map"). Rand McNally organizes the 50 states and the District of Columbia into 47 MTAs and 487 BTAs. The BTA/MTA Map is available for public inspection at the Office of Engineering and Technology's Technical Information Center, 2000 M Street, NW, Washington, DC 20554.

(a) The MTA service areas are based on the Rand McNally 1992 Commercial Atlas & Marketing Guide, 123rd Edition, at pages 38-39, with the following exceptions and additions:

- (1) Alaska is separated from the Seattle MTA and is licensed separately.
- (2) Guam and the Northern Mariana Islands are licensed as a single MTA-like area.
- (3) Puerto Rico and the United States Virgin Islands are licensed as a single MTA-like area.
- (4) American Samoa is licensed as a single MTA-like area.

(b) The BTA service areas are based on the Rand McNally 1992 Commercial Atlas & Marketing Guide, 123rd Edition, at pages 38-39, with the following additions licensed separately as BTA-like areas: American Samoa; Guam; Northern Mariana Islands; Mayaguez/Aguadilla-Ponce, Puerto Rico; San Juan, Puerto Rico; and the United States Virgin Islands. The Mayaguez/Aguadilla- Ponce BTA consists of the following municipalities: Adjuntas, Aguada, Aguadilla, Anasco, Arroyo, Cabo Rojo, Coamo, Guanica, Guayama, Guayanilla, Hormigueros, Isabela, Jayuya, Juana Diaz, Lajas, Las Marias, Mayaguez, Maricao, Maunabo, Moca, Patillas, Penuelas, Ponce, Quebradillas, Rincon, Sabana Grande, Salinas, San Germain, Santa Isabel, Villalba, and Yauco. The San Juan

BTA consists of all other municipios in Puerto Rico.

§ 24.203 Construction requirements.

(a) Licensees of 30 MHz blocks must serve with a signal level sufficient to provide adequate service to at least one-third of the population in their licensed area within five years of being licensed and two-thirds of the population in their licensed area within 10 years of being licensed. Licensees may choose to define population using the 1990 census or the 2000 census. Failure by any licensee to meet these requirements will result in forfeiture or non-renewal of the license and the licensee will be ineligible to regain it.

(b) Licensees of 10 MHz blocks must serve with a signal level sufficient to provide adequate service to at least one-quarter of the population in their licensed area within five years of being licensed, or make a showing of substantial service in their licensed area within five years of being licensed. Population is defined as the 1990 population census. Licensees may elect to use the 2000 population census to determine the five-year construction requirement. Failure by any licensee to meet these requirements will result in forfeiture of the license and the licensee will be ineligible to regain it.

(c) Licensees must file maps and other supporting documents showing compliance with the respective construction requirements within the appropriate five- and ten-year benchmarks of the date of their initial licenses.

§ 24.229 Frequencies.

The frequencies available in the Broadband PCS service are listed in this section in accordance with the frequency allocations table of Section 2.106 of this chapter.

(a) The following frequency blocks are available for assignment on an MTA basis:

Block A: 1850-1865 MHz paired with 1930-1945 MHz; and

Block B: 1870-1885 MHz paired with 1950-1965 MHz.

(b) The following frequency blocks are available for assignment on a BTA basis:

Block C: 1895-1910 MHz paired with 1975-1990 MHz;

Block D: 1865-1870 MHz paired with 1945-1950 MHz;

Block E: 1885-1890 MHz paired with 1965-1970 MHz; and

Block F: 1890-1895 MHz paired with 1970-1975 MHz.

§ 24.232 Power and antenna height limits.

(a) Base stations are limited to 1640 watts peak equivalent isotropically radiated power (e.i.r.p.) with an antenna height up to 300 meters HAAT. See § 24.53 for HAAT calculation method. Base station antenna heights may exceed 300 meters with a corresponding reduction in power; see Table 1 of this section. In no case may the peak output power of a base station transmitter exceed 100 watts. The service area boundary limit and microwave protection criteria specified in Section 24.236 and Section 24.237 apply.

Table 2.--Coordination Distances In Kilometers

Table 2: Coordination Distances in Kilometers
[PCS Base Station Antenna HAAT in Meters]

eirp.(W)	5	10	20	50	100	150	200	250	300	500	1000	1500	2000
0.1	90	93	99	110	122	131	139	146	152	173	210	239	263
0.5	96	100	105	116	128	137	145	152	158	179	216	245	269
1	99	103	108	119	131	140	148	155	161	182	219	248	272
2	120	122	126	133	142	148	154	159	164	184	222	250	274
5	154	157	161	168	177	183	189	194	198	213	241	263	282
10	180	183	187	194	203	210	215	220	225	240	268	291	310
20	206	209	213	221	229	236	242	247	251	267	296	318	337
50	241	244	248	255	264	271	277	282	287	302	331	354	374
100	267	270	274	282	291	297	303	308	313	329	358	382	401
200	293	296	300	308	317	324	330	335	340	356	386	409	--
500	328	331	335	343	352	359	365	370	375	391	421	--	--
1000	354	357	361	369	378	385	391	397	402	418	--	--	--
1200	361	364	368	376	385	392	398	404	409	--	--	--	--
1640	372	375	379	388	397	404	410	416	421	--	--	--	--

Note: If actual value does not match table values, round to the closest higher value on this table. See Section 24.53 for HAAT calculation method.

(e) For microwave paths of 25 kilometers or less, interference determinations shall be based on the C/I criteria set forth in TIA Telecommunications Systems Bulletin 10-F, "Interference Criteria for Microwave Systems," May 1994 (TSB10- F).

(f) For microwave paths longer than 25 kilometers, the interference protection criterion shall be such that the interfering signal will not produce more than 1.0 dB degradation of the practical threshold of the microwave receiver for analog system, or such that the interfering signal will not cause an increase in the bit error rate (BER) from 10E-6 to 10E-5 for digital systems.

(g) The development of the C/I ratios and interference criteria specified in paragraphs (e) and (f) of this section and the methods employed to compute the interfering power at the microwave receivers shall follow generally acceptable good engineering practices. The procedures described for computing interfering signal levels in (Appendix I to this subpart E Appendix E of the Memorandum Opinion and Order, GEN Docket No. 90-314, FCC 94-144) shall be applied. Alternatively, procedures for determining interfering signal levels and other criteria as may be developed by the Electronics Industries Association (EIA), the Institute of Electrical and Electronics Engineers, Inc. (IEEE), the American National Standards Institute (ANSI) or any other recognized authority will be acceptable to the Commission.

§ 24.238 Emission limits.

(a) On any frequency outside a licensee's frequency block, the power of any emission shall be attenuated below the transmitter power (P) by at least $43 + 10 \log (P)$ dB.

(b) Compliance with these provisions is based on the use of measurement instrumentation employing a resolution bandwidth of 1 MHz or greater. However, in the 1 MHz bands immediately outside and adjacent to the frequency block a resolution bandwidth of at least one percent of the emission bandwidth of the fundamental emission of the transmitter may be employed. The emission bandwidth is defined as the width of the signal between two points, one below the carrier center frequency and one above the carrier center frequency, outside of which all emissions are attenuated at least 26 dB below the transmitter power.

(c) When measuring the emission limits, the nominal carrier frequency shall be adjusted as close to the licensee's frequency block edges, both upper and lower, as the design permits.

(d) The measurements of emission power can be expressed in peak or average values, provided they are expressed in the same parameters as the transmitter power.

(e) When an emission outside of the authorized bandwidth causes harmful interference, the Commission may, at its discretion, require greater attenuation than specified in this section.

SUBPART H--COMPETITIVE BIDDING PROCEDURES FOR BROADBAND PCS

§ 24.701 Broadband PCS subject to competitive bidding.

Mutually exclusive initial applications to provide broadband PCS service are subject to competitive bidding procedures. The general competitive bidding procedures found in 47 CFR Part 1, Subpart Q will apply unless otherwise provided in this part.

§ 24.702 Competitive bidding design for Broadband PCS licensing.

(a) The Commission will employ the following competitive bidding designs when choosing from among mutually exclusive initial applications to provide broadband PCS service:

(1) Simultaneous multiple round auctions.

(2) Sequential auctions.

(b) The Commission may design and test alternative procedures. The Commission will announce by Public Notice before each auction the competitive bidding design to be employed in a particular auction.

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

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

§ 24.704 Withdrawal, default and disqualification penalties.

See § 1.2104 of this chapter.

§ 24.706 Submission of upfront payments and down payments.

(a) All auction participants are required to submit an upfront payment in accordance with § 1.2106 of this chapter. Any C block applicant that has previously been in default on any Commission licenses or has previously been delinquent on any non-tax debt owed to any Federal agency must submit an upfront payment equal to 50 percent more than that set for each particular license.

(b) Winning bidders in an auction must submit a down payment to the Commission in accordance with § 1.2107(b) of this chapter and §§ 24.711(a)(2) and 24.716(a)(2).

(c) Each eligible bidder for licenses on frequency Blocks D and E subject to auction shall pay an upfront payment of \$0.06 per MHz per pop for the maximum number of licenses (in terms of MHz-pops) on which it intends to bid pursuant to § 1.2106 of this chapter and procedures specified by Public Notice.

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

(a) Except with respect to entities eligible for installment payments (see § 24.711), each winning bidder will be required to pay the balance of its winning bid in a lump sum payment within five (5) business days following the award of the license. Grant of the license will be conditioned upon full and timely payment of the winning bid amount.

(b) A bidder who withdraws its bid subsequent to the close of bidding, defaults on a payment due or is disqualified will be subject to the penalties specified in § 1.2109 of this Chapter.

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

(a) General Rule.

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

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

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

(4) In order to be eligible for participation in a C block auction, an applicant must certify that it is not in default on any Commission licenses and that it is not delinquent on any non-tax debt owed to any Federal agency. See § 24.706 of this part.

(5) An applicant for participation in a C block auction must state under penalty of perjury whether or not it has ever been in default on any Commission licenses or has ever been delinquent on any non-tax debt owed to any

Federal agency. See § 24.706 of this part.

(b) Exceptions to General Rule.

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

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

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

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

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

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

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

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

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

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

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

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

(A) At least 15 percent of the applicant's (or licensee's) total equity must be held by qualifying investors, either unconditionally or in the form of options exercisable, at the option of the holder, at any time and at any exercise price equal to or less than the market value at the time the applicant files its short-form application (Form 175);

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

(C) The remaining 10 percent of the applicant's (or licensee's) total equity may be owned, either unconditionally or in the form of stock options, by any of the following entities, which may not comply with § 24.720(n)(1):

- (1) Institutional Investors;
- (2) Noncontrolling existing investors in any preexisting entity that is a member of the control group;
- (3) Individuals that are members of the applicant's (or licensee's) management; or
- (4) Qualifying investors, as specified in § 24.720(n)(4).

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

(i) Except for an applicant (or licensee) whose sole control group member is a preexisting entity, as provided in paragraph (b)(6)(ii) of this section, at the time the applicant's short-form application (Form 175) is filed and until at least three years following the date of initial license grant, the applicant's (or licensee's) control group must own at least 50.1 percent of the applicant's (or licensee's) total equity as follows:

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

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

(C) The remaining 20.1 percent of the applicant's (or licensee's) total equity may be owned by qualifying investors, either unconditionally or in the form of stock options not subject to the restrictions of paragraph (b)(6)(i)(A) of this section, or by any of the following entities which may not comply with § 24.720(n)(1):

- (1) Institutional investors, either unconditionally or in the form of stock options;
- (2) Noncontrolling existing investors in any preexisting entity that is a member of the control group, either unconditionally or in the form of stock options;
- (3) Individuals that are members of the applicant's (or licensee's) management, either unconditionally or in the form of stock options; or
- (4) Qualifying investors, as specified in 24.720(n)(4).

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

(ii) At the election of an applicant (or licensee) whose control group's sole member is a preexisting entity, the 50.1 percent minimum equity requirements set forth in paragraph (b)(6)(i) of this section shall apply, except that only 20 percent of the applicant's (or licensee's) total equity must be held by qualifying investors, and that the remaining 30.1 percent of the applicant's (or licensee's) total equity may be held by qualifying investors, or noncontrolling existing investors in such control group member or individuals that are members of the applicant's (or licensee's) management. These restrictions on the identity of the holder(s) of the remaining 30.1 percent of the licensee's total

equity no longer apply after termination of the three-year period specified in paragraph (b)(6)(i) of this section.

(7) Calculation of Certain Interests. Except as provided in paragraphs (b)(5) and (b)(6) of this section, ownership interests shall be calculated on a fully diluted basis; all agreements such as warrants, stock options and convertible debentures will generally be treated as if the rights thereunder already have been fully exercised, except that such agreements may not be used to appear to terminate or divest ownership interests before they actually do so, in order to comply with the nonattributable equity requirements in paragraphs (b)(3)(i) and (b)(4)(i) of this section.

(8) Aggregation of Affiliate Interests. Persons or entities that hold interest in an applicant (or licensee) that are affiliates of each other or have an identity of interests identified in § 24.720(1)(3) will be treated as though they were one person or entity and their ownership interests aggregated for purposes of determining an applicant's (or licensee's) compliance with the nonattributable equity requirements in paragraphs (b)(3)(i) and (b)(4)(i) of this section.

Example 1 for paragraph (b)(8). ABC Corp. is owned by individuals, A, B, and C, each having an equal one-third voting interest in ABC Corp. A and B together, with two-thirds of the stock have the power to control ABC Corp. and have an identity of interest. If A & B invest in DE Corp., a broadband PCS applicant for block C, A and B's separate interests in DE Corp. must be aggregated because A and B are to be treated as one person.

Example 2 for paragraph (b)(8). ABC Corp. has subsidiary BC Corp., of which it holds a controlling 51 percent of the stock. If ABC Corp. and BC Corp., both invest in DE Corp., their separate interests in DE Corp. must be aggregated because ABC Corp. and BC Corp. are affiliates of each other.

(9) Special rule for licensees disaggregating or returning certain spectrum in frequency block C.

(i) In addition to entities qualifying under this section, any entity that was eligible for and participated in the auction for frequency block C, which began on December 18, 1995, or the reauction for frequency block C, which began on July 3, 1996, will be eligible to bid in any reauction of block C spectrum that begins within two years of the start date of the first reauction of C block spectrum following the effective date of this rule.

(ii) The following restrictions will apply for any reauction of frequency block C spectrum conducted after March 24, 1998:

(A) Applicants that elected to disaggregate and surrender to the Commission 15 MHz of spectrum from any or all of their frequency block C licenses, as provided in Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, Second Report and Order and Further Notice of Proposed Rule Making, WT Docket No. 97-82, 12 FCC Rcd 16,436 (1997), as modified by the Order on Reconsideration of the Second Report and Order, WT Docket No. 97-82, FCC 98-46 (rel. Mar. 24, 1998), will not be eligible to apply for such disaggregated spectrum until 2 years from the start of the reauction of that spectrum.

(B) Applicants that surrendered to the Commission any of their frequency block C licenses, as provided in Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, Second Report and Order and Further Notice of Proposed Rule Making, WT Docket No. 97-82, 12 FCC Rcd 16,436 (1997), as modified by the Order on Reconsideration of the Second Report and Order, WT Docket No. 97-82, FCC 98-46 (rel. Mar. 24, 1998), will not be eligible to apply for the licenses that they surrendered to the Commission until 2 years from the start of the reauction of those licenses if they elected to apply a credit of 70% of the down payment they made on those licenses toward the prepayment of licenses they did not surrender.

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

(1) Short-form Application. In addition to certifications and disclosures required by Part 1, subpart Q of this chapter and § 24.813, each applicant for a license for frequency block C or frequency block F shall certify on its short-form application (Form 175) that it is eligible to bid on and obtain such license(s), and (if applicable) that it

is eligible for designated entity status pursuant to this section and § 24.720, and shall append the following information as an exhibit to its Form 175:

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

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

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

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

(ii) For all other applicants:

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

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

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

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

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

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

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

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

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

(ii) List and summarize all agreements or other instruments (with appropriate references to specific provisions in the text of such agreements and instruments) that support the applicant's eligibility for a license(s) for frequency block C or frequency block F and its eligibility under §§ 24.711, 24.712, 24.714 and 24.720, including the establishment of de facto and de jure control; such agreements and instruments include articles of incorporation and bylaws, shareholder agreements, voting or other trust agreements, partnership agreements, management agreements, joint marketing agreements, franchise agreements, and any other relevant agreements (including letters of intent), oral or written; and

(iii) List and summarize any investor protection agreements and identify specifically any such provisions in those agreements identified pursuant to paragraph (c)(2)(ii) of this section, including rights of first refusal, supermajority

clauses, options, veto rights, and rights to hire and fire employees and to appoint members to boards of directors or management committees.

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

(d) Audits.

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

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

(e) Definitions. The terms affiliate, business owned by members of minority groups and/or women, and gross revenues used in this section are defined in § 1.2110 of this chapter. The terms consortium of small businesses, control group, existing investor, institutional investor, nonattributable equity, preexisting entity, publicly traded corporation with widely dispersed voting power, qualifying investor, small business, and total assets used in this section are defined in § 24.720 of this chapter.

§ 24.710 Limitation on licenses won at auction for frequency Blocks C and F.

(a) No applicant may be deemed the winning bidder of more than 98 of the licenses available for frequency Blocks C and F. Any applicant who is the high bidder for more than 98 of the licenses available for frequency Blocks C and F shall be required to withdraw its bid(s) for a sufficient number of licenses to achieve compliance with this section and may be subject to bid withdrawal penalties under § 24.704.

(b) For purposes of paragraph (a) of this section, licenses will be deemed to be won by the same bidder if an entity that controls or has the power to control any applicant that wins licenses at the auction, has the power to control any other applicant that wins licenses at the auction.

§ 24.711 Upfront payments, down payments and installment payments for licenses for frequency Block C.

(a) Upfront Payments and Down Payments.

(1) Each eligible bidder for licenses subject to auction on frequency Block C shall pay an upfront payment as set forth in a Public Notice pursuant to the procedures in § 1.2106 of this chapter.

(2) Each winning bidder shall make a down payment and pay the balance of its winning bids pursuant to § 1.2107 and § 1.2109 of this chapter.

(b) Installment payments. Each eligible licensee of frequency Block C or F may pay the remaining 90 percent of

the net auction price for the license in installment payments pursuant to § 1.2110(g) of this chapter and under the following terms:

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

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

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

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

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

(c) Unjust enrichment. See § 1.2111 of this chapter.

§ 24.712 Bidding credits for licenses for frequency Block C.

(a) A winning bidder that qualifies as a small business or a consortium of small businesses as defined in § 24.720(b)(1) or § 24.720(b)(4) of this part may use a bidding credit of fifteen percent, as specified in § 1.2110(e)(2)(iii) of this chapter, to lower the cost of its winning bid.

(b) A winning bidder that qualifies as a very small business or a consortium of very small businesses as defined in § 24.720(b)(2) or § 24.720(b)(5) of this part may use a bidding credit of twenty-five percent as specified in § 1.2110(e)(2)(ii) of this chapter, to lower the cost of its winning bid.

(c) Unjust enrichment. See § 1.2111 of this chapter.

§ 24.714 Partitioned licenses and disaggregated spectrum.

(a) Eligibility.

(1) Parties seeking approval for partitioning and disaggregation shall request an authorization for partial assignment of a license pursuant to § 24.839.

(2) Broadband PCS licensees in spectrum blocks A, B, D, and E may apply to partition their licensed geographic service area or disaggregate their licensed spectrum at any time following the grant of their licenses.

(3) Broadband PCS licensees in spectrum blocks C and F may not partition their licensed geographic service area or disaggregate their licensed spectrum for the first five years of the license term unless it is to an entity that meets the eligibility criteria set forth in § 24.709 at the time the request for partial assignment of license is filed or to an entity that holds license(s) for frequency blocks C and F that met the eligibility criteria set forth in § 24.709 at the time of receipt of such license(s). Partial assignment applications seeking partitioning or disaggregation of broadband PCS licenses in spectrum blocks C and F must include an attachment demonstrating compliance with this section.

(b) Technical standards--

(1) Partitioning. In the case of partitioning, applicants and licensees must file FCC Form 603 pursuant to § 1.948 of this chapter and list the partitioned service area on a schedule to the application. The geographic coordinates must be specified in degrees, minutes, and seconds to the nearest second of latitude and longitude and must be based upon the 1983 North American Datum (NAD83).

(2) Disaggregation. Spectrum may be disaggregated in any amount.

(3) Combined partitioning and disaggregation. The Commission will consider requests for partial assignment of licenses that propose combinations of partitioning and disaggregation.

(c) Unjust enrichment--

(1) Installment payments. Licensees in frequency Blocks C and F making installment payments that partition their licenses or disaggregate their spectrum to entities not meeting the eligibility standards for installment payments, will be subject to the provisions concerning unjust enrichment as set forth in §§ 1.2111 of this chapter and 24.716(d).

(2) Bidding credits. Licensees in frequency Blocks C and F that received a bidding credit and partition their licenses or disaggregate their spectrum to entities not meeting the eligibility standards for such a bidding credit, will be subject to the provisions concerning unjust enrichment as set forth in §§ 1.2110(f) of this chapter and 24.717(c).

(3) Apportioning unjust enrichment payments. Unjust enrichment payments for partitioned license areas shall be calculated based upon the ratio of the population of the partitioned license area to the overall population of the license area and by utilizing the most recent census data. Unjust enrichment payments for disaggregated spectrum shall be calculated based upon the ratio of the amount of spectrum disaggregated to the amount of spectrum held by the licensee.

(d) Installment payments--

(1) Apportioning the balance on installment payment plans. When a winning bidder elects to pay for its license through an installment payment plan pursuant to §§ 1.2110(e) of this chapter or 24.716, and partitions its licensed area or disaggregates spectrum to another party, the outstanding balance owed by the licensee on its installment payment plan (including accrued and unpaid interest) shall be apportioned between the licensee and partitionee or disaggregatee. Both parties will be responsible for paying their proportionate share of the outstanding balance to the U.S. Treasury. In the case of partitioning, the balance shall be apportioned based upon the ratio of the population of the partitioned area to the population of the entire original license area calculated based upon the most recent census data. In the case of disaggregation, the balance shall be apportioned based upon the ratio of the amount of spectrum disaggregated to the amount of spectrum allocated to the licensed area.

(2) Parties not qualified for installment payment plans.

(i) When a winning bidder elects to pay for its license through an installment payment plan, and partitions its license or disaggregates spectrum to another party that would not qualify for an installment payment plan or elects

not to pay for its share of the license through installment payments, the outstanding balance owed by the licensee (including accrued and unpaid interest) shall be apportioned according to § 24.714(d)(1).

(ii) The partitionee or disaggregatee shall, as a condition of the approval of the partial assignment application, pay its entire pro rata amount within 30 days of Public Notice conditionally granting the partial assignment application. Failure to meet this condition will result in a rescission of the grant of the partial assignment application.

(iii) The licensee shall be permitted to continue to pay its pro rata share of the outstanding balance and shall receive new financing documents (promissory note, security agreement) with a revised payment obligation, based on the remaining amount of time on the original installment payment schedule. These financing documents will replace the licensee's existing financing documents which shall be marked "superseded" and returned to the licensee upon receipt of the new financing documents. The original interest rate, established pursuant to § 1.2110(e)(3)(i) of this chapter at the time of the grant of the initial license in the market, shall continue to be applied to the licensee's portion of the remaining government obligation. We will require, as a further condition to approval of the partial assignment application, that the licensee execute and return to the U.S. Treasury the new financing documents within 30 days of the Public Notice conditionally granting the partial assignment application. Failure to meet this condition will result in the automatic cancellation of the grant of the partial assignment application.

(iv) A default on the licensee's payment obligation will only affect the licensee's portion of the market.

(3) Parties qualified for installment payment plans.

(i) Where both parties to a partitioning or disaggregation agreement qualify for installment payments, the partitionee or disaggregatee will be permitted to make installment payments on its portion of the remaining government obligation, as calculated according to § 24.714(d)(1).

(ii) Each party will be required, as a condition to approval of the partial assignment application, to execute separate financing documents (promissory note, security agreement) agreeing to pay their pro rata portion of the balance due (including accrued and unpaid interest) based upon the installment payment terms for which they qualify under the rules. The financing documents must be returned to the U.S. Treasury within thirty (30) days of the Public Notice conditionally granting the partial assignment application. Failure by either party to meet this condition will result in the automatic cancellation of the grant of the partial assignment application. The interest rate, established pursuant to § 1.2110(e)(3)(i) of this chapter at the time of the grant of the initial license in the market, shall continue to be applied to both parties' portion of the balance due. Each party will receive a license for their portion of the partitioned market or disaggregated spectrum.

(iii) A default on an obligation will only affect that portion of the market area held by the defaulting party.

(iv) Partitionees and disaggregatees that qualify for installment payment plans may elect to pay some of their pro rata portion of the balance due in a lump sum payment to the U.S. Treasury and to pay the remaining portion of the balance due pursuant to an installment payment plan.

(e) License term. The license term for a partitioned license area and for disaggregated spectrum shall be the remainder of the original licensee's license term as provided for in § 24.15.

(f) Construction requirements--

(1) Requirements for partitioning. Parties seeking authority to partition must meet one of the following construction requirements:

(i) The partitionee may certify that it will satisfy the applicable construction requirements set forth in § 24.203 for the partitioned license area; or

(ii) The original licensee may certify that it has or will meet its five-year construction requirement and will meet the ten-year construction requirement, as set forth in § 24.203, for the entire license area. In that case, the partitionee must only satisfy the requirements for "substantial service," as set forth in § 24.16(a), for the partitioned license area by the end of the original ten-year license term of the licensee.

(iii) Applications requesting partial assignments of license for partitioning must include a certification by each party as to which of the above construction options they select.

(iv) Partitionees must submit supporting documents showing compliance with the respective construction requirements within the appropriate five- and ten-year construction benchmarks set forth in § 24.203.

(v) Failure by any partitionee to meet its respective construction requirements will result in the automatic cancellation of the partitioned or disaggregated license without further Commission action.

(2) Requirements for disaggregation. Parties seeking authority to disaggregate must submit with their partial assignment application a certification signed by both parties stating which of the parties will be responsible for meeting the five- and ten-year construction requirements for the PCS market as set forth in § 24.203. Parties may agree to share responsibility for meeting the construction requirements. Parties that accept responsibility for meeting the construction requirements and later fail to do so will be subject to license forfeiture without further Commission action.

§ 24.716 Upfront payments, down payments, and installment payments for licenses for frequency Block F.

(a) Upfront Payments and Down Payments.

(1) Each eligible bidder for licenses subject to auction on frequency Block F shall pay an upfront payment as set forth in a Public Notice pursuant to the procedures in § 1.2106 of this chapter.

(2) Each winning bidder shall make a down payment and pay the balance of its winning bids pursuant to § 1.2107 and § 1.2109 of this chapter.

(b) Installment Payments. Each eligible licensee of frequency Block F may pay the remaining 80 percent of the net auction price for the license in installment payments pursuant to § 1.2110(e) of this chapter and under the following terms:

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

(2) For an eligible licensee with gross revenues not exceeding \$75 million (calculated in accordance with § 24.709 (a)(2) and (b)) in each of the two preceding years (calculated in accordance with § 24.720(f)), interest shall be imposed based on the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted, plus 2.5 percent; payments shall include interest only for the first year and payments of interest and principal amortized over the remaining nine years of the license term; or

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

(c) Late installment payments. See § 1.2110(f)(4) of this chapter.

(d) Unjust enrichment. See § 1.2111 of this chapter.

§ 24.717 Bidding credits for licenses for frequency Block F.

(a) A winning bidder that qualifies as a small business or a consortium of small businesses as defined in § 24.720(b)(1) or § 24.720(b)(4) of this part may use a bidding credit of fifteen percent, as specified in § 1.2110(e)(2)(iii) of this chapter, to lower the cost of its winning bid.

(b) A winning bidder that qualifies as a very small business or a consortium of very small businesses as defined in § 24.720(b)(2) or § 24.720(b)(5) of this part may use a bidding credit of twenty-five percent, as specified in § 1.2110(e)(2)(ii) of this chapter, to lower the cost of its winning bid.

(c) Unjust enrichment. See § 1.2111 of this chapter.

§ 24.720 Definitions.

(a) Scope. The definitions in this section apply to §§ 24.709 through 24.717, unless otherwise specified in those sections.

(b) Small business; very small business; consortia.

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

(2) A very small business is an entity that, together with its affiliates and persons or entities that hold interests in such entity and their affiliates, has average annual gross revenues that are not more than \$15 million for the preceding three years.

(3) For purposes of determining whether an entity meets the \$40 million average annual gross revenues size standard set forth in paragraph (b)(1) of this section or the \$15 million average annual gross revenues size standard set forth in paragraph (b)(2) of this section, the gross revenues of the entity, its affiliates, persons or entities holding interests in the entity and their affiliates shall be considered on a cumulative basis and aggregated subject to the exceptions set forth in § 24.709(b).

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

(5) A very 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 very small business in paragraphs (b)(2) and (b)(3) of this section.

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

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

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

(d) Small Business Owned by Members of Minority Groups and/or Women: Consortium of Small Businesses Owned by Members of Minority and/or Women. A Small business owned by members of minority groups and/or women is an entity that meets the definitions in both paragraphs (b) and (c) of this section. A consortium of small

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

(e) Rural Telephone Company. A rural telephone company is a local exchange carrier operating entity to the extent that such entity:

(1) Provides common carrier service to any local exchange carrier study area that does not include either;

(i) 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

(ii) Any territory, incorporated or unincorporated, included in an urbanized area, as defined by the Bureau of the Census as of August 10, 1993;

(2) Provides telephone exchange service, including exchange access, to fewer than 50,000 access lines;

(3) Provides telephone exchange service to any local exchange carrier study area with fewer than 100,000 access lines; or

(4) 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.

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

(g) Total Assets. Total assets shall mean the book value (except where generally accepted accounting principles (GAAP) require market valuation) of all property owned by an entity, whether real or personal, tangible or intangible, as evidenced by the most recent audited financial statements or certified by the applicant's chief financial officer or its equivalent if the applicant does not otherwise use audited financial statements.

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

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

(j) Nonattributable Equity.

(1) Nonattributable equity shall mean:

(i) For corporations, voting stock or non-voting stock that includes no more than twenty-five percent of the total voting equity, including the right to vote such stock through a voting trust or other arrangement;

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

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

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

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

(2) That the entity and/or its members receive at least 50.1 percent of the annual distribution or any dividends paid on the voting stock of a corporation;

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

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

NOTE to paragraph (k): Voting control does not always assure de facto control, such as for example, when the voting stock of the control group is widely dispersed (see e.g., § 24.720(1)(2)(iii)).

(l) Affiliate.

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

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

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

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

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

(2) Nature of control in determining affiliation.

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

Example for paragraph (l)(2)(i). An applicant owning 50 percent of the voting stock of another concern would have negative power to control such concern since such party can block any action of the other stockholders. Also, the bylaws of a corporation may permit a stockholder with less than 50 percent of the voting to block any actions

taken by the other stockholders in the other entity. Affiliation exists when the applicant has the power to control a concern while at the same time another person, or persons, are in control of the concern at the will of the party or parties with the power of control.

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

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

Example for paragraph (1)(2)(iii). In a corporation where the officers and directors own various size blocks of stock totaling 40 percent of the corporation's voting stock, but no officer or director has a block sufficient to give him or her control or the power to control and the remaining 60 percent is widely distributed with no individual stockholder having a stock interest greater than 10 percent, management has the power to control. If persons with such management control of the other entity are persons with attributable interests in the applicant, the other entity will be deemed an affiliate of the applicant.

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

Example 1. Two shareholders in Corporation Y each have attributable interests in the same PCS application. While neither shareholder has enough shares to individually control Corporation Y, together they have the power to control Corporation Y. The two shareholders with these common investments (or identity of interest) are treated as though they are one person and Corporation Y would be deemed an affiliate of the applicant.

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

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

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

(A) The family members are estranged,

(B) The family ties are remote, or

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

Example for paragraph (1)(3)(ii). A owns a controlling interest in Corporation X. A's sister-in-law, B, has an attributable interest in a PCS application. Because A and B have a presumptive kinship affiliation, A's interest in Corporation X is attributable to B, and thus to the applicant, unless B rebuts the presumption with the necessary

showing.

(4) Affiliation through stock ownership.

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

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

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

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

Example 1 for paragraph (1)(5). If company B holds an option to purchase a controlling interest in company A, who holds an attributable interest in a PCS application, the situation is treated as though company B had exercised its rights and had become owner of a controlling interest in company A. The gross revenues of company B must be taken into account in determining the size of the applicant.

Example 2 for paragraph (1)(5). If a large company, BigCo, holds 70% (70 of 100 outstanding shares) of the voting stock of company A, who holds an attributable interest in a PCS application, and gives a third party, SmallCo, an option to purchase 50 of the 70 shares owned by BigCo, BigCo will be deemed to be an affiliate of company A, and thus the applicant, until SmallCo actually exercises its options to purchase such shares. In order to prevent BigCo from circumventing the intent of the rule which requires such options to be considered on a fully diluted basis, the option is not considered to have present effect in this case.

Example 3 for paragraph (1)(5). If company A has entered into an agreement to merge with company B in the future, the situation is treated as though the merger has taken place.

(6) Affiliation under voting trusts.

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

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

(iii) If the primary purpose of a voting trust, or similar agreement, is to separate voting power from beneficial ownership of voting stock for the purpose of shifting control of or the power to control a concern in order that such concern or another concern may meet the Commission's size standards, such voting trust shall not be considered valid for this purpose regardless of whether it is or is not recognized within the appropriate jurisdiction.

(7) Affiliation through common management. Affiliation generally arises where officers, directors, or key

employees serve as the majority or otherwise as the controlling element of the board of directors and/or the management of another entity.

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

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

(10) Affiliation under joint venture arrangements.

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

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

(11) For purposes of §§ 24.709(a)(2) and paragraphs (b)(2) and (d) of this section, Indian tribes or Alaska Regional or Village Corporations organized pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.), or entities owned and controlled by such tribes or corporations, are not considered affiliates of an applicant (or licensee) that is owned and controlled by such tribes, corporations or entities, and that otherwise complies with the requirements of § 24.709 (b)(3) and (b)(5) or § 24.709 (b)(4) and (b)(6), except that gross revenues derived from gaming activities conducted by affiliated entities pursuant to the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.) will be counted in determining such applicant's (or licensee's) compliance with the financial requirements of § 24.709(a) and paragraphs (b) and (d) of this section, unless such applicant establishes that it will not receive a substantial unfair competitive advantage because significant legal constraints restrict the applicant's ability to access such gross revenues.

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

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

(2) In which no person

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

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

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

(4) The term person shall be defined as in section 13(d) of the Securities and Exchange Act of 1934, as amended

(15 U.S.C. 78(m)), and shall also include investors that are commonly controlled under the indicia of control set forth in the definition of affiliate in paragraphs (1)(2) through (1) of this section.

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

(1) A qualifying investor is a person who is (or holds an interest in) a member of the applicant's (or licensee's) control group and whose gross revenues and total assets, when aggregated with those of all other attributable investors and affiliates, do not exceed the gross revenues and total assets limits specified in § 24.709(a), or, in the case of an applicant (or licensee) that is a small business, do not exceed the gross revenues limit specified in paragraph (b) of this section.

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

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

(4) For purposes of § 24.709 (b)(5)(i)(C) and (b)(6)(i)(C), a qualifying investor is a person who is (or holds an interest in) a member of the applicant's (or licensee's) control group and whose gross revenues and total assets do not exceed the gross revenues and total assets limits specified in § 24.709(a).

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

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

SUBPART I--INTERIM APPLICATION, LICENSING, AND PROCESSING RULES FOR BROADBAND PCS

§ 24.804 Eligibility.

(a) General. Authorizations will be granted upon proper application if:

- (1) The applicant is qualified under all applicable laws and Commission regulations, policies and decisions;
- (2) There are frequencies available to provide satisfactory service; and
- (3) The public interest, convenience or necessity would be served by a grant.

(b) Alien ownership. A broadband PCS authorization to provide Commercial Mobile Radio Service may not be granted to or held by:

- (1) Any alien or the representative of any alien.
- (2) Any corporation organized under the laws of any foreign government.

(3) Any corporation of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof or any corporation organized under the laws of a foreign country.

(4) Any corporation directly or indirectly controlled by any other corporation of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such license.

(c) A broadband PCS authorization to provide Private Mobile Radio Service may not be granted to or held by a foreign government or a representative thereof.

§ 24.815 Technical content of applications; maintenance of list of station locations.

(a) All applications required by this part shall contain all technical information required by the application forms or associated Public Notice(s). Applications other than initial applications for a broadband PCS license must also comply with all technical requirements of the rules governing the broadband PC (see Subparts C and E of this Part as appropriate). The following paragraphs describe a number of general technical requirements.

(b) Each application (except applications for initial licenses filed on Form 175) for a license for broadband PCS must comply with the provisions of §§ 24.229-24.238 of the Commission's Rules.

(c) to (i) [Reserved]

(j) The location of the transmitting antenna shall be considered to be the station location. Broadband PCS licensees must maintain a current list of all station locations, which must describe the transmitting antenna site by its geographical coordinates and also by conventional reference to street number, landmark, or the equivalent. All such coordinates shall be specified in terms of degrees, minutes, and seconds to the nearest second of latitude and longitude.

§ 24.830 Opposition to applications.

(a) Petitions to deny (including petitions for other forms of relief) and responsive pleadings for Commission consideration must comply with § 1.2108 of this Chapter and must:

(1) Identify the application or applications (including applicant's name, station location, Commission file numbers and radio service involved) with which it is concerned;

(2) Be filed in accordance with the pleading limitations, filing periods, and other applicable provisions of §§ 1.41 through 1.52 of this Chapter except where otherwise provided in § 1.2108 of this Chapter;

(3) Contain specific allegations of fact which, except for facts of which official notice may be taken, shall be supported by affidavit of a person or persons with personal knowledge thereof, and which shall be sufficient to demonstrate that the petitioner (or respondent) is a party in interest and that a grant of, or other Commission action regarding, the application would be prima facie inconsistent with the public interest;

(4) Be filed within thirty (30) days after the date of public notice announcing the acceptance for filing of any such application or major amendment thereto (unless the Commission otherwise extends the filing deadline); and

(5) Contain a certificate of service showing that it has been mailed to the applicant no later than the date of filing thereof with the Commission.

(b) A petition to deny a major amendment to a previously-filed application may only raise matters directly related

to the amendment which could not have been raised in connection with the underlying previously-filed application. This subsection does not apply, however, to petitioners who gain standing because of the major amendment.

§ 24.831 Mutually exclusive applications.

(a) The Commission will consider applications for broadband PCS licenses to be mutually exclusive if they relate to the same geographical boundaries (MTA or BTA) and are timely filed for the same frequency block.

(b) Mutually exclusive applications filed on Form 175 for the initial provision of broadband PCS are subject to competitive bidding in accordance with the procedures in Subpart H of this part and in Part 1, Subpart Q of this Chapter.

(c) An application will be entitled to comparative consideration with one or more conflicting applications only if the Commission determines that such comparative consideration will serve the public interest.

§ 24.833 Post-auction divestitures.

Any parties sharing a common non-controlling ownership interest who aggregate more PCS spectrum among them than a single entity is entitled to hold (See §§ 20.6(e), 24.710, 24.204, 24.229(c) of this chapter) will be permitted to divest sufficient properties within 90 days of the license grant to come into compliance with the spectrum aggregation limits as follows:

(a) The broadband PCS applicant shall submit a signed statement with its long- form application stating that sufficient properties will be divested within 90 days of the license grant. If the licensee is otherwise qualified, the Commission will grant the applications subject to a condition that the licensee come into compliance with the PCS spectrum aggregation limits within 90 days of grant.

(b) Within 90 days of license grant, the licensee must certify that the applicant and all parties to the application have come into compliance with the PCS spectrum aggregation limits. If the licensee fails to submit the certification within 90 days, the Commission will immediately cancel all broadband PCS licenses won by the applicant, impose the default penalty and, based on the facts presented, take any other action it may deem appropriate. Divestiture may be to an interim trustee if a buyer has not been secured in the required time frame, as long as the applicant has no interest in or control of the trustee, and the trustee may dispose of the property as it sees fit. In no event may the trustee retain the property for longer than six months from grant of license.

§ 24.839 Transfer of control or assignment of license.

(a) Restrictions on Assignments and Transfers of Licenses for Frequency Blocks C and F. No assignment or transfer of control of a license for frequency Block C or frequency Block F will be granted unless:

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

(2) The proposed assignee or transferee meets the eligibility criteria set forth in § 24.709 of this part at the time the application for assignment or transfer of control is filed, or the proposed assignee or transferee holds other license(s) for frequency blocks C and F and, at the time of receipt of such license(s), met the eligibility criteria set forth in § 24.709 of this part;

(3) The application is for partial assignment of a partitioned service area to a rural telephone company pursuant to § 24.714 of this part and the proposed assignee meets the eligibility criteria set forth in § 24.709 of this part;

(4) The application is for an involuntary assignment or transfer of control to a bankruptcy trustee appointed under involuntary bankruptcy, an independent receiver appointed by a court of competent jurisdiction in a foreclosure

action, or, in the event of death or disability, to a person or entity legally qualified to succeed the deceased or disabled person under the laws of the place having jurisdiction over the estate involved; provided that, the applicant requests a waiver pursuant to this paragraph; or

(5) The assignment or transfer of control is pro forma.

(b) If the assignment or transfer of control of a license is approved, the assignee or transferee is subject to the original construction requirement of § 24.203 of this part.

§ 24.843 Extension of time to complete construction.

(a) If construction is not completed within the time period set forth in § 24.203, the authorization will automatically expire. Before the period for construction expires an application for an extension of time to complete construction (FCC Form 489) may be filed. See paragraph (b) of this section. Within 30 days after the authorization expires an application for reinstatement may be filed on FCC Form 489.

(b) Extension of Time to Complete Construction. An application for extension of time to complete construction may be made on FCC Form 489. Extension of time requests must be filed prior to the expiration of the construction period. Extensions will be granted only if the licensee shows that the failure to complete construction is due to causes beyond its control.

(c) An application for modification of an authorization (under construction) does not extend the initial construction period. If additional time to construct is required, an FCC Form 489 must be submitted.

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Letters from the Office of General Counsel and the Wireless Telecommunications Bureau:

Letter to Gary M. Epstein and James H. Barker from William E. Kennard, General Counsel, Federal Communications Commission (released October 25, 1994).

Letter to Alan F. Ciamporcerro from William E. Kennard, General Counsel, Federal Communications Commission (released October 25, 1996).

Letter to R. Michael Senkowski from Rosalind K. Allen, Acting Chief, Commercial Radio Division, Wireless Telecommunications Bureau (released December 1, 1994).

Letter to Leonard J. Kennedy from Rosalind K. Allen, Acting Chief, Commercial Radio Division, Wireless Telecommunications Bureau (released December 14, 1994).

Letter to Jonathan D. Blake and Robert J. Rini from Kathleen O'Brien Ham, Chief, Auctions Division, Wireless Telecommunications Bureau, DA 95-2404 (released November 28, 1995).

Letter to Mark Grady from Kathleen O'Brien Ham, Chief, Auctions Division, Wireless Telecommunications Bureau, 11 FCC Rcd. 10895 (1996).

Letter to David L. Nace from Kathleen O'Brien Ham, Chief, Auctions Division, Wireless Telecommunications Bureau, 11 FCC Rcd. 11363 (1996).

Letter to Elliott J. Greenwald from Christopher J. Wright, General Counsel, Federal Communications Commission (released April 6, 1998).

Civil Actions Initiated by U.S. Department of Justice:

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Department of Justice, 63 FR 65,228 (November 25, 1998).

"Justice Department Sues Three Firms Over FCC Auction Practices," *Press Release*, U.S. Department of Justice (November 10, 1998).

Complaint, *U.S. v. Omnipoint Corp.*, No. 1:98CV02750 (D.D.C. November 10, 1998).

Complaint, *U.S. v. Mercury PCS II, L.L.C.*, No. 1:98CV02751 (D.D.C. November 10, 1998).

Complaint, *U.S. v. 21st Century Bidding Corp.*, No. 1:98CV02752 (D.D.C. November 10, 1998).

Miscellaneous:

Many of these documents can be retrieved from the FCC web site (<http://www.fcc.gov/wtb/auctions/collusio/collusio.html>), where documents may be located by using our search engine (select the link "search"). All of these documents can be ordered in hard copy from the Commission's contractor, International Transcription Service, Inc. at (202) 857-3800.

Documents retrieved from the FCC web site are available in more than one format: .pdf, .txt, and .wp. (The key to the extensions is the following: .pdf = Acrobat Reader, .txt = Text, and .wp = Word Perfect.) In order to review a document in its entirety, including footnotes, it is necessary to access the document in Word Perfect or Acrobat Reader.