

with and covered by the authorization issued to the carrier serving the land mobile station. No additional authorization is required.

Sec. 24.410 [Reserved]

Sec. 24.411 Miscellaneous forms.

(a) Licensee qualifications. FCC Form 430 ("Common Carrier and Satellite Radio Licensee Qualifications Report") shall be filed by Narrowband Personal Communications Service licensees only as required by Form 490 (Application for Assignment or Transfer of Control Under Part 22).

(b) Renewal of station license. Except for renewal of special temporary authorizations, FCC Form 405 ("Application for Renewal of Station License") must be filed in duplicate by the licensee between thirty (30) and sixty (60) days prior to the expiration date of the license sought to be renewed.

Sec. 24.412 [Reserved]

Sec. 24.413 General application requirements.

(a) Each application (including applications filed on Forms 175 and 401) for a radio station authorization or for consent to assignment or transfer of control in the narrowband PCS shall disclose fully the real party or parties in interest and must include the following information:

(1) A list of its subsidiaries, if any. Subsidiary means any business five per cent or more whose stock, warrants, options or debt securities are owned by the applicant or an officer, director, stockholder or key management personnel of the applicant. This list must include a description of each subsidiary's principal business and a description of each subsidiary's relationship to the applicant.

(2) A list of its affiliates, if any. Affiliates means any business which holds a five per cent or more interest in the applicant, or any business in which a five per cent or more interest is held by another company which holds a five per cent interest in the applicant (e.g. Company A owns 5% of Company B and 5% of Company C; Companies B and C are affiliates).

(3) A list of the names, addresses, citizenship and principal business of any person holding five per cent or more of each class of stock, warrants, options or debt securities together with the amount and percentage held, and the name, address, citizenship and principal place of

business of any person on whose account, if other than the holder, such interest is held. If any of these persons are related by blood or marriage, include such relationship in the statement.

(4) In the case of partnerships, the name and address of each partner, each partner's citizenship and the share or interest participation in the partnership. This information must be provided for all partners, regardless of their respective ownership interests in the partnership. A signed and dated copy of the partnership agreement must be included in the application. This information must be included in Exhibit V of the application.

(b) Each application for a radio station authorization in the narrowband PCS must:

(1) Submit the information required by the Commission's rules, requests, and application forms;

(2) Be maintained by the applicant substantially accurate and complete in all significant respects in accordance with the provisions of Sec. 1.65 of this chapter, and

(3) Show compliance with and make all special showings that may be applicable.

(c) Where documents, exhibits, or other lengthy showings already on file with the Commission contain information which is required by an application form, the application may specifically refer to such information, if:

(1) The information previously filed is over one A4 (21 cm x 29.7 cm) or 8.5 x 11 inch (21.6 cm x 27.9 cm) page in length, and all information referenced therein is current and accurate in all significant respects under Section 1.65 of this chapter, and

(2) The reference states specifically where the previously filed information can actually be found, including mention of:

(i) The station call sign or application file number whenever the reference is to station files or previously filed applications;

(ii) The title of the proceeding, the docket number, and any legal citations, whenever the reference is to a docketed proceeding.

However, questions on an application form which call for specific technical data, or which can be answered by a "yes" or "no" or other short answer shall be answered as appropriate and shall not be cross-referenced to a previous filing.

(d) In addition to the general application requirements of Subpart F and Secs. 1.2105, 24.413 and 24.415 of this part, applicants shall submit any additional documents, exhibits, or signed written statements of fact:

(1) As may be required by these rules; and

(2) As the Commission, at any time after the filing of an application and during the term of any authorization, may require from any applicant, permittee, or licensee to enable it to determine whether a radio authorization should be granted, denied, or revoked.

(e) Except when the Commission has declared explicitly to the contrary, an informational requirement does not in itself imply the processing treatment of decisional weight to be accorded the response.

(f) All applicants (except applicants filing FCC Form 175) are required to indicate at the time their application is filed whether or not a Commission grant of the application may have a significant environmental impact as defined by Sec. 1.1307 of the Commission's rules. If answered affirmatively, the requisite environmental assessment as prescribed in Sec. 1.1311 of this chapter must be filed with the application and Commission environmental review must be completed prior to construction. See Sec. 1.1312 of this chapter. All narrowband PCS licensees are subject to a continuing obligation to determine whether subsequent construction may have a significant environmental impact prior to undertaking such construction and to otherwise comply with Section 1.1301 et seq. of the Commission's Rules. See Section 1.1312.

Sec. 24.414 [Reserved]

Sec. 24.415 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 narrowband PCS license must also comply with all technical requirements of the rules governing the narrowband PCS (see Subparts C and D 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 radio station authorization for narrowband PCS must comply with the provisions of Sections 24.129-24.135.

(c)-(i) [Reserved]

(i) The location of the transmitting antenna shall be considered to be the station location. Narrowband 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.

Sec. 24.416 Station Antenna Structures.

(a) Unless the narrowband PCS licensee has received prior approval from the FCC, no antenna structure, including radiating elements, tower, supports and all appurtenances, may be higher than 61 m (200 feet) above ground level at its site.

(b) Unless the narrowband PCS licensee has received prior approval from the FCC, no antenna structure at an airport or heliport that is available for public use and is listed in the Airport Directory of the current Airman's Information Manual or in either the Alaska or Pacific Airman's Guide and Chart Supplement; or at an airport or heliport under construction that is the subject of a notice or proposal on file with the FAA, and except for military airports, it is clearly indicated that the airport will be available for public use; or at an airport or heliport that is operated by the armed forces of the United States; or at a place near any of these airports or heliports, may be higher than:

(1) 1 m above the airport elevation for each 100 m from the airport runway longer than 1 km within 6.1 km of the antenna structure.

(2) 2 m above the airport elevation for each 100 m from the nearest runway shorter than 1 km within 3.1 km of the antenna structure.

(3) 4 m above the airport elevation for each 100 m from the nearest landing pad within 1.5 km of the antenna structure.

(c) A narrowband PCS station antenna structure no higher than 6.1 m (10 feet) above ground level at its site or no higher than 6.1 m above any natural object or existing manmade structure, other than an antenna structure, is exempt from the requirements of paragraphs (a) and (b) of this section.

(d) Further details as to whether an aeronautical study and/or obstruction marking and lighting may be required, and specifications for obstruction marking and lighting are contained in Part 17 of the FCC Rules, Construction, Marking and Lighting of Antenna Structures. To request approval to place an antenna structure higher than the limits specified in paragraphs (a), (b), and (c) of this section, the licensee must notify the Federal Aviation Administration (FAA) on FAA Form 7460-1 and the FCC on FCC Form 854.

Secs. 24.417-24.418 [Reserved]

Sec. 24.419 Waiver of rules.

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(a) Request for waivers. (1) Waivers of these rules may be granted upon application or by

the Commission on its own motion. Requests for waivers shall contain a statement of reasons sufficient to justify a waiver. Waivers will not be granted except upon an affirmative showing:

(i) That the underlying purpose of the rule will not be served, or would be frustrated, by its application in a particular case, and that grant of the waiver is otherwise in the public interest; or

(ii) That the unique facts and circumstances of a particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest. Applicants must also show the lack of a reasonable alternative.

(2) If the information necessary to support a waiver request is already on file, the applicant may cross-reference to the specific filing where it may be found.

(b) Denial of waiver, alternate showing required. If a waiver is not granted, the application will be dismissed as defective unless the applicant has also provided an alternative proposal which complies with the Commission's rules (including any required showings).

Sec. 24.420 Defective applications.

(a) Unless the Commission shall otherwise permit, an application will be unacceptable for filing and will be returned to the applicant with a brief statement as to the omissions or discrepancies if:

(1) The application is defective with respect to completeness of answers to questions, informational showings, execution, or other matters of a formal character, or

(2) The application does not comply with the Commission's rules, regulations, specific requirements for additional information or other requirements.

See also Section 1.2105.

(b) Some examples of common deficiencies which result in defective applications under paragraph (a) of this section are:

(1) The application is not filled out completely and signed;

(2)-(4) [Reserved]

(5) The application (other an application filed on FCC Form 175) does not include an environmental assessment as required for an action that may have a significant impact upon the environment, as defined in Sec. 1.1307 of this chapter.

(6) [Reserved]

(7) The application is filed prior to the Public Notice issued under Section 24.305 of this Part announcing the application filing date for the relevant auction or after the cutoff date prescribed in that Public Notice;

(c) [Reserved]

(d) If an applicant is requested by the Commission to file any documents or any supplementary or explanatory information not specifically required in the prescribed application form, a failure to comply with such request within a specified time period will be deemed to render the application defective and will subject it to dismissal.

Sec. 24.421 Inconsistent or conflicting applications.

While an application is pending and undecided, no subsequent inconsistent or conflicting application may be filed by the same applicant, his successor or assignee, or on behalf or for the benefit of the same applicant, his successor or assignee.

Sec. 24.422 Amendment of application for Narrowband Personal Communications Service filed on FCC Form 175.

(a) The Commission will provide bidders a limited opportunity to cure defects in FCC Form 175 specified herein except for failure to sign the application and to make certifications, defects which may not be cured. See also Section 1.2105.

(b) In the Narrowband PCS, the only amendments to FCC Form 175 which will be permitted are minor amendments to correct minor errors or defects such as typographical errors. All other amendments to FCC Form 175, such as ownership changes or changes in the identification of parties to bidding consortia, will be considered to be major amendments. An FCC Form 175 which is amended by a major amendment will be considered to be newly filed and cannot be resubmitted after applicable filing deadlines. See also Section 1.2105.

Sec. 24.423 Amendment of applications for Narrowband Personal Communications Service (other than applications filed on FCC Form 175). This section applies to all applications for Narrowband Personal Communications Service other than applications filed on FCC Form 175.

(a) Amendments as of right. A pending application may be amended as a matter of right if the application has not been designated for hearing.

(1) Amendments shall comply with Sec. 24.429, as applicable; and

(2) Amendments which resolve interference conflicts or amendments under Sec. 24.429 may be filed at any time.

(b) The Commission or the presiding officer may grant requests to amend an application designated for hearing only if a written petition demonstrating good cause is submitted and properly served upon the parties of record.

(c) Major amendments, minor amendments. The Commission will classify all amendments as minor except in the cases listed below. An amendment shall be deemed to be a major amendment subject to Sec. 24.427 under any of the following circumstances:

(1) Change in technical proposal. If the amendment results in a substantial change in the engineering proposal such as (but not necessarily limited to) a change in, or an addition of, a radio frequency; or

(2) Amendment to proposed service area. If the amendment extends the reliable service area of the proposed facilities outside its MTA, BTA, or other applicable market area as defined in Section 24.102; or

(3) A substantial change in ownership or control.

(d) If a petition to deny (or other formal objection) has been filed, any amendment, requests for waiver, (or other written communications) shall be served on the petitioner, unless waiver of this requirement is granted pursuant to paragraph (e) of this section. See also Section 1.2108.

(e) The Commission may waive the service requirements of paragraph (d) of this section and prescribe such alternative procedures as may be appropriate under the circumstances to protect petitioners' interests and to avoid undue delay in a proceeding, if an applicant submits a request for waiver which demonstrates that the service requirement is unreasonably burdensome.

(f) Any amendment to an application shall be signed and shall be submitted in the same manner, and with the same number of copies, as was the original application. Amendments may be made in letter form if they comply in all other respects with the requirements of this chapter.

(g) An application will be considered to be a newly filed application if it is amended by a major amendment (as defined in this section), except in the following circumstances:

(1) [Reserved]

(2) [Reserved]

(3) The amendment reflects only a change in ownership or control found by the Commission to be in the public interest;

(4) [Reserved]

(5) The amendment corrects typographical transcription, or similar clerical errors which are clearly demonstrated to be mistakes by reference to other parts of the application, and whose discovery does not create new or increased frequency conflicts;

(6) The amendment does not create new or increased frequency conflicts, and is demonstrably necessitated by events which the applicant could not have reasonably foreseen at the time of filing, such as, for example:

(i) The loss of a transmitter or receiver site by condemnation, natural causes, or loss of lease or option; or

(ii) Obstruction of a proposed transmission path caused by the erection of a new building or other structure.

Sec. 24.424 [Reserved]

Sec. 24.425 Application for temporary authorizations.

(a) In circumstances requiring immediate or temporary use of facilities, request may be made for special temporary authority to install and/or operate new or modified equipment. Any such request may be submitted as an informal application in the manner set forth in Sec. 24.5 and must contain full particulars as to the proposed operation including all facts sufficient to justify the temporary authority sought and the public interest therein. No such request will be considered unless the request is received by the Commission at least 10 days prior to the date of proposed construction or operation or, where an extension is sought, expiration date of the existing temporary authorization. A request received within less than 10 days may be accepted upon due showing of sufficient reasons for the delay in submitting such request.

(b) Special temporary authorizations may be granted without regard to the 30-day public notice requirements of Sec. 24.27(b) when:

(1) The authorization is for a period not to exceed 30 days and no application for regular application is contemplated to be filed;

(2) The authorization is for a period not to exceed 60 days pending the filing of an application for such regular operation;

(3) The authorization is to permit interim operation to facilitate completion of authorized construction or to provide substantially the same service as previously authorized; or

(4) The authorization is made upon a finding that there are extraordinary circumstances requiring operation in the public interest and that delay in the institution of such service would seriously prejudice the public interest.

(c) Temporary authorizations of operation not to exceed 180 days may be granted under the standards of section 309(f) of the Communications Act where extraordinary circumstances so require. Extensions of the temporary authorization for a period of 180 days each may also be granted, but the renewal applicant bears a heavy burden to show that extraordinary circumstances warrant such an extension.

(d) In cases of emergency found by the Commission, involving danger to life or property or due to damage of equipment, or during a national emergency proclaimed by the president or declared by the Congress or during the continuance of any war in which the United States is engaged and when such action is necessary for the national defense or safety or otherwise in furtherance of the war effort, or in cases of emergency where the Commission finds that it would not be feasible to secure renewal applications from existing licensees or otherwise to follow normal licensing procedure, the Commission will grant radio station authorizations and station licenses, or modifications or renewals thereof, during the emergency found by the Commission or during the continuance of any such national emergency or war, as special temporary licenses, only for the period of emergency or war requiring such action, without the filing of formal applications.

Processing of Applications

Sec. 24.426 Receipt of application; applications in the narrowband Personal Communications Services filed on FCC Form 175 and other applications in the narrowband PCS Service.

(a) All applications for the initial provision of narrowband PCS service must be submitted on FCC Forms 175 and 175-S. Mutually exclusive initial applications in the narrowband Personal Communications Services are subject to competitive bidding. FCC Form 401 ("Application for New or Modified Common Carrier Radio Station Under Part 22") must be submitted by each winning bidder for each narrowband PCS license applied for on FCC Form 175. In the event that mutual exclusivity does not exist between applicants filing FCC Form 175, the applicant will also file FCC Form 401. The aforementioned Forms 175, 175-S, and 401 are subject to the provisions of 47 C.F.R. Part 1, Subpart Q ("Competitive Bidding

Proceedings") and Subpart F of this Part. Blanket licenses are granted for each market frequency block. Applications for individual sites are not needed and will not be accepted. See Section 24.11.

(b) Applications received for filing are given a file number. The assignment of a file number to an application is merely for administrative convenience and does not indicate the acceptance of the application for filing and processing. Such assignment of a file number will not preclude the subsequent return or dismissal of the application if it is found to be not in accordance with the Commission's rules.

(c) Acceptance of an application for filing merely means that it has been the subject of a preliminary review as to completeness. Such acceptance will not preclude the subsequent return or dismissal of the application if it is found to be defective or not in accordance with the Commission's rules. (See Sec. 24.413 for additional information concerning filing of applications.)

Sec. 24.427 Public notice period.

(a) At regular intervals, the Commission will issue a public notice listing:

(1) The acceptance for filing of all applications and major amendments thereto;

(2) Significant Commission actions concerning applications listed as acceptable for filing;

(3) Information which the Commission in its discretion believes of public significance. Such notices are solely for the purpose of informing the public and do not create any rights in an applicant or any other person.

(4) Special environmental considerations as required by Part 1 of this chapter.

(b)(1) The Commission will not grant any application until expiration of a period of thirty (30) days following the issuance date of a public notice listing the application, or any major amendments thereto, as acceptable for filing. Provided, that the Commission will not grant an application filed on Form 401 filed either by a winning bidder or by an applicant whose Form 175 application is not mutually exclusive with other applicants, until the expiration of a period of forty (40) days following the issuance of a public notice listing the application, or any major amendments thereto, as acceptable for filing. See also Section 1.2108.

(c) As an exception to paragraphs (a)(1), (a)(2) and (b) of this section, the public notice provisions are not applicable to applications:

(1) For authorization of a minor technical change in the facilities of an authorized station where such a change would not be classified as a major amendment (as defined by Sec.

24.423) were such a change to be submitted as an amendment to a pending application;

(2) For issuance of a license subsequent to a radio station authorization or, pending application for a grant of such license, any special or temporary authorization to permit interim operation to facilitate completion of authorized construction or to provide substantially the same service as would be authorized by such license;

(3) For extension of time to complete construction of authorized facilities, see Section 24.103;

(4) For temporary authorization pursuant to Sec. 24.425(b);

(5) [Reserved]

(6) For an authorization under any of the proviso clauses of section 308(a) of the Communications Act of 1934 (47 U.S.C. 308(a));

(7) For consent to an involuntary assignment or transfer of control of a radio authorization;
or

(8) For consent to a voluntary assignment or transfer of control of a radio authorization, where the assignment or transfer does not involve a substantial change in ownership or control.

Sec. 24.428 Dismissal and return of applications.

(a) Except as provided under Sec. 24.429, any application may be dismissed without prejudice as a matter of right if the applicant requests its dismissal prior to designation for hearing or, in the case of applications filed on Forms 175 and 175-S, prior to auction. An applicant's request for the return of his application after it has been accepted for filing will be considered to be a request for dismissal without prejudice. Applicants requesting dismissal of their applications are also subject to Section 1.2104. Requests for dismissal shall comply with the provisions of Sec. 24.429 as appropriate.

(b) A request to dismiss an application without prejudice will be considered after designation for hearing only if:

(1) A written petition is submitted to the Commission and is properly served upon all parties of record, and

(2) The petition complies with the provisions of Sec. 24.429 (whenever applicable) and demonstrates good cause.

(c) The Commission will dismiss an application for failure to prosecute or for failure to respond substantially within a specified time period to official correspondence or requests for additional information. Dismissal shall be without prejudice if made prior to designation for hearing or prior to auction, but dismissal may be made with prejudice for unsatisfactory compliance with Sec. 24.429 or after designation for hearing or after the applicant is notified that it is the winning bidder under the auction process.

Sec. 24.429 Ownership changes and agreements to amend or to dismiss applications or pleadings.

(a) **Applicability.** Subject to the provisions of Sec. 1.2105 (Bidding Application and Certification Procedures; Prohibition of Collusion), this section applies to applicants and all other parties interested in pending applications who wish to resolve contested matters among themselves with a formal or an informal agreement or understanding. This section applies only when the agreement or understanding will result in:

(1) A major change in the ownership of an applicant to which Sec. 24.423 and 24.423(g) apply or which would cause the applicant to lose its status as a designated entity under Section 24.309, or

(2) The individual or mutual withdrawal, amendment or dismissal of any pending application, amendment, petitioner or other pleading.

(b) **Policy.** Parties to contested proceedings are encouraged to settle their disputes among themselves. Parties which, under a settlement agreement, apply to the Commission for ownership changes or for the amendment or dismissal of either pleadings or applications, shall at the time of filing notify the Commission that such filing is the result of an agreement or understanding.

(c) If the amendment would, if granted, cause the applicant to lose its status as a designated entity under Section 24.309, the applicant must comply with the obligations imposed by Sections 24.309 (Designated Entities) and 1.2111 (Assignment of transfer of control; unjust enrichment) before the amendment will be granted.

(d) The provisions of Section 22.927 will apply in the event of the individual or mutual withdrawal, amendment or dismissal of any pending application, amendment, petitioner or other pleading.

Sec. 24.430 Opposition to applications.

(a) Petitions to deny (including petitions for other forms of relief) and responsive pleadings for Commission consideration must comply with Section 1.2108 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 Secs. 1.41 through 1.52 except where otherwise provided in Section 1.2108;

(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 does not apply to petitioners who gain standing because of the major amendment.

Sec. 24.431 Mutually exclusive applications.

(a) The Commission will consider applications to be mutually exclusive if their conflicts are such that the grant of one application would effectively preclude by reason of harmful electrical interference, or other practical reason, the grant of one or more of the other applications. The Commission will presume "harmful electrical interference" to mean interference which would result in a material impairment to service rendered to the public despite full cooperation in good faith by all applicants or parties to achieve reasonable technical adjustments which would avoid electrical conflict.

(b) Mutually exclusive applications filed on Form 175 for the initial provision of narrowband PCS service are subject to competitive bidding in accordance with the procedures in Subpart F and in Part 1, Subpart Q.

(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.

(d)-(j) Reserved

Sec. 24.432 Consideration of applications.

(a) Applications for an instrument of authorization will be granted if, upon examination of the application and upon consideration of such other matters as it may officially notice, the Commission finds that the grant will serve the public interest, convenience, and necessity. See also Section 1.2108.

(b) The grant shall be without a formal hearing if, upon consideration of the application, any pleadings or objections filed, or other matters which may be officially noticed, the Commission finds that:

(1) The application is acceptable for filing, and is in accordance with the Commission's rules, regulations, and other requirements;

(2) The application is not subject to a post-auction hearing or to comparative consideration pursuant to Sec. 24.431 with another application(s);

(3) A grant of the application would not cause harmful electrical interference to an authorized station;

(4) There are no substantial and material questions of fact presented; and

(5) The applicant is qualified under current FCC regulations and policies.

(c) If the Commission should grant without a formal hearing an application for an instrument of authorization which is subject to a petition to deny filed in accordance with Sec. 24.430, the Commission will deny the petition by the issuance of a Memorandum Opinion and Order which will concisely report the reasons for the denial and dispose of all substantial issues raised by the petition.

(d) Whenever the Commission, without a formal hearing, grants any application in part, or subject to any terms or conditions other than those normally applied to applications of the same type, it shall inform the applicant of the reasons therefor, and the grant shall be considered final unless the Commission should revise its action (either by granting the application as originally requested, or by designating the application for a formal evidentiary hearing) in response to a petition for reconsideration which:

(1) Is filed by the applicant within thirty (30) days from the date of the letter or order giving the reasons for the partial or conditioned grant;

(2) Rejects the grant as made and explains the reasons why the application should be

granted as originally requested; and,

(3) Returns the instrument of authorization.

(e) The Commission will designate an application for a formal hearing, specifying with particularity the matters and things in issue, if, upon consideration of the application, any pleadings or objections filed, or other matters which may be officially noticed, the Commission determines that:

(1) A substantial and material question of fact is presented (see also Section 1.2108);

(2) The Commission is unable for any reason to make the findings specified in paragraph (a) of this section and the application is acceptable for filing, complete, and in accordance with the Commission's rules, regulations, and other requirements; or

(3) The application is entitled to comparative consideration (under Sec. 24.431) with another application (or applications)

(f) The Commission may grant, deny or take other action with respect to an application designated for a formal hearing pursuant to paragraph (e) or Part I of this chapter.

(g) Reserved

(h) Reconsideration or review of any final action taken by the Commission will be in accordance with Subpart A of Part 1 of this chapter.

Sec. 24.433—24.438 [Reserved]

Sec. 24.439 Transfer of control or assignment of station authorization.

(a) Approval required. Authorizations shall be transferred or assigned to another party, voluntarily (for example, by contract) or involuntarily (for example, by death, bankruptcy, or legal disability), directly or indirectly or by transfer of control of any corporation holding such authorization, only upon application and approval by the Commission. A transfer of control or assignment of station authorization in the narrowband Personal Communications Service is also subject to Sections 24.309 (Designated Entities) and 1.2111 (Assignment or transfer of control: unjust enrichment)

(1) A change from less than 50% ownership to 50% or more ownership shall always be considered a transfer of control.

(2) In other situations a controlling interest shall be determined on a case-by-case basis

considering the distribution of ownership, and the relationships of the owners, including family relationships.

(b) Form required—(1) Assignment.

(i) FCC Form 490 shall be filed to assign a license or permit.

(ii) In the case of involuntary assignment, FCC Form 490 shall be filed within 30 days of the event causing the assignment.

(2) Transfer of control. (i) FCC Form 490 shall be submitted in order to transfer control of a corporation holding a license or permit.

(ii) In the case of involuntary transfer of control, FCC Form 490 shall be filed within 30 days of the event causing the transfer.

(3) Form 430. Whenever an application must be filed under paragraph (a) (1) or (2) of this section, the assignee or transferee shall file FCC Form 430 ("Common Carrier Radio License Qualification Report") unless an accurate report is on file with the Commission.

(4) Notification of completion. The Commission shall be notified by letter of the date of completion of the assignment or transfer of control.

(5) If the transfer of control of a license is approved, the new licensee is held to the original build-out requirement of Section 24.103.

(c) In acting upon applications for transfer of control or assignment, the Commission will not consider whether the public interest, convenience, and necessity might be served by the transfer or assignment of the authorization to a person other than the proposed transferee or assignee.

(d) [Reserved]

Sec. 24.440—24.442 [Reserved]

Sec. 24.443 Extension of time to complete construction.

(a) If construction is not completed within the time period set forth in Section 24.103, 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 subsection (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—(1) General rule.

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 his control.

(i) 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.

(d) [Reserved]

Sec. 24.444 Termination of authorization.

(a)(1) All authorizations shall terminate on the date specified on the authorization or on the date specified by these rules, unless a timely application for renewal has been filed.

(2) If no application for renewal has been made before the authorization's expiration date, a late application for renewal will only be considered if it is filed within 30 days of the expiration date and shows that the failure to file a timely application was due to causes beyond the applicant's control. During this 30 day period reinstatement applications must be filed on FCC Form 489. Service to subscribers need not be suspended while a late filed renewal application is pending, but such service shall be without prejudice to Commission action on the renewal application and any related sanctions. See also Section 24.16 (Criteria for Comparative Renewal Proceedings).

(b) Special Temporary Authority. A special temporary authorization shall automatically terminate upon failure to comply with the conditions in the authorization.

(c) [Reserved]

CONCURRING STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

RE: IMPLEMENTATION OF THE SECTION 309(j) OF THE COMMUNICATIONS ACT-- COMPETITIVE BIDDING NARROWBAND PERSONAL COMMUNICATIONS SERVICES IN THE 900 MHz BAND. [THIRD REPORT AND ORDER]

This Third Report and Order adopts rules to conduct competitive bidding for narrowband Personal Communications Services [PCS]. Competitive bidding will be conducted to auction these narrowband PCS licenses for nationwide, regional, Major Trading Area, and Basic Trading Area markets. In our prior spectrum allocation Order for narrowband PCS [Memorandum Opinion and Order Gen Docket 90-314 (released March 4, 1994) (narrowband PCS Order)], the Commission allocated a total of 3,554 licenses in the following license areas for narrowband PCS: 11 nationwide licenses, 6 regional licenses in each of the 5 PCS narrowband regional markets, 11 Major Trading Area licenses [MTA] and 6 Basic Trading Area licenses [BTA]. The narrowband PCS Order also allowed any narrowband PCS licensee to aggregate up to three licenses in any geographic area. Incumbent paging licensees can aggregate two of the smaller allocations for narrowband PCS in the MTA and BTA markets.

Our Order today authorizes simultaneous, multiple round bidding for narrowband PCS licenses. The use of this auction methodology, in conjunction with our permissive rules for aggregation, will allow major market bidders to aggregate significant spectrum blocks for sophisticated, two-way advanced paging services. The process for bidding will be sophisticated, in order to permit market aggregation flexibility at the auction. I am hopeful that our efforts to conduct these auctions will be supplemented by educational seminars and concise instructions, to ensure that the public has a thorough understanding of this bidding process. I support these aspects of the Order.

The Order also adopts a 25% bidding credit and installment payments to facilitate participation in the narrowband PCS auction process by small businesses, and businesses owned by women and minorities [Designated Entities or DEs]. The Order declines to designate any of the PCS narrowband licenses for specific bidding by Designated Entities only. Instead, a bidding credit scheme is adopted which allows a bid on one of each type of license in a given market, except at the BTA level. I am concerned that we should have included more flexibility in the bidding credit structure in three ways: 1. Allow a band of bidding credit from 25-35% for major market licenses at the nationwide and regional level to enhance DE probability of participation in these auctions; 2. Allow more flexible consortia

configuration for larger market licenses, to allow DE participation that is non-controlling to qualify such a consortia for a 10-20% bidding credit, tied to the level of DE equity and operational ownership of 10-20% of the venture; and 3. Allow the 25% bidding credit for any DE bid that seeks to acquire 3 BTAs at the time of auction, in order to aggregate to a larger service area.

I believe these features would enhance the probability of DE participation in nationwide and regional licenses, in particular, and facilitate more flexible support for DE aggregation of BTAs. Without some blocks specifically set-aside for DE bidding only in each market, I remain concerned that our sincere efforts in this Order could still limit the ability to participate in major license markets--particularly nationwide or regional licenses. Thus, I would have sought additional flexibility with bidding credits and potential consortia arrangement for DEs to enhance their ability to participate in major market license operations. It is my hope that we will retain the flexibility to adjust these rules prior to conducting the narrowband PCS auctions, if it proves useful to our goal of facilitating real, substantive opportunities for DE participation in the bidding process and eventual operation of PCS licenses. For this reason, I concur in our action today.

BTA, MTA or regional narrowband licenses.

We also incorporate and adopt the unjust enrichment provisions adopted in the Second Report and Order applicable to installment payments and bidding credits, and we adopt unjust enrichment provisions for parties receiving licenses as a result of our tax certificate policy. Small businesses and businesses owned by women and minorities will also be defined according to the definitions and eligibility criteria established in the Second Report and Order.³⁹

69. We believe that narrowband PCS will provide significant opportunities for all designated entities. Narrowband PCS will likely include a wide variety of services, including advanced paging, messaging, and advanced cordless telephones, which will have the capability to offer voice, facsimile, graphic and other imaging services. This should afford licensees flexibility to offer an array of innovative service offerings, particularly to smaller niche markets, thereby enhancing both customer choice and fostering competitive markets for products and services. Narrowband PCS also involves relatively low capital entry requirements, and is therefore well-suited to small entities, which lack access to large amounts of capital.⁴⁰

70. We also find that the preferences we have selected for auctions in this service will fulfill the congressional directive that we provide meaningful opportunities for small businesses and businesses owned by minorities and/or women to participate in the provision of narrowband PCS services. As explained below, we have selected preferences that are tailored

³⁹ See 47 C.F.R. § 1.2110. This section requires that for applicants that are limited partnerships, the general partner must be a minority and/or woman (or an entity 100 percent owned and controlled by minorities and/or women) who is a U.S. citizen and owns at least 50.1 percent of the partnership equity. We clarify that in the context of limited partnerships, we will regard a woman or minority general partner as having a 50.1 percent equity stake if it shares pro rata in 50.1 percent of the partnership's profits and losses or contributes at least 50.1 percent of the partnership's capital contribution.

⁴⁰ Although the record contains no direct evidence of the costs to build out narrowband PCS systems, we have estimated these costs based on the typical construction costs of existing paging systems. Accordingly, we estimate that the cost to construct a narrowband BTA facility would be approximately \$50,000. The cost to construct a narrowband MTA facility, in accordance with the five-year build-out requirements, would be approximately \$100,000 to meet the minimum population coverage requirements, and approximately \$1.25 million (assuming 25 base stations) to meet the minimum geographic coverage requirements. Constructing a regional narrowband facility would cost approximately \$1 million to cover the necessary population and \$2.5 million to cover the minimum geographic area. Finally, we estimate that the build-out cost for a nationwide facility would be approximately \$1.7 million for population coverage and \$12.5 million for geographic area coverage.

to the unique characteristics of narrowband PCS and that should create meaningful incentives for small businesses and businesses owned by minorities and/or women to both bid successfully for available licenses and provide innovative and expeditious service to the public. We believe that installment payments provide a significant means for small businesses to overcome their main barrier to entry: lack of access to financing. And, a 25 percent bidding credit for minority and women-owned businesses together with a tax certificate program addresses the additional obstacles faced by those designated entities. The preferences adopted here reflect our desire to carefully balance the congressional mandate to ensure meaningful access for designated entities, with the goal of ensuring the expeditious delivery of new services and preventing abuses of our preference policies and procedures. We will continue to assess the effectiveness of the measures taken in this proceeding, and will apply any knowledge gained to subsequent auctions for other services.

71. We have decided not to provide bidding credits or other separate preferences for rural telephone companies bidding on narrowband PCS spectrum because we conclude that given the relatively modest build-out costs, such preferences are unnecessary to ensure the participation of rural telephone companies in the provision of this service to rural areas. Moreover, in view of the fact that rural telephone companies may use their existing infrastructure to provide integrated narrowband PCS services in their rural service areas, should they choose to do so, we believe that they will have ample opportunity to participate in narrowband PCS. Rural telephone companies will, however, be eligible for bidding credits if they are owned by women or minorities. They may also qualify for installment payments if they satisfy the eligibility criteria for small businesses.

1. Bidding Credits for Businesses Owned By Women And Minorities

72. In the Second Report and Order we stated that we would consider using bidding credits to encourage participation by designated entities in auctions. Upon consideration and review of the record on this subject, we believe that affording businesses owned by women and minorities a substantial bidding credit for certain specified narrowband PCS licenses is the most cost-effective and efficient means of achieving Congress' objective of "ensuring" the opportunity of these designated entities to participate in the provision of narrowband PCS services. Bidding credits will provide minority and female-owned firms with a significant advantage, which we believe is necessary to achieve this congressional goal, while preserving the advantages of open bidding competition. In effect, the bidding credit will function as a discount on the bid price a minority or female-owned firm will actually have to pay to obtain a license and, thus, will address directly the financing obstacles encountered by these entities. We also believe that a bidding credit in the amount of 25 percent is necessary to provide these designated entities with a significant enough advantage to ensure their ability to compete successfully for some narrowband PCS licenses. Thus, we will make a 25 percent bidding credit available to businesses owned by women and minorities bidding on the following licenses: (1) the nationwide licenses on Channel 5, Channel 8 and Channel 11; (2) all regional licenses on Channel 13 and Channel 17; and (3) all MTA licenses on Channel 22,

Channel 24, and Channel 26. See 47 C.F.R. § 24.129.

73. As discussed in the Second Report and Order, Congress mandated that the Commission "ensure" the opportunity for participation in spectrum-based services by each category of designated entity, including businesses owned by minorities and women. This plain language leads us to conclude that adequate measures must be taken to assure that minority and female-owned businesses have the ability to participate in the provision of services subject to competitive bidding. Moreover, in enacting this legislation, it is clear that Congress was concerned about disseminating licenses to a wide variety of applicants and wanted the Commission to take meaningful steps to accomplish this goal. Indeed, Congress included a requirement in the statute that the Commission report to it in 1997 about, among other things, whether competitive bidding facilitated the introduction of new companies into the telecommunications market and whether designated entities "were able to participate successfully in the competitive bidding process" 47 U.S.C. § 309 (j)(12)(iv).

74. Apart from Congress' directive, we think that ensuring the opportunity for women and minorities to participate in narrowband PCS is important for the telecommunications industry. Companies owned by women and minorities can play a vital role in serving certain geographic areas and other niche markets that may be overlooked by other industry competitors, thus promoting our goal of universal access to telecommunications services. Not only will the industry become more diverse through the adoption of meaningful preferences, but we believe that a much wider customer base will obtain access to innovative technologies. Moreover, studies show that even when minority-owned firms do not locate within urban minority communities, they employ more minorities relative to other companies, thereby promoting our goals of equal employment opportunity, economic growth⁴¹ and community economic development.⁴²

75. The record reflects a severe underrepresentation of women and minorities in telecommunications. Indeed, the Commission's Small Business Advisory Committee (SBAC) found only 11 minority firms engaged in the delivery of cellular, specialized mobile radio,

⁴¹ See e.g., 47 C.F.R. § 21.307, 22.307 (equal employment opportunity rules for common carriers); Implementation of the Commission's Equal Employment Opportunity Rules (Notice of Inquiry)(released April 21, 1994) ("[O]ur EEO rules enhance access by minorities and women to increased employment opportunities, which are the foundation for increasing opportunities for minorities and women in all facets of the communications industry, including participation in ownership. Thus, the rules . . . promote the further development of the broader communications infrastructure.")

⁴² See e.g., Banking on Black Enterprise at 3.

radio paging, or messaging services.⁴³ Likewise, American Women in Radio and Television (AWRT) found that only 24 percent of small communications businesses are owned by women (and when companies without paid employees are excluded, women own less than 15 percent of small communications firms). See Comments of AWRT at 5. Many commenters observe that the factors that preclude minorities and women from effective participation involve access to financing. With regard to women they note that no existing FCC policy provides an incentive for women to enter the communications business, and that access to capital remains the biggest obstacle women business owners must face. Similarly, the SBAC states that minorities frequently do not or cannot use traditional sources of financing. Citing the U.S. Senate amicus brief in Metro Broadcasting, Inc. v. FCC, 110 S.Ct. 2997 (1990), the SBAC further asserts that "spectrum for radio facilities was first allocated at a time when undisguised discrimination in education, employment opportunities, and access to capital excluded minorities from all but token participation." The SBAC concludes that minorities were impeded from successfully competing for licenses when they were first awarded and, due to systematic barriers to technical training and employment opportunities, this situation has continued over time.⁴⁴

76. Given this history of underrepresentation of minorities and women in telecommunications and the inability of these groups to access financing, we find that the best way we can accomplish these statutory mandates is to provide bidding credits exclusively to minority and female-owned businesses. The record demonstrates that women and minorities face barriers to entry not encountered by other firms, including other designated entities, and it is, therefore, appropriate and necessary that we provide them with a substantial bidding advantage.⁴⁵ In other contexts, Congress has recognized that the use of preferences in the licensing process can be necessary to remedy underrepresentation by minorities. For example, in 1982, Congress mandated the grant of a "significant preference" to minority applicants participating in lotteries for spectrum-based services. 47 U.S.C. § 309(i)(3)(A). And, in 1988, Congress attached a provision to the FCC appropriations legislation, which precluded the Commission from spending any appropriated funds to examine or change its minority broadcast preference policies.⁴⁶ Absent such measures targeted specifically to women and minorities, it would be virtually impossible to assure that these groups achieve any meaningful

⁴³ Report of the FCC Small Business Advisory Committee to the FCC Regarding Gen. Docket No. 99-314 (Sept. 15, 1993), reprinted at 8 FCC Rcd 7820, 7827 (1993) (SBAC Report).

⁴⁴ Id.

⁴⁵ See e.g., Comments of AWRT at 4-7; Call-Her at 5; Cook inlet at 38-39.

⁴⁶ Continuing Appropriations Act for Fiscal Year 1988, Pub.L. 100-102, 101 Stat. 1329-31.

measure of opportunity for actual participation in the provision of the services in question.⁴⁷

77. We also agree with Call-Her that even comparatively large businesses owned by women and minorities face discriminatory lending practices and other discriminatory barriers to entry and, therefore, eligibility for bidding credits should not be limited to small firms. The narrowband auctions in question present a unique licensing opportunity that will allow these historically disadvantaged groups to gain a foot-hold in the communications industry.⁴⁸ Our goal is to encourage businesses owned by minorities and women to provide viable, sustained competition to incumbent providers and larger businesses. Therefore, we have accorded preferences to minority and women-owned firms regardless of their size. This approach is consistent with our auction rules and will further the statutory mandate to ensure participation by designated entities.⁴⁹

⁴⁷ In the Second Report and Order, we addressed the constitutionality of gender and race-based preferences and concluded that the proper standard of scrutiny to be employed in this context is the "intermediate scrutiny" standard used in the Metro case, 110 S. Ct. 2997. We further concluded that under such a standard, preferences for women and minority-owned businesses are constitutionally permissible. We recognize that Metro's standard of review applies to measures approved by Congress, 110 S. Ct. at 3008-09. As noted above, the bidding credits in question here were expressly approved and, indeed, are required to achieve the statutory goals. See 47 U.S.C. § 309(j)(4)(D) (The Commission must "consider the use of tax certificates, bidding preferences, and other procedures" to ensure the participation of "small businesses, rural telephone companies, and businesses owned by members of minority groups and women."). Moreover, a number of commenters have argued that PCS licensees will be able to control the content of the transmissions carried on their facilities and that such transmissions can be analogous to media of mass communications. See e.g., Comments of UCC at 10-12; AWCC at 7-8; and ex parte filing of Frank Washington, April 26, 1994. To the extent this control exists, or is later developed, with regard to narrowband PCS, the preferences we adopt for minorities and women would be consistent with the important governmental interest identified in Metro: increasing minority ownership to encourage diversity in the provision of content.

⁴⁸ Because of the discrimination suffered by minorities and women as contractors and subcontractors in the telecommunications industry, see MBELDEF Study, this unique chance to enter the field as primary telecommunications providers, competing with, rather than dependent upon, other providers, is especially important.

⁴⁹ In the Second Report and Order, we recognized that ensuring the participation of only bona fide, qualified bidders in our auctions is an important aspect of complying with the competitive bidding statute's requirement that we promote a competitive marketplace, See e.g., 47 U.S.C. sec. 309(j)(3)(B). Thus we adopted a requirement that auction participants tender a substantial upfront payment, and we declined to create a general exception to this rule for designated entities. See Second Report and Order at ¶¶171, 186. Likewise, in designing preferences for women and minority-owned businesses, we want to ensure that

78. Congress clearly intended that businesses owned by minorities and women must be given the opportunity to participate in the provision of spectrum-based services independent of their status as small businesses. The plain language of Section 309(j)(4)(D) states that the Commission "shall . . . ensure" the opportunity for participation by "small businesses . . . and businesses owned by members of minority groups and women . . ." (emphasis added). If Congress had intended to limit the directive of Section 309(j)(4)(D) only to small businesses, no need would have existed to mention separately minorities and women. Moreover, Section 309(j)(4)(D) was added at Conference, and the Conference Report does not offer any suggestion that, to come within the section's purview, businesses owned by minorities or women must be small businesses. In contrast, and as we discussed more fully in the Second Report and Order, the legislative history of Section 309(j)(4)(A), relating to installment payments, expressly indicates that the provision was intended only to promote financial assistance for small businesses.⁵⁰ Accordingly, we shall interpret Section 309(j)(4)(D) in accordance with its plain language and will not limit its application to small businesses.⁵¹

79. In determining the appropriate amount of the bidding credit we considered several factors. First, our analysis of the market shows that, because of existing infrastructure and economies of scope, incumbent providers will have the ability to bid more than first-time operators. This is because, in most cases, incumbent providers, including extant wireless operators, telephone companies and cable operators, are able to make use of their existing infrastructure to provide PCS services.⁵² The record demonstrates that very few incumbent

those companies that have the greatest ability to remain viable in the long run will have incentives to participate in the auction process. See *Banking on Black Enterprise* at 13 (government assistance should accrue to more capable black entrepreneurs, who are most likely to contribute to the goal of economic development).

⁵⁰ See Second Report and Order at ¶¶ 234-236.

⁵¹ Even though small businesses are also mentioned in section 309(j)(4)(D), we do not believe bidding credits for small businesses are appropriate for narrowband PCS auctions. As a practical matter, due to the substantial capital necessary to construct a nationwide narrowband PCS system, most small businesses do not have the wherewithal to construct and operate the proposed systems. Accordingly, provisions designed to encourage participation by small entities in nationwide narrowband PCS service would be unlikely to result in the expeditious provision of new service to the public and therefore would be contrary to one of the principal objectives of the statutory auction provisions. Moreover, as to regional, MTA and BTA licenses, small businesses will be entitled to installment payments, which we believe will be sufficient to ensure their participation.

⁵² Reed, David P., *Putting it all Together: The Cost Structure of Personal Communications Services*, OPP Working Paper 28, November 1992. Although this study examined the broadband PCS market, we expect that a similar incumbency advantage exists in

providers are minorities or women, so that a substantial discount is necessary to put these designated entities on equal footing with incumbents.⁵³ Several commenters indicate that a bidding credit of 25 percent or more was necessary to ensure the opportunity of businesses owned by women and minorities to participate in auctions.⁵⁴ Moreover, in the broadcast context, we held that licensees can transfer their stations to minorities in distress sales provided that the price is no more than 75 percent of market value.⁵⁵ This policy is based upon our finding that 25 percent is an appropriate discount to eliminate financial entry barriers for minority-owned companies seeking to become broadcast licensees. Likewise, we believe that a discount on the bid price in this amount will adequately ensure participation by a wide variety of minority and female-owned firms in narrowband PCS auctions and service provision. That being said, we note that this number is based also on our assessment of the capital entry requirements of the narrowband PCS service.⁵⁶ As discussed, we think that a 25 percent bidding credit is sufficient to ensure minority and female entry. It is not so substantial, however, as to foster participation by firms that are not otherwise financially capable of building-out a narrowband PCS network. In this regard, we emphasize that the financing requirements of other spectrum-based services may necessitate use of a different figure to provide the proper assurances. Therefore, we will continue to examine this issue on a service-by-service basis. We will also monitor carefully the effectiveness of the 25 percent bidding credit in the narrowband PCS auctions and continually assess whether it is achieving the goal of ensuring that minority and women-owned firms participate successfully in auctions for this service.

80. To prevent unjust enrichment by women and minorities trafficking in licenses acquired through the use of bidding credits, we will impose a forfeiture requirement on transfers of such licenses to entities that are not owned by women or minorities.⁵⁷ Female and minority-owned businesses seeking to transfer a license to an entity that is not owned by women or minorities will be required to reimburse the government for the amount of the bidding credit, plus interest at the rate imposed for installment financing at the time the

the narrowband PCS market.

⁵³ See e.g., Comments of AWCC at 13-14; Cook Inlet at 10-15; and UCC at 7-10.

⁵⁴ See comments of AIDE at 7; Devsha at 5; NABOB at 10-11; and ex parte filing of Personal Communications Network Services of New York at 2-3, each suggesting a bidding credit of 25 percent. Rocky Mountain Telephone proposes a 50 percent bidding credit. Comments of Rocky Mountain Telephone at 16. And Richard Vega proposes a 100 percent bidding credit for certain designated entities. Comments of Richard Vega at 7.

⁵⁵ See Lee Broadcasting Corp., 76 FCC 2d 462 (1980).

See supra n. 40.

⁵⁷ See Second Report and Order at ¶ 258.

license was awarded, before transfer will be permitted. The amount of the penalty will be reduced over time so that 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; in year three of the license term the penalty will be 75 percent; in year four the penalty will be 50 percent and in year five the penalty will be 25 percent, after which there will be no penalty. Furthermore, we have adopted strict eligibility criteria to ensure that only legitimate minority and women-owned firms are able to take advantage of bidding credits. See Second Report and Order at ¶¶ 277-278. In addition, to further ensure that our rules are as narrowly tailored as possible, while still fulfilling the statutory goal, we will prohibit publicly-traded companies from taking advantage of the bidding credits.

2. Tax Certificates

81. Congress instructed the Commission to consider the use of tax certificates to help ensure designated entity participation in spectrum-based services. See 47 U.S.C. § 309(j)(4)(D). In the Second Report and Order we observed that tax certificates could be useful as a means of attracting investors to designated entity enterprises and to encourage licensees to assign or transfer control of licenses to designated entities in post-auction transactions. We stated further that we would examine the feasibility of using this measure in subsequent service-specific auction rules. Second Report and Order at ¶ 251. After further consideration of this matter, we believe that tax certificates would be an appropriate tool to assist minority and female-owned businesses to attract start-up capital from non-controlling investors. In addition, we believe that tax certificates will give licensees the incentive to assign or transfer their authorizations to such entities in post-auction sales, thereby providing added assurance that minority and women-owned entities will have the opportunity to participate in narrowband PCS services. Accordingly, we will issue tax certificates to non-controlling initial investors in minority and female-owned narrowband PCS applicants, upon the sale of their non-controlling interests. We will also issue tax certificates to narrowband PCS licensees who assign or transfer control of their licenses to minority and women-owned entities.

82. As stated previously, the record reveals that women and minorities face barriers to entry not encountered by other designated entities. In particular, they have an especially difficult time accessing capital and, as a result, are severely underrepresented in the telecommunications industry. Together with the other preferences we adopt today, tax certificates should help to ensure the participation of minority and female-owned businesses in narrowband PCS services. This measure will make it easier for these designated entities to attract start-up capital because investors will know that they can defer taxes on any gains made when their interests are sold. In addition, tax certificates will provide incentives to licensees to seek out minority and female buyers in after-market sales because the licensees will be able to defer taxes on profits made in the sale.

83. We have used tax certificates over the years to encourage broadcast licensees and

cable television operators to transfer their stations and systems to minority buyers.³⁸ We also have granted tax certificates to shareholders in minority-controlled broadcast or cable entities who sell their shares, when such interests were acquired to assist in the financing of the acquisition of the facility.³⁹ These broadcast and cable tax certificates are issued pursuant to the Internal Revenue Code, 26 U.S.C. § 1071. While Congress' goal in authorizing tax certificates under Section 309(j)(4)(D) of the Act is somewhat different, and focuses on ensuring the opportunity for designated entities to participate in auctions and spectrum-based services, we think that it will be an equally valuable program. Issuance of tax certificates to investors and licensees that sell to minorities and women will augment the bidding credits preference, and together the measures should increase the ability of these entities to access financing, thus ensuring their opportunity to participate in narrowband PCS auctions and services.

84. In implementing this program, we will borrow from our existing tax certificate program and grant tax certificates, upon request, that will enable the licensees and investors meeting the criteria outlined here to defer the gain realized upon a sale either by: (1) treating it as an involuntary conversion under 26 U.S.C. § 1033, with the recognition of gain avoided by the acquisition of qualified replacement property; or (2) electing to reduce the basis of certain depreciable property, or both. Tax certificates will be available to initial investors in minority and female-owned businesses who provide "start-up" financing, which allows these businesses to acquire licenses at auction or in the aftermarket, and those investors who purchase interests within the first year after license issuance, which allows for the stabilization of the designated entities' capital base. Also, in accordance with our existing policy, to be eligible for a tax certificate, such investor transactions must not reduce minority or female ownership or control in the entity below 50.1 percent. The definition of a minority or female-owned entity is set forth in the Second Report and Order and, with regard to our investor tax certificate policy, the entity in which the investment is made must satisfy that definition at the time of the original investment as well as after the investor's shares are sold. For after-market sales, tax certificates will only be issued to licensees who sell to entities that meet that definition. Tax certificates will be granted only upon completion of the sale, although parties can request a declaratory ruling from the Commission regarding the tax consequences of prospective transactions.

³⁸ See Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, 92 FCC 2d 849 (1982) ("1982 Policy Statement"); see also Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 FCC 2d 979 (1978). We have also employed tax certificates as a means of encouraging fixed microwave operators to relocate from spectrum allocated to emerging technologies. See Third Report and Order and Memorandum Opinion and Order, ET Docket No. 92-9, 8 FCC Rcd 6589 (1993).

³⁹ 1982 Policy Statement, 92 FCC 2d at 855-58.

85. As with our other tax certificate policies, we are concerned about avoiding "sham" arrangements to obtain tax certificates and, pursuant to Section 309(j)(4)(E), thus adopt measures to prevent unjust enrichment. First, we intend to enforce strictly the definitions adopted in the Second Report and Order and will carefully review investment and purchase arrangements to ensure that 50.1 percent control and equity by minorities and women was, and will be, maintained. Second, like our existing tax certificate program,⁶⁰ we will impose a one-year holding requirement on the transfer or assignment of narrowband PCS licenses obtained through the benefit of tax certificates. We believe that the rapid resale of such licenses at a profit would subvert our goal of ensuring the opportunity to participate by minority and women-owned businesses, unless the buyer itself is a minority or female-owned business. The well-established one-year holding period would prevent this type of unjust enrichment. While this restriction will not be applied to assignments or transfers to qualified minority and female-owned businesses, assignees and transferees obtaining licenses pursuant to this exception will be subject to the one-year holding requirement.

3. Installment Payments

86. In this Report and Order, we adopt installment payments for small businesses bidding for any of the BTA, MTA or regional narrowband licenses. The record in this proceeding indicates that the most significant barrier for small business participation in the auctioning of narrowband PCS spectrum will be access to adequate private financing to ensure their ability to compete against larger firms in the competitive bidding process.⁶¹ In the Second Report and Order, we concluded that installment payments are an effective means to address the inability of small businesses to obtain financing and will enable these entities to compete more effectively for the auctioned spectrum. We also determined that small businesses eligible for installment payments would only be required to pay half of the down payment (10 percent of the winning bid, as opposed to 20 percent) five days after the auction closes, with the remaining 10 percent payment deferred until five days after grant of the license. Finally, we indicated that installment payments should be made available to designated entities at an interest rate equal to the rate for U.S. Treasury obligations. See Second Report and Order at ¶¶ 236-240.

87. Based on our review of the record, we conclude that installment payments are an appropriate preference for small businesses bidding for the BTA, MTA or regional narrowband licenses. We have limited eligibility for installment payments to small businesses because we believe that our system of preferences should be designed to match the particular needs and characteristics of the eligible recipients. In this respect, installment payments will

⁶⁰ See Amendment of Section 73.3597 of the Commission's Rules, Memorandum Opinion and Order, 99 FCC 2d 971, 974 (1985).

⁶¹ See e.g., Comments of SBA at 10-23; Palmer Communications at 3; NTIA at 27.

provide financial assistance to all small businesses, including small businesses owned by women and minorities and rural telephone companies that meet the small business definition. By allowing payment in installments, the government is in effect extending credit to licensees, thus reducing the amount of private financing needed prior to the auction. Such low cost government financing will promote participation by small businesses, which, because of their size, lack access to capital needed to participate in new spectrum opportunities such as narrowband PCS. We have decided to limit installment payments to those small businesses bidding on smaller spectrum blocks, specifically the BTA, MTA and regional licenses. This will deter potential abuse of the installment payment option by large firms and ensure that the public receives the maximum value for the use of spectrum. BTA, MTA and regional narrowband licenses are appropriately sized for development by bona fide small businesses. We estimate that the cost to build-out these licenses to meet the minimum population coverage requirements will be between \$50,000 and \$1 million. See supra n. 40. By contrast, the nationwide narrowband licenses will require capital commitments that are more suitable to large firms. Accordingly, we believe that application of installment payments to bidding on nationwide narrowband licenses is inappropriate to promote economic opportunity for small businesses. Installment payments for licenses of this magnitude may create incentives for large firms to create small business "fronts" to take advantage of low cost government financing or may result in payment defaults, which would prevent recovery for the public of the value of the spectrum and would hinder rapid deployment of service to the public.

88. The installment payment option will enable all small businesses to pay the full amount of their winning bid in installments (less the upfront payment, which must be paid in full, and the down payment, half of which is due five days after the auction closes and the other half five days after the application is granted). Generally, the terms and conditions of the installment payments will be the same as those provided in the general rules – interest charges will be fixed at the time of licensing at a rate equal to the rate for ten-year U.S. Treasury obligations. Payments of interest only will be due for the first two years. Principal and interest payments will be amortized over the remaining years of the license. Timely payment of all installments will be a condition of the license grant and failure to make such timely payment will be grounds for revocation of the license.⁶²

89. To ensure that large businesses do not become the unintended beneficiaries of preferences meant for small firms, we will use the unjust enrichment provisions adopted in the Second Report and Order applicable to installment payments. Specifically, if a small business making installment payments seeks to transfer a license to a non-small business entity during the term of the license, we will require payment of the remaining principal balance as a condition of the license transfer. Second Report and Order at ¶ 263.

⁶² As described in the Second Report and Order, the Commission may, on a case-by-case basis permit a three to six month grace period within which the licensee may seek a restructuring of the payment plan.

VII. CONCLUSION

90. We believe that the competitive bidding rules we adopt for narrowband PCS, in conjunction with our spectrum allocation rules, will promote the public policy objectives set forth by Congress. Our rules will encourage economic growth and enhance access to narrowband PCS services for consumers, producers, and new entrants. Structuring our rules to promote opportunity and competition should result in the rapid implementation of new PCS services and encourage efficient spectrum use. The preferences we adopt for small businesses and businesses owned by women and minorities will help to promote access to narrowband PCS services by ensuring that these groups will genuine opportunities to participate in the auctions and in provision of service.

VIII. PROCEDURAL MATTERS AND ORDERING CLAUSES

A. Final Regulatory Flexibility Analysis

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

92. Need for and purpose of the action. This rulemaking proceeding was initiated to implement Section 309(j) of the Communications Act, as amended. The rules adopted herein will carry out Congress's intent to establish a system of competitive bidding for narrowband PCS licenses. The rules adopted herein also will carry out Congress's intent to ensure that small businesses, rural telephone companies, and businesses owned by women and minorities are afforded an opportunity to participate in the provision of spectrum-based services.

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

94. Significant alternatives considered and rejected. All significant alternatives have been addressed in the Second Report and Order.

B. Ordering Clauses

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

96. IT IS FURTHER ORDERED that the rules changes made herein WILL BECOME EFFECTIVE 30 days after their publication in the Federal Register. This action is taken pursuant to Sections 4(i), 303(r) and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r) and 309(j).

FEDERAL COMMUNICATIONS
COMMISSION

William F. Caton
Acting Secretary