

their affiliates, that exceed the entrepreneurs' block or small business size thresholds): (1) individuals who are members of an applicant's management team; (2) existing investors of businesses in the control group that were operating and earning revenues for two years prior to December 31, 1994; or (3) noncontrolling institutional investors.¹⁶²

66. In addition, the control group minimum equity requirement will be reduced three years from the date of license grant as suggested by Lehman Brothers, but the control group must still retain voting control (*i.e.*, 50.1 percent of the vote).¹⁶³ According to the control group the option to reduce the equity requirement accommodates the needs of designated entity licensees to raise capital as they build out their systems.¹⁶⁴ Significantly, the three-year mark corresponds with the end of the no transfer period under our license holding rule. In the case of a licensee that has chosen the 25 percent minimum equity option, the principals in the control group will only be required to hold 10 percent of the licensee's equity after three years, with no further equity requirements imposed on the control group. Similarly, in the case of a licensee that has used the 50.1 percent minimum equity option, the principals in the control group will be required to hold 20 percent of the licensee's equity, and no further equity requirements will be imposed on the control group.

67. After reviewing the record, we are persuaded that these changes will afford the control group greater flexibility in raising the necessary equity for participation in the entrepreneurs' blocks. In particular, we are allowing that 10 (or 20.1) percent of the equity

¹⁶² For our purposes, we define institutional investors in a manner that is similar to the definition that is used by the Commission in the attribution rules applied to assess compliance with the broadcast multiple ownership rules. We modify that definition slightly, however, to fit this service. Specifically, we expect that investment companies will be important sources of capital formation for designated entities. Accordingly, we adopt a definition that specifically includes venture capital firms and other smaller investment companies that may not be included in the definition of investment companies found in 15 U.S.C. § 80a-3 (which is cited in our broadcast rules at 47 C.F.R. § 73.3555 Note 2(c)). Specifically, we define an *institutional investor* as an insurance company, a bank holding stock in trust accounts through its trust department, or an investment company as defined under 15 U.S.C. § 80a-3(a). We include in the 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) and we do so without regard to whether the entity is an issuer of securities. However, if the investment company is owned, in whole or in part, by other entities, the investment company, other entities and *affiliates* of 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. *See* Section 24.720(h).

¹⁶³ *See* Lehman Bros. Petition at 4-5.

¹⁶⁴ *See id.* at 2-4.

can come from sources that otherwise would not qualify for the control group. In making these limited changes to the control group equity requirements, we believe the amended rules will: (1) promote investment in designated entities generally; (2) attract and promote skilled management for applicants; and (3) encourage involvement by existing firms that have valuable management skills and resources to contribute to the success of applicants.

68. With respect to our decision to allow investment in the control group by investors of preexisting firms, the business involved must be a going concern that has been in existence for a reasonable period of time prior to adoption of our rules in order to avoid any sham arrangements. Specifically, the business involved must have been operating and earning revenues for at least two years prior to December 31, 1994 to qualify for this provision. While we want to relax the control group equity requirements slightly, we also recognize there may be an incentive for nonqualifying investors to purchase substantial interests in "preexisting" businesses unless we place some restrictions on those investors. As a practical matter, however, we realize that the identity of noncontrolling investors in such businesses, particularly if they are publicly-traded companies, will change regularly. As we state *infra* in our discussion on the treatment of preexisting businesses that are the sole control group member, we intend that the allowed equity (10 or 20.1 percent) portion should be held by existing investors in such a company although we will not place limits on who qualifies as such an investor. We emphasize, however, that we will scrutinize any significant equity restructuring of preexisting companies that occurs after adoption of our rules. We would presume that any change of equity by an investor in a preexisting company (that is in an applicant's control group) that is five percent or less would not be significant, and the burden is on the applicant to demonstrate whether changes in equity that exceed five percent are *not* significant.

69. We also agree with petitioners and commenters that greater flexibility should be afforded to any applicant whose ownership structures were established before our designated entity requirements were formulated.¹⁶⁵ Therefore, as a further modification, if the sole control group member of an applicant is a business that was in existence and had earnings from operations for at least two years prior to December 31, 1994, we offer the option that control group principals establishing the applicant's status as a minority and/or women-owned business, small or entrepreneurial business may hold 10 percent of the applicant's equity if the 25 percent equity option is used, or a 20 percent equity interest if the 50.1 percent equity option is used.¹⁶⁶ The balance of the control group's equity contribution (*i.e.*, 15 or 30.1

¹⁶⁵ See, *e.g.*, BET Petition at 12-15; CTIA Petition at 8-9; EATEL Petition at 2-3; MEANS/SDN Opposition at 10.

¹⁶⁶ As described *supra* at ¶ 65, this equity may be held outright or in the form of options provided these options are exercisable at any time, solely at the holder's discretion, and at an exercise price equal to or less than the current market valuation of the underlying shares at the time of the filing of the short-form application.

percent) must be held in the form of shares or stock options by any of the following: (1) qualifying principals in the control group; (2) individuals who are members of the applicant's management team (which could include "nonqualifying" individuals); or (3) existing investors of businesses in the control group that were operating and earning revenues for two years prior to December 31, 1994.

70. The lower equity requirement of 10 percent for preexisting companies that are sole control group members addresses the concerns of these firms, many of which have already undergone successive rounds of financing that may have diluted the qualifying investors' original equity interest in the business. Existing firms that were structured prior to the adoption of the entrepreneurs' block regulatory scheme are less likely to become "fronts" for businesses that would not qualify for the entrepreneurs' blocks or the special provisions accorded designated entities. This option is solely intended to accommodate long-standing capital structures of applicants that have already been required to dilute equity ownership to raise capital. Thus, we will require that the portion of equity not held by qualifying principals (15 or 30.1 percent, as the case may be) to be comprised entirely of existing investors of the company (unless the equity is held by management or qualified principals of the control group). As we stated above, we recognize that for many companies, especially those that are publicly-traded, the identities of noncontrolling investors change regularly. Thus, as stated *supra*, we will not place limits on the amount of time a particular individual or entity must have been an investor in the company. We emphasize, however, that we will scrutinize carefully applicants that engage in significant equity reshuffling after adoption of our rules.¹⁶⁷ By giving preexisting applicants additional flexibility, we do not intend to place other applicants at a competitive disadvantage by permitting greater capital infusion from institutional investors.¹⁶⁸

71. In implementing our requirements, we will provide that where the interests in question are not held directly in the applicant, a multiplier will be used to calculate the effective interests held by the control group principals toward fulfillment of the minimum equity requirement. In addition, we will use a multiplier to calculate the interests of noncontrolling investors in the control group so as to assess compliance with the 25 percent nonattributable equity limit.¹⁶⁹ A multiplier is a traditional tool used by the Commission to

¹⁶⁷ As stated *supra* at ¶ 68, we will presume that a change in equity by an investor (in a preexisting business) of five percent or less is not significant, and the burden is on the applicant to demonstrate whether equity changes above five percent are *not* significant.

¹⁶⁸ See BET *ex parte* comments, filed Nov. 3, 1994, at 2-4.

¹⁶⁹ We illustrate the application of a multiplier as follows: If a member of a minority group or a woman holds a 25 percent equity interest in a corporate member of the control group and that corporation holds a 25 percent equity interest in the applicant, the effective interest for purposes of assessing compliance with the minimum equity requirement would be 6.25 percent (*i.e.*, $0.25 \times 0.25 = 6.25$). This falls well below the 25 percent requirement of

calculate the effective ownership levels of investors that, through one or more intervening corporations, hold indirect interests in a licensee.¹⁷⁰

72. Additionally, in a written *ex parte* presentation, Metricom requests that we exempt small, publicly-traded corporations with widely dispersed voting stock ownership from our control group requirement.¹⁷¹ Metricom contends that the control group concept is unworkable for small, publicly-traded companies, because it would not be possible to identify a group of shareholders that own 50.1 percent of the corporation's voting stock.¹⁷² As a result, such corporations could be unable to establish eligibility for the entrepreneurs' blocks, or status as a small business. Metricom proposes a test for identifying small, publicly-traded corporations with widely dispersed voting stock ownership that closely follows guidelines used by the Securities and Exchange Commission.¹⁷³

73. We will adopt Metricom's proposal, and create a limited exemption from the control group requirement for small, publicly-traded corporations with widely dispersed voting stock ownership. As Metricom points out, a significant number of small, publicly-traded companies have such widely dispersed voting stock ownership that no identifiable control group exists or can be created.¹⁷⁴ Without a control group, such companies may not be able bid for entrepreneurs' block licenses or qualify for small business status even though

our original rule. Correspondingly, if a noncontrolling (and nonqualifying) investor holds a 40 percent interest in a corporate member of a control group and that corporation holds 25 percent of the applicant's total equity, the effective interest held in the applicant by the investor would be 10 percent (*i.e.*, $0.25 \times .40 = 10.00$). If that same investor also owns more than 15 percent of the applicant's equity outside of the control group, it would exceed the 25 percent nonattributable equity limit.

¹⁷⁰ See, *e.g.*, 47 C.F.R. § 73.3555 Note 2(d) (indicating that attribution ownership interests in a broadcast licensee, cable television system or daily newspaper that are held indirectly by a party through one or more intervening corporations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain). We note that the multiplier used here does not employ the 51 percent control exception used in the broadcast context since we are using a multiplier only to determine a control group member's equity investment, not whether such member has control or substantial influence over the applicant.

¹⁷¹ Metricom, Inc. *ex parte* comments, filed Oct. 20, 1994.

¹⁷² *Id.* at 6-7.

¹⁷³ *Id.* at 10-11.

¹⁷⁴ See *id.* at 6-7.

their gross revenues and assets meet our financial caps. It was not the Commission's intent that these companies be denied the opportunity to bid on the entrepreneurs' block, or to qualify for treatment as a small business.

74. Consistent with Metricom's proposal, a small, publicly-traded corporation will be found to have dispersed ownership of voting stock if no person (including any "group" as that term is used in the Securities Exchange Act of 1934)¹⁷⁵ has the power to control the election of more than 15 percent of the corporation's directors. In addition, we will require that no person shall have an equity interest in the applicant of more than 15 percent, which is consistent with our revised equity requirements for small business applicants utilizing a control group. Under those requirements, discussed *supra* at paragraph 64, small business principals in an applicant's control group must hold at least a 15 percent interest in the applicant (in combination with an additional, 10 percent equity interest that may come from "nonqualifying" sources). A 15 percent equity requirement is appropriate here because the same percentage of equity is needed for a small business applicant's control group to satisfy its equity obligations (unless it is a preexisting company), and because a 15 percent equity cap is likely to ensure that no control questions arise. We emphasize that this control group exemption will only apply to an applicant or licensee that is not controlled by any entity or group other than corporate management, as should be the case where there is no identifiable group of shareholders holding a controlling interest in the company's voting stock. A small corporation that has dispersed voting stock ownership and no controlling affiliates will therefore not be required to aggregate with its own revenues and assets the revenues and assets of management and shareholders for purposes of entrepreneurs' block eligibility or small business status.

75. Small, publicly-traded corporations that choose to exempt themselves from the control group requirement must own all the equity and voting stock of the applicant or licensee. We find their ability to rely on the corporation's existing capital structure to introduce new passive investment on an ongoing basis provides a level of flexibility that is comparable to applicants/licensees with an identifiable control group. We note that minority and/or women-owned businesses would not qualify for this exemption since a control group is necessary to determine whether the applicant is controlled by minorities or women.

76. Finally, we consider a few other points. First, as BET requests, we clarify that an individual can be the control group of an applicant, so long as our equity requirements and other provisions are satisfied. In response to Lehman Brothers' concerns, we clarify the control group requirements to provide that control group investors must receive dividends,

¹⁷⁵ See *id.* at 10-11; see also 15 U.S.C. § 78(a) *et seq.* (Section 13(d) and Section 13(g) state that "when two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities in an issuer, such syndicate or group shall be deemed a 'person' and therefore required to make the disclosures indicated in those subsections").

profits, and regular and liquidating distributions in proportion to their actual possession of equity holdings, rather than in proportion to their interest in the total equity (which may include options not yet exercised). Finally, we see no conflict in our rules with a Pacific Telesis' proposal to allow designated entities and their partners to allocate amongst themselves tax benefits on a non-pro rata basis.¹⁷⁶

2. *De Facto* Control Issues and Management Contracts

77. In the *Fifth Report and Order*, we provided that the designated entity control group must have *de facto* as well as *de jure* control of the applicant and must be prepared to demonstrate that it controls the enterprise.¹⁷⁷ The requirement of *de facto* control arises from Section 310(d) of the Communications Act, which prohibits any transfer or assignment of license or transfer of control of a corporation holding a license without the Commission's authorization.¹⁷⁸ To help in determining what constitutes a transfer of control under this statutory provision, we follow precedent defining *de facto* control.¹⁷⁹ We also apply this standard in the case of designated entities to determine whether the applicant is in fact controlled by qualifying individuals or entities. Several petitioners seek reconsideration or clarification of our *de facto* control standard, particularly as it applies to questions of *de facto* control by the designated entity control group and use of management contracts by licensees.¹⁸⁰

a. Definition of *De Facto* Control

78. Background. The *Fifth Report and Order* does not set forth specific guidelines defining *de facto* control in the entrepreneurs' block context. Because issues of *de facto* control are necessarily fact-specific, we have treated the issue as one to be handled on a case-by-case basis.¹⁸¹ Consequently, a wide variety of factors may be relevant to determining whether a control group has *de facto* control of a particular applicant, applying in the entrepreneurs' blocks.

¹⁷⁶ See Pacific Telesis *ex parte* comments, dated Oct. 19, 1994, at 4.

¹⁷⁷ *Fifth Report and Order*, FCC 94-178 at ¶¶ 115, 164; 47 C.F.R. § 24.720(k).

¹⁷⁸ 47 U.S.C. § 310(d).

¹⁷⁹ See *Rochester Telephone v. United States*, 23 F. Supp. 634, 636 (S.D.N.Y. 1938), *aff'd*, 307 U.S. 125 (1939); *Lorain Journal Co. v. FCC*, 351 F.2d 824, 827-828 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966).

¹⁸⁰ See discussion *infra* at ¶¶ 79, 84.

¹⁸¹ *Stereo Broadcasters, Inc.*, 55 FCC 2d 819, 821 (1975), *modified*, 59 FCC 2d 1002 (1976).

79. Petitions. Some petitioners ask us to provide more specific guidelines with respect to what does and does not constitute *de facto* control. Omnipoint states that such guidelines would help designated entity applicants in setting up their management structure.¹⁸² Others seek assurance that designated entity control groups can meet the *de facto* control test even if they enter into agreements containing "standard" covenants for the protection of non-majority or non-voting shareholders, *e.g.*, supermajority voting requirements for major corporate changes, liquidation preferences (commonly in the form of preferred stock), rights of first refusal, veto rights concerning particular corporate transactions, or the preemptive right to purchase stock to prevent dilution.¹⁸³

80. Decision. We continue to believe that determinations of *de facto* control for purposes of determining designated entity eligibility for entrepreneurs' blocks are inherently factual and therefore will require case-by-case determination. Nevertheless, to provide a level of certainty for designated entities and to ensure that designated entities maintain *de facto* control, we believe it is appropriate to articulate some guidelines for defining *de facto* control in this context. We therefore clarify that a designated entity or entrepreneurs' control group must demonstrate at least the following indicia of control to establish that it retains *de facto* control of the applicant: (1) the control group must constitute or appoint more than 50 percent of the board of directors or partnership management committee; (2) the control group must have authority to appoint, promote, demote and fire senior executives that control the day-to-day activities of the licensee; (3) the control group must play an integral role in all major management decisions; and (4) in the case of applicants controlled by minorities and women, at least one minority or female control group member must have senior managerial responsibility over day-to-day operations, *e.g.*, as President or CEO of the licensee.¹⁸⁴ We emphasize, however, that these criteria are guidelines only and are not necessarily dispositive of the issue of *de facto* control in all situations. Even where these criteria are met, therefore, the determination of whether *de facto* control exists will depend on the totality of circumstances in the particular case.

¹⁸² Omnipoint Petition at 11-12.

¹⁸³ See Media Communications Partners *ex parte* comments, filed October 11, 1994; Pacific Telesis *ex parte* comments, filed October 19, 1994.

¹⁸⁴ These same four indicia will be used to determine whether the "qualified" members of the control group (*i.e.*, women, minorities, and small business or entrepreneurial principals) have *de facto* control over the control group. For example, in a women-owned limited partnership applicant with one corporate general partner, the women shareholders of that corporation must constitute, or be able to appoint more than 50 percent of the board, appoint, promote, demote and fire senior executives, play an integral role in all major management decisions, and at least one of the women must have senior managerial responsibility over day-to-day operations.

81. With respect to provisions benefitting non-majority or non-voting shareholders, we recognize that inclusion of such provisions is a common practice to induce investment and ensure that the basic interests of such shareholders are protected. For example, many corporations require a supermajority of shareholders to approve major corporate decisions such as taking on additional debt, significant corporate acquisitions, or issuance of new stock. Similarly, strategic investors making large passive equity contributions to a company frequently insist on a right of first refusal exercisable in the event that a third party seeks to purchase the company. We agree with petitioners that allowing such provisions enhances the ability of designated entities to raise needed capital from strategic investors, thereby bolstering their financial stability and competitive viability.¹⁸⁵ We believe, however, that precedent provides guidance in determining the appropriate extent to which these safeguards may protect investment.¹⁸⁶ We therefore clarify that under our case law non-majority or non-voting shareholders may be given a decision-making role (through supermajority provisions or similar mechanisms) in major corporate decisions that fundamentally affect their interests as shareholders without being deemed to be in *de facto* control.¹⁸⁷ Such decisions generally include: (1) issuance or reclassification of stock; (2) setting compensation for senior management; (3) expenditures that significantly affect market capitalization; (4) incurring significant corporate debt or otherwise encumbering corporate assets; (5) sale of major corporate assets; and (6) fundamental changes in corporate structure, including merger or dissolution.¹⁸⁸ We also clarify that non-majority or non-voting investors may hold rights of first refusal, provided that right is exercisable only to prevent dilution of the investor's interest or a transfer of control by the control group to a third party. We also observe that we would not look favorably upon an assignment or transfer of a license that resulted from

¹⁸⁵ See note 183 *infra*.

¹⁸⁶ See GO Communications *ex parte* comments, filed Nov. 3, 1994, at 5-6.

¹⁸⁷ See, e.g., *News International*, 97 FCC 2d 349, 357-66 (1984) (describing minority shareholder voting and consent rights that serve to protect interests and do not constitute a transfer of control); *Data Transmissions*, 44 FCC 2d 935, 936-37 (1974) (same).

¹⁸⁸ Our most recent decision on such voting and consent rights addressed an agreement between MCI Communications Corporation (MCI) and British Telecommunications plc (BT). In that *Order*, we evaluated whether particular voting and consent rights intended to protect BT's investment in MCI triggered a transfer of control. See *Declaratory Ruling and Order*, 9 FCC Rcd 3960 (1994). We indicated that covenants that give a party the power to block certain major transactions of a company do not in and of themselves represent the type of transfer of corporate control envisioned by Section 310(d) of the Communications Act. We found it significant, however, that while BT could block certain major transactions by MCI, BT could not compel MCI to engage in such major transactions. Thus, we concluded that BT's power was permissibly limited to protecting its own investment in MCI. *Id.* 9 FCC Rcd at 3962. See also *McCaw Cellular Communications, Inc.*, 4 FCC Rcd 3784 (Com. Car. Bur. 1989).

rights of first refusal being exercised if (1) the holder of such rights was a manager of the licensee, and (2) there was evidence the manager had not acted to maximize the profitability of the business in order to ensure that the options would be exercised at a lower price.

82. While we conclude that the provisions described above will generally not be considered to deprive an otherwise qualified control group of *de facto* control, some proposals made by petitioners and commenters to benefit non-majority shareholders would violate this standard. For example, non-majority shareholders should not have the power to select or replace members of the control group or key employees of the corporation. Further, as discussed in the *Second Report and Order* in this docket, we do not intend to restrict the use of preferential dividends and liquidation preferences. We will scrutinize, however, any mechanisms that deprive the control group of the ability to realize a financial benefit proportional to its ownership of the applicant.¹⁸⁹ Finally, we emphasize that any final determination of whether a control group has yielded *de facto* control to outside investors must depend on the circumstances of the particular case. For example, while certain provisions benefitting non-majority investors may not give rise to a transfer of control when considered individually, the aggregate effect of multiple provisions could be sufficient to deprive the control group of *de facto* control, particularly if the terms of such provisions vary from recognized standards.¹⁹⁰ To facilitate review of such provisions, we will amend the Form 401 (long-form)¹⁹¹ to require winners of C and F block auctions to disclose any such covenants and terms that protect non-majority investors' rights in the licensee.

b. Management Contracts

83. Background. An issue of concern to many petitioners and commenters is whether designated entities may enter into management agreements with third parties without being deemed to have engaged in an unauthorized transfer of control. Although we did not

¹⁸⁹ See *Second Report and Order*, 9 FCC Rcd 2348 at ¶ 278.

¹⁹⁰ In assessing whether such provisions vary from recognized standards, the Commission may assess whether the provisions are accepted measures to protect financial interests of noncontrolling investors. See, e.g., discussion *supra* at paragraph 81 and *infra* at paragraphs 94-95; Model Business Corporations Act and Uniform Limited Partnership Act.

¹⁹¹ FCC Form 600 will replace both Form 401 (used under Part 22 of the Commission's Rules) and Form 574 (used under Part 90 of the Commission's Rules). *Third Report and Order* in Gen. Docket No. 93-252, FCC 94-212 (released September 23, 1994) at ¶ 286. Applicants must use Form 600 beginning January 2, 1995. *Id.* ¶¶ 298, 414. The Commission has received a Motion for Stay of the January 2, 1995 effective date, which is currently pending. National Association of Business and Educational Radio, Inc., *Motion for Partial Stay of the Third Report and Order* in Gen. Docket No. 93-252, filed November 4, 1994.

expressly address this issue in the *Fifth Report and Order*, we have traditionally scrutinized common carrier management agreements for this purpose under the *Intermountain Microwave* test,¹⁹² and we recently extended the use of this test to all CMRS providers in our *Fourth Report and Order* in Gen. Docket 93-252.¹⁹³ Under this test, a licensee may enter into a management agreement with a third party provided that the licensee retains exclusive responsibility for operation and control of the licensed facilities, as determined by the following six factors: (1) unfettered use of licensed facilities and equipment; (2) day-to-day operation and control; (3) determination of and carrying out of policy decisions; (4) employment, supervision, and dismissal of personnel; (5) payment of financial obligations; and (6) receipt of profits from operation of the licensed facilities.¹⁹⁴

84. Petitions. In its petition, Pacific Bell contends that the *Intermountain Microwave* test needs to be clarified to eliminate uncertainty about the permissible scope of management agreements.¹⁹⁵ Pacific Bell notes that the D.C. Circuit has recently remanded a case in which the Commission purportedly misapplied the *Intermountain* test and argues that further guidance from the Commission is therefore needed to prevent sham agreements between designated entities and third party managers.¹⁹⁶ Other parties also support the view that the Commission should clarify its standards regarding management contracts, but do not necessarily agree about what standard should be articulated. NABOB, for example, argues that the *Intermountain* test is too rigid and that a more flexible standard should be applied to designated entities who enter into management agreements.¹⁹⁷ Columbia PCS, on the other hand, contends that the Commission should apply a stricter standard by limiting managers to performing discrete functions on a subcontractor basis as opposed to assuming broad

¹⁹² See *Intermountain Microwave, Inc.*, 24 Rad. Reg. (P&F) 983 (1963) (*Intermountain Microwave*). See also *Memorandum Opinion and Order* in CC Docket No. 90-257 (*La Star Cellular Telephone Company*), FCC 94-299 (adopted Nov. 18, 1994; released ____) (on remand from the D.C. Circuit).

¹⁹³ *Fourth Report and Order*, Gen. Docket No. 93-252, FCC 94-270 (released Nov. 18, 1994) ¶ 20. In this order, we also concluded that management contracts could be considered "attributable interests" for purposes of the PCS/cellular/SMR spectrum cap even if they did not confer control under the *Intermountain Microwave* standard. This conclusion applies only for spectrum cap purposes, however, and does not affect our underlying analysis of when a management contract gives rise to an unauthorized transfer of control. *Id.* at ¶ 25.

¹⁹⁴ *Intermountain Microwave*, 24 Rad. Reg. at 984.

¹⁹⁵ Pacific Bell Petition at 9.

¹⁹⁶ *Id.* at 11-12 (citing *Telephone and Data Systems v. FCC*, 19 F.3d 655 (D.C. Cir. 1994), vacating and remanding *La Star Cellular Telephone Co.*, 7 FCC Rcd 3762 (1992))

¹⁹⁷ NABOB Petition at 7.

responsibility for system management.¹⁹⁸

85. **Decision.** As noted above, we have recently held in Gen. Docket 93-252 that the *Intermountain Microwave* standard applies to all CMRS licensees who enter into management contracts. Because we have determined that broadband PCS licensees will be presumptively classified as CMRS providers,¹⁹⁹ we reaffirm the applicability of the *Intermountain* standard here. We disagree with NABOB's view that this standard is not sufficiently flexible to account for the management needs of designated entities. The six *Intermountain* factors provide reasonable benchmarks for ensuring retention of control by the licensee while allowing for full consideration of the circumstances in each case. In the case of designated entity applicants, they will ensure that designated entities participate actively in the day-to-day management of the company while allowing reasonable flexibility to obtain services from outside experts as well. We believe that relaxing the *Intermountain* standard, by contrast, could give rise to sham agreements in which designated entities do not exercise actual control.

86. While we reject the view that scrutiny of management contracts should be relaxed, we also disagree with the view that such contracts should be subject to a stricter standard than we have applied previously. We conclude that limiting managers to discrete "subcontractor" functions, as Columbia PCS proposes, could prevent designated entities from drawing on managers with broad expertise.²⁰⁰ Moreover, whether a manager undertakes a large number of operational functions is irrelevant to the issue of control so long as ultimate responsibility for those functions resides with the licensee.

3. Attribution Rules

a. Voting Equity

87. **Background.** The *Fifth Report and Order* provided that an investor may hold a 25 percent passive equity interest in the entrepreneurs' block applicant before its interest is attributable for purposes of our eligibility rules.²⁰¹ In addition, the passive equity investment for closely-held companies could include no more than five percent voting equity, while

¹⁹⁸ Columbia PCS Opposition to Petitions for Reconsideration (Columbia PCS Opposition), filed Sept. 9, 1994, at 5-6.

¹⁹⁹ See *Second Report and Order*, Gen. Docket No. 93-252, 9 FCC Rcd 1411 (1994) at ¶ 119.

²⁰⁰ See e.g. NABOB Petition at 7-8; Pacific Bell Reply Comments (Pacific Bell Reply), filed Sept. 27, 1994, at 1-3; AIDE Opposition to Petitions for Reconsideration (AIDE Opposition), filed Sept. 9, 1994, at 8.

²⁰¹ *Fifth Report and Order*, FCC 94-178 at ¶ 158.

publicly-traded companies could include no more than 15 percent voting equity.²⁰² In a subsequent *Order*, we increased the threshold percentage of non-attributable voting equity from five percent to 15 percent for closely-held companies.²⁰³ Similarly, for the alternative equity option available to women and/or minority principals, the 49.9 percent passive investment could include no more than 15 percent voting equity.

88. Petitions. Petitioners request that the Commission increase the threshold percentage of non-attributable voting equity from 15 percent to an amount ranging from 20 percent to 49 percent.²⁰⁴ In addition, petitioners request that the Commission clarify whether the existing rules permit nonattributable investors outside of the control group to hold a less than 25 percent or a less than or equal to 25 percent equity interest in the applicant.²⁰⁵ Also, on reconsideration of our *Order on Reconsideration* (discussed *supra*), parties have debated our decision to raise the voting equity threshold for closely-held applicants from five to 15 percent.²⁰⁶ AIDE argues that raising the voting level of closely-held applicants is imprudent because it increases the likelihood that big business will control the applicant.²⁰⁷ AMP disagrees with AIDE that 15 percent voting control would increase the likelihood of shams, because 15 percent is still not a controlling percentage.²⁰⁸ Rather, AMP argues that increasing the permissible level of voting equity will enable applicants to attract more equity financing, thereby increasing the applicant's likelihood of success.²⁰⁹

89. Decision. We amend our attribution rules to raise the voting equity threshold that qualifies an investor as having an attributable interest in an applicant to 25 percent. We will raise the voting equity level for both publicly-traded and closely-held corporations, and will apply the 25 percent threshold for the 25/75 percent equity option available to all

²⁰² *Id.* at ¶¶ 158, 163.

²⁰³ *Order on Reconsideration*, FCC 94-217 at ¶ 8-10.

²⁰⁴ Omnipoint Petition at 10 (20 percent); CTIA Petition at 6 (25 percent); BET Petition at 14-15 (25 percent); Pacific Telecom Cellular, Inc. Petition for Reconsideration, filed Aug. 22, 1994, at 4 (49 percent).

²⁰⁵ CTIA Petition at 6, n. 9

²⁰⁶ *See* AIDE Petition for Reconsideration of *Order on Reconsideration* (filed Sept. 21, 1994); AMP Opposition to Petition for Reconsideration of *Order on Reconsideration* (filed Oct. 17, 1994).

²⁰⁷ *See* AIDE Petition for Reconsideration of *Order on Reconsideration* at 4.

²⁰⁸ AMP Opposition to Petition for Reconsideration of *Order on Reconsideration* at 3-4.

²⁰⁹ *Id.* at 4.

applicants and to the 49.9/50.1 percent equity option additionally available to minority and/or women applicants. We observe that 25 percent is the percentage suggested by both CTIA and BET.²¹⁰ We agree with CTIA that investors will be more likely to invest in new companies if they have the ability to protect their investment through increased voting rights.²¹¹ We also agree that a 25 percent voting interest will not convey a significantly greater risk of control than a 15 percent voting interest.²¹² BET asserts that higher voting thresholds will enable a larger number of existing companies -- those which have established financial structures with a higher percentage of voting stock owned by noncontrolling stockholders -- to compete in the entrepreneurial block. Furthermore, in other contexts, Congress has used a 25 percent threshold as a measure of determining control. For example, under Section 310(b) of the Communications Act, foreign companies are permitted to directly or indirectly control up to 25 percent of CMRS licensees.²¹³ We believe that in this context as well, a 25 percent threshold strikes an appropriate balance between the need to encourage investment and our goal of ensuring that designated entities remain in clear control. Finally, for purposes of clarification, the maximum permissible nonattributable equity level may be no greater than 25 percent of the applicant's total equity and includes the right to vote such shares (e.g., through voting trusts or other arrangements).²¹⁴

90. Additionally, however, to discourage large investors from circumventing our equity limitations for nonattributable investors, we clarify that persons or entities that are affiliates of one another, or that have an "identity of interests," will be treated as though they are one person or entity and their ownership interests aggregated for purposes of determining compliance with our maximum nonattributable equity limits. We will aggregate their ownership interests in calculating their total equity interests in the applicant and in determining whether their gross revenues and assets will be attributed to the applicant. Thus, for example, if two entities form a joint venture or consortium to apply for broadband PCS A and B block licenses, they have an identity of interests that is characteristic of affiliates,

²¹⁰ CTIA Petition at 6; BET Petition at 14-15.

²¹¹ CTIA Petition at 6.

²¹² *Id.* See also AMP Opposition to Petition for Reconsideration of the Order on Reconsideration at 3-4. But see AIDE Petition for Reconsideration of Order on Reconsideration at 4 (likelihood of abuse of nonattributable investor rule becomes greater if big business permitted to acquire 15 percent of voting stock of closely-held applicant).

²¹³ 47 U.S.C. § 310(b)(4); see CTIA Petition at 6-7. See also 22 C.F.R. § 122.1 - 122.2 (Office of Thrift Supervision regulation, which defines control as representing more than 25 percent of the voting stock).

²¹⁴ For example, an investor holding 25 percent of an applicant's voting stock will not be considered a nonattributable equity investor if it also has the right, through a voting trust or other arrangement, to vote additional shares.

and will be treated as a single entity when investing in the same entrepreneurs' block applicant.²¹⁵ Consequently, under our rules we would aggregate all equity investments in the applicant and count it as a single, possibly attributable investment in the applicant where such investors have an identity of interests.

b. Ownership Interests

91. Background. The *Fifth Report and Order* states that ownership interests are to be calculated on a fully diluted basis and that all agreements such as warrants, stock options and convertible debentures will generally be treated as if the rights thereunder have been fully exercised.²¹⁶ Designated entities are required to disclose any business five percent or more of whose stocks, warrants, options or debt securities are owned by the applicant or an officer, director, stockholder or key management personnel of the applicant.²¹⁷

92. Petitions. Petitioners and *ex parte* commenters request that we clarify our rules regarding the treatment of various ownership instruments such as warrants, stock options and convertible debentures.²¹⁸ Additionally, commenters have asked whether rights of first refusal are considered options and how stock "calls" and "puts" will be treated.²¹⁹ A "put" option gives the holder the right to sell a share of stock at a specified price at any time up to the expiration date. Conversely, a "call" option gives the holder the right to buy a share of stock at a specified price, known as the "exercise price."

93. Decision. In general, we will treat stock options as fully exercised with the exception of some ownership instruments discussed *infra* at paragraphs 95-96. We recognize that some forms of options are common and often beneficial to the management of a company. Many companies, for example, include stock options in senior management compensation packages. We also recognize that treating options as fully exercised will encourage companies to hire minorities and women for top management positions, because any options they receive will count toward the equity eligibility requirement.

94. We decide that for purposes of calculating ownership interests, however, some

²¹⁵ See 47 C.F.R. § 24.720(1)(3); see also 47 C.F.R. § 24.204 note 1.

²¹⁶ See *Fifth Report and Order*, FCC 94-178 at ¶ 158 n.133.

²¹⁷ See 47 C.F.R. § 24.813(a)(1)) (Form 175 and Form 401 application requirements).

²¹⁸ See, e.g., Terry Rakolta *ex parte* comments, filed Oct. 4, 1994, at 2; Pacific Telesis *ex parte* comments, filed Oct. 25, 1994, at 2-4; Airtouch *ex parte* comments, filed Oct. 12, 1994, at 4-6; Fleischman and Walsh *ex parte* comments, filed Aug. 10, 1994, at 2.

²¹⁹ See e.g. BellSouth *ex parte* comments, filed Sept. 14, 1994, at 2; Pac Tel *ex parte* comments, filed Oct. 19, 1994, at 5-6.

ownership instruments will not be treated as "fully diluted," or will not be considered options generally. For example, we will not consider rights of first refusal as options when calculating ownership interests.²²⁰ Rights of first refusal differ from other types of options because they cannot be exercised unless there is a proposed sale to a third party. Sales and transfers to third parties are restricted during the holding period, so rights of first refusal do not threaten the composition of designated entities.²²¹ At the end of the five-year period, it will still be the designated entity's decision as to whether to sell the business, which ensures that the designated entity controls the decision whether to sell. We agree that without these rights, investors are likely to shy away from investing in designated entities.²²² As Pacific Telesis and BellSouth point out, rights of first refusal are a valued safeguard mechanism because they give investors some control over the entry of new business associates.²²³ They also enable investors to prevent their own shares from becoming diluted as a result of a sale.

95. "Put" options held by the designated entity -- which can be realized only after the licensee can permissibly transfer the license -- will not be treated as fully diluted for purposes of determining ownership interests. Put options held by the designated entity leave the ownership decision in the designated entity's control and do not force an unwanted sale upon the designated entity.²²⁴ We observe, however, that while such options will not be factored in for purposes of determining *de jure* control, we will continue to look at whether put options in combination with other terms to an agreement deprive an otherwise qualified control group of *de facto* control over the applicant. Thus, a "put" in combination with other terms to an agreement may result in an applicant not retaining *de facto* control. For example, if an agreement between a strategic investor and a designated entity provides that (1) the investor makes debt financing available to the applicant on very favorable terms (*e.g.*, 15 year-term, no payments of principal or interest for six years) and (2) that the designated entity has a one-time put right that is exercisable at a time and under conditions that are designed to maximize the incentive of the licensee to sell (*e.g.*, six years after issue, option to put partnership interest in lieu of payment of principal and accrued interest on loan), we

²²⁰ A "right of first refusal" is an agreement between parties which grants an investor the right to match a purchase offer from a third party.

²²¹ See 47 C.F.R. § 24.839 (d) (restrictions on assignment or transfer of control of C and F block licensees). In any event, the Commission would have to approve any sale or transfer that would result from a noncontrolling investor exercising a right of first refusal.

²²² See The Marshall Company *ex parte* comments, filed Oct. 6, 1994, at 1.

²²³ Pacific Telesis *ex parte* comments, filed Oct. 19, 1994, at 5; See also BellSouth *ex parte* comments, filed Sept. 14, 1994, at 2 ("right of first refusal is necessary so each partner can preempt sale to outsider who may not be a desirable partner for strategic or other business reasons").

²²⁴ See The Marshall Company *ex parte* comments, filed Oct. 6, 1994, at 1.

may conclude that *de facto* control has been relinquished. "Call" options held by investors will be considered exercised immediately to calculate ownership levels because they can be used to force a designated entity to sell its ownership interests. Finally, we observe that such a call option would vest an impermissible degree of control in the applicant's so-called "noncontrolling" investors.

96. In summary, agreements between designated entities and strategic investors that involve terms (such as management contracts combined with rights of first refusal, loans, puts, etc.) that cumulatively are designed financially to force the designated entity into a sale (or major refinancing) will constitute a transfer of control under our rules. We will look at the totality of circumstances in each particular case. We emphasize that our concerns are greatly increased when a single entity provides most of the capital and management services and is the beneficiary of the investor protections.

D. Special Provisions For Designated Entities

1. Bidding Credits

97. Background. In the *Fifth Report and Order*, we determined that bidding credits were necessary to better ensure that women and minority-owned businesses and small businesses have meaningful opportunities to participate in broadband PCS.²²⁵ Accordingly, our rules provided that small businesses will receive a 10 percent credit, women and minority-owned businesses will receive a 15 percent credit, and small businesses owned by women and minorities will receive an aggregate credit of 25 percent.²²⁶ Our decision in the *Fifth Report and Order* to enhance the effectiveness of the entrepreneurs' blocks through the addition of bidding credits reflected our expectation that broadband PCS will be a capital intensive undertaking. We stated that bidding credits would function as a discount on the bid price a firm will actually have to pay to obtain a license and, thus, would directly address the obstacles to raising capital encountered by small, women and minority-owned firms.²²⁷

98. Petitions. Several petitioners request that we increase the level of bidding credits. For example, while some petitioners argue in favor of higher bidding credits for all designated entities,²²⁸ others seek to raise the bidding credit for women and minority-owned businesses,²²⁹ or only for minority-owned small businesses.²³⁰ Many of these petitioners find

²²⁵ *Fifth Report and Order*, FCC 94-178 at ¶ 130.

²²⁶ See 47 C.F.R. §§ 24.712(a)-(c).

²²⁷ *Fifth Report and Order*, FCC 94-178 at ¶ 131-132.

²²⁸ See, e.g., USIMTA/USIPCA Petition at 6-7 and NPPCA Petition at 4-6 .

²²⁹ See Hernandez Petition at 3-4 and BET Petition at 1-2, 9-12.

support in our *Third Memorandum Opinion and Order* in this docket, where we raised the bidding credit for minority and women-owned businesses bidding on regional narrowband PCS licenses from 25 percent to 40 percent.²³¹ Two petitioners contend that rural telephone companies should receive a 10 percent bidding credit, that would be cumulative with any other bidding credits for which the applicant would be eligible.²³² Finally, consistent with its argument that the entrepreneurs' blocks should be abolished, GTE supports availability of bidding credits across all broadband PCS channel blocks.²³³

99. Decision. We will retain our existing bidding credit scheme. Present levels of bidding credits, coupled with other provisions directed at the capital formation problems of designated entities, such as size limitations on the entrepreneurs' block and installment payments, are sufficient to achieve our regulatory objectives.²³⁴ Moreover, additional measures that we have adopted on reconsideration, including elimination of the limits on personal net worth and relaxation on the attribution of affiliates owned and controlled by minorities, will further enhance the value of the bidding credits to women and minority-owned firms in particular. We find that our action on reconsideration of the narrowband PCS auction rules does not dictate raising the bidding credit in this instance. As the *Third Memorandum Opinion and Order* makes clear, the 40 percent bidding credit for women and minorities bidding on regional narrowband PCS licenses was adopted in the absence of any entrepreneurs' blocks.²³⁵ Further, we state that in the insulated entrepreneurs' block setting, a 25 percent bidding credit for minority and/or women-owned small firms is more appropriate.²³⁶

100. We also find that the record does not support creation of a new bidding credit for rural telephone companies. In this regard, we agree with BET that petitioners have failed to demonstrate a historical lack of access to capital that was the basis for according bidding

²³⁰ See NABOB Petition at 6-7.

²³¹ *Third Memorandum Opinion and Order*, FCC 94-219 at ¶ 58. See also 47 C.F.R. § 24.309(b)(2).

²³² See MEANS/SDN Petition at 9; *accord*, United States Telephone Association Opposition to Petitions for Reconsideration (USTA Opposition), filed Sept. 9, 1994, at 3 n.1. *But see* BET Opposition at 15-17.

²³³ GTE Petition at 10.

²³⁴ *Accord*, Encompass Opposition at 2-3 and United States Small Business Administration Reply Comments (SBA Reply), filed Sept. 16, 1994, at 3-5.

²³⁵ *Third Memorandum Opinion and Order*, FCC 94-219 at ¶ 87.

²³⁶ *Id.*

credits to small businesses, minorities and women.²³⁷ To the extent that a rural telephone company is also a small business, or minority or women-owned, then bidding credits would, of course, be available. We also decline to adopt GTE's scheme to eliminate the entrepreneurs' blocks, and distribute bidding credits throughout the broadband PCS channel blocks. As Omnipoint, Columbia PCS and BET observe, the insulation provided by the entrepreneurs' block is key to the utility of bidding credits in such a capital intensive undertaking.²³⁸

2. Installment Payments

101. **Background.** In the *Fifth Report and Order* we made installment payments available to most businesses that obtain entrepreneurs' block licenses. Installment payments directly address the significant barriers that smaller businesses face in accessing private financing.²³⁹ With the expectation of enormous costs associated with obtaining and operating a broadband PCS license, installment payments provide low-cost government financing that reduces the amount of private financing needed before and after the auction.²⁴⁰ Our installment payment plan was made available to all entrepreneurs' block eligibles granted licenses in the 50 largest BTAs.²⁴¹ In the smaller BTAs where the costs of license acquisition and operation are expected to be lower, installment payments are only available to licensees owned by women and minorities, and licensees with less than \$75 million in gross revenues.²⁴² We also provided an "enhanced" installment payment plan for small businesses and businesses owned by women and minorities where interest-only payments were required for such entities for as long as five years from the date of license grant if the firm is both small and owned by women or minorities.²⁴³ By tailoring the deferral of principal payments to the needs of the particular designated entities, we promoted greater participation in broadband PCS by viable competitors.²⁴⁴

²³⁷ BET Opposition at 15-16.

²³⁸ Omnipoint Opposition at 7-12; Columbia PCS Opposition at 2-3; and BET Opposition at 7.

²³⁹ *Fifth Report and Order*, FCC 94-178 at ¶ 135.

²⁴⁰ *Id.* at ¶ 136.

²⁴¹ *Id.* at ¶ 137.

²⁴² *Id.*

²⁴³ See generally 47 C.F.R. § 24.711.

²⁴⁴ *Fifth Report and Order*, FCC 94-178 at ¶¶ 139-140.

102. Petitions. Vanguard asks us to offer installment payments to all entrepreneurs' block winners for all BTAs.²⁴⁵ Without this relief, Vanguard contends that small cellular carriers that are, in fact, more likely to serve the smaller markets would be forced to comply with the same payment schedule as large carriers bidding for smaller markets.²⁴⁶ SBPCS seeks to eliminate interest on installment payments altogether, and limit availability of a installment payment plans to revenues less than \$75 million dollars.²⁴⁷ Hernandez requests that the Commission require bidders to demonstrate their ability to meet the terms of an installment payment plan when the short-form application is filed.²⁴⁸

103. Decision. We will extend availability of installment payments to all entrepreneurs' block licensees, regardless of gross revenues. A key factor to the overall success of the entrepreneurs' blocks is the installment payment plan. The installment plan was established to facilitate the entry of small and minority-owned businesses into the broadband PCS market. The top 50 BTAs will be the most competitive wireless communications markets in the country and will require inordinately large amounts of capital. It will be extremely challenging for any entrepreneurs' block participant to compete in these markets. The installment plans will greatly enhance the ability of all entrepreneurs' block participants to raise capital to succeed against major, well-capitalized competitors. As Vanguard points out, disallowing installment payments to large entrepreneurs' block winners of smaller BTAs unfairly restricts these companies from competing for markets in which they will have a logical interest.²⁴⁹ In addition, the larger entrepreneurs would be forced to pay for BTAs on the same terms as major companies that do not qualify for the entrepreneurs' blocks. While we accept these arguments, and therefore extend installment payments to all entrepreneurs' block licensees, we note that the terms of these payments should be less generous than those extended to smaller companies, less able to access traditional sources of capital. Therefore, we will require entrepreneurs with gross revenues exceeding \$75 million to make a post-auction down payment equaling ten percent of their winning bids, but then pay the remaining 90 percent of the auction price in installments with interest charges to be fixed at the time of licensing at a rate equal to that for ten year U.S. Treasury obligations plus 3.5 percent, with payments on both interest and principal required.

104. We decline to reduce or eliminate interest rates entirely because we believe that

²⁴⁵ Vanguard Cellular Systems, Inc. Opposition to Petitions for Reconsideration (Vanguard Opposition), filed Sept. 9, 1994, at 2-4.

²⁴⁶ *Id.* at 4.

²⁴⁷ Small Business PCS Association Petition for Reconsideration (SBPCS Petition), filed Aug. 22, 1994, at 2-3.

²⁴⁸ Hernandez Petition at 5.

²⁴⁹ Vanguard Opposition at 4.

the present approach achieves the proper balance among our regulatory objectives. In particular, our present tailoring of interest rates to the needs of the designated entity enables licenses to be disseminated to small businesses and furthers the congressional goal of allowing taxpayers to reap a portion of the value of the licenses. Reducing or eliminating interest payments could result in very high bids, which could reduce competition and promote defaults among entrepreneurs. Such an approach could also encourage speculation instead of legitimate applicants who can attract capital. On our own motion, however we will amend 47 C.F.R. § 24.711 to permit small businesses owned by minorities and/or women to make interest-only payments for six years from the date of license grant. Under our current rules, principal payments start to come due at the same time the entrepreneur is permitted to transfer the license and immediately following the first, build-out requirement. By deferring payment of principal an additional year, we intend to assist the designated entity in avoiding an unwanted sale of business at the five-year mark in order to avoid payment of principal. Finally, for the reasons discussed in the *Fourth Memorandum Opinion and Order*, we believe that our existing requirements for broadband PCS auction applicants adequately measure an applicant's ability to pay.²⁵⁰ We therefore decline to impose more stringent requirements to determine whether an applicant can meet the terms of an installment payment plan.

3. Rural Telephone Company Provisions

105. **Background.** In the *Fifth Report and Order*, the Commission established several provisions to help rural telephone companies become meaningful participants in the emerging PCS market. In that proceeding, we defined a rural telephone company as a local exchange carrier having 100,000 or fewer access lines, including all affiliates.²⁵¹ In departing from the more restrictive definition adopted in the *Second Report and Order*, the Commission stated that the revised definition strikes an appropriate balance by facilitating the rapid deployment of broadband PCS to rural areas, without giving benefits to large companies that do not require special assistance.²⁵² Qualified rural telephone companies are eligible for broadband PCS licenses through a partitioning system, which permits rural telephone companies to obtain licenses that are geographically partitioned from larger PCS service areas.²⁵³ These companies will be permitted to acquire partitioned broadband PCS licenses in any frequency block in two ways: (1) they may form bidding consortia consisting entirely of rural telephone companies to participate in the auctions, and then partition the licenses won among consortia participants; and (2) they may acquire partitioned broadband PCS licenses from

²⁵⁰ *Fourth Memorandum Opinion and Order*, FCC 94-246 at ¶ 45.

²⁵¹ *Fifth Report and Order*, FCC 94-178 at ¶ 198.

²⁵² *Id.* See also *Second Report and Order*, 9 FCC Rcd 2348 at ¶ 282.

²⁵³ *Fifth Report and Order*, FCC 94-178 at ¶ 151.

other licensees through private negotiation and agreement either before or after the auction.²⁵⁴

106. Under our rules, if a rural telephone company receives a partitioned license from another PCS licensee in a post-auction transaction, the partitioned area must be reasonably related to the rural telephone company's wireline service area that lies within the PCS service area. We recognized in the *Fifth Report and Order* that rural telephone companies will require some flexibility in fashioning areas in which they will receive partitioned licenses, so we did not adopt a strict rule concerning the reasonableness of the partitioned area.

107. Petitions. Petitioners variously request the Commission modify our rural telephone company provisions. Century Telephone Enterprises, Inc. (Century) and Citizens Utilities Company (Citizens) argue that the rural telephone company definition adopted in the *Fifth Report and Order* is overly restrictive and excludes local exchange carriers that exceed the access line standard but nevertheless serve predominantly rural areas.²⁵⁵ Alternatively, Citizens requests the Commission implement waiver procedures.²⁵⁶ In addition, Hicks and Ragland and TEC urge the Commission to eliminate its partitioned service area limitations, stating that the present rules unnecessarily impede the ability of a rural telephone company to provide service in a technically and economically feasible manner.²⁵⁷ Finally, MEANS/SDN and TEC contend that rural telephone companies should be afforded the same benefits as other designated entities, including outside passive investment in rural telephone company consortia and bidding credits.²⁵⁸

108. Decision. We generally will retain the rural telephone company provisions adopted in the *Fifth Report and Order*. We remain convinced that our definition of rural telephone company, which reflects the views of numerous parties to this proceeding, will ensure that broadband PCS will be deployed rapidly to rural areas. At the same time, it is narrowly tailored to exclude large local exchange carriers that do not require special

²⁵⁴ *Id.*

²⁵⁵ Century Telephone Enterprises, Inc. Petition for Reconsideration (Century Petition), filed Aug. 22, 1994, at 2-7. *See also* USTA Opposition at 2; Telephone and Data Systems, Inc. Opposition to Petitions for Reconsideration, filed Sept. 9, 1994, at 4-5.

²⁵⁶ Citizens Utilities Company Petition for Reconsideration (Citizens Petition), filed Aug. 19, 1994, at 5-9.

²⁵⁷ Hicks and Ragland Petition for Reconsideration (Hicks and Ragland Petition), filed Aug. 22, 1994, at 2-5.

²⁵⁸ MEANS/SDN Petition at 4-9; TEC Petition at 8.

treatment.²⁵⁹ We observe that we can entertain and grant a waiver request if a local exchange carrier that does not satisfy our rural telephone company definition can meet our waiver standard set forth in Section 24.819 of the Commission's Rules to warrant qualifying the LEC for a partitioned broadband PCS license.²⁶⁰

109. We continue to believe that our existing rules, which allow rural telephone companies to obtain broadband PCS licenses that are geographically partitioned from larger PCS service areas, will provide a viable opportunity for these entities to successfully acquire PCS licenses and offer service to rural areas.²⁶¹ We are confident that the partitioning system articulated in the *Fifth Report and Order* satisfies the directive of Congress to ensure that rural telephone companies have the opportunity to provide PCS services to all areas of the country, including rural areas. In addition, we believe that the other benefits afforded to designated entities, combined with the cellular attribution threshold for rural telephone companies adopted in Gen. Docket No. 90-314, will further ensure that rural areas have expedient access to PCS services.²⁶²

110. We disagree with MEANS/SDN's contention that modifications to our consortia provisions are needed to fulfill Congress' mandate that rural telephone companies have an opportunity to acquire PCS licenses. As we noted in the *Fifth Report and Order*, we expect that virtually all rural telephone company consortia will be eligible to bid on licenses in Blocks C and F without competition from "deep pocket" bidders.²⁶³ Additionally, if consortia members qualify as small businesses, the Commission will provide the bidding credit and installment payment provisions extended to similarly-situated applicants. Accordingly, we believe it is unnecessary to permit passive equity investments in rural telephone company consortia, as MEANS/SDN request.

111. We also reject TEC's and MEANS/SDN's proposal to extend bidding credits to rural telephone companies even if they are not small businesses or owned by minorities and/or women. We continue to believe that existing benefits for rural telephone companies

²⁵⁹ As we noted in the *Second Report and Order*, we do not believe that Congress intended for us to give special treatment to large LECs that happen to serve small rural communities. See *Second Report and Order*, 9 FCC Rcd 2348 at ¶ 196.

²⁶⁰ See 47 C.F.R. § 24.819.

²⁶¹ See *Fifth Report and Order*, FCC 94-178 at ¶¶ 148-153.

²⁶² See *Fifth Report and Order*, FCC 94-178 at ¶ 153 (discussing designated entity eligibility criteria and accompanying benefits); see also *Memorandum Opinion and Order* in Gen. Docket No. 90-314 (*Broadband PCS Reconsideration Order*), FCC 94-144 (released June 13, 1994) at ¶¶ 125-132.

²⁶³ *Fifth Report and Order*, FCC 94-178 at ¶ 153.

will allow them to effectively compete for licenses that serve rural territories. In addition to the partitioning and consortia provisions, we also note that rural telephone companies qualify for significant financial benefits from the Rural Electrification Administration and the Universal Service Fund which, as BET suggests, adequately compensates these entities for the lack of bidding credits.²⁶⁴ Additionally, we note that our bidding credits were specifically tailored to address the discriminatory market barriers faced by women and minority-owned entities.²⁶⁵ We concur with BET's assessment that rural telephone companies do not face the same kinds of barriers raising capital.

112. We note that most, if not all, rural telephone companies meet the entrepreneurs' block size standards and are permitted to bid directly on entrepreneurs' blocks licenses. To the extent that a rural telephone company does not qualify for the entrepreneurs' blocks, however, we disagree that it will be forced to negotiate with other licensees that may not be willing to sell their broadband PCS interests in the form of partitioned licenses or other ownership arrangements. On the contrary, we believe that other applicants and licensees will find rural telephone companies attractive entities to negotiate with, because of the efficiencies associated with rural telephone companies existing infrastructure. Additionally, since a licensee will be permitted to assign a portion of its license to a rural telephone company without violating the transfer and holding requirements, we expect that licensees will actively solicit participation by rural telephone companies. For the reasons discussed above, we continue to believe that our existing scheme, which is narrowly tailored to satisfy Congress' mandate, will provide rural telephone companies with a meaningful opportunity to participate in the provision of broadband PCS services and further the objective of rapidly getting service to rural areas.

113. Finally, we dismiss concerns raised by TEC and Hicks and Ragland concerning the permissible size of a rural telephone company's service area. We addressed these concerns in the *Fifth Report and Order* and concluded that a partitioned area containing no more than twice the population of that portion of a rural telephone company's wireline service area provides a reasonable presumption of a permissible service territory.²⁶⁶ However, we agree that rural telephone companies will require some flexibility in fashioning a partitioned service area and thereby affirm our prior conclusion that a strict rule is not needed.²⁶⁷

E. Aggregation of and Holding Period for the Entrepreneurs' Block Licenses

²⁶⁴ BET Opposition at 16.

²⁶⁵ *Id.* at 16-17.

²⁶⁶ *Fifth Report and Order*, FCC 94-178 at ¶ 151.

²⁶⁷ *See id.*

a. Single Entity Purchase Limit

114. Background. To ensure that C and F block licenses are disseminated among a wide variety of applicants, our rules as adopted in the *Fifth Report and Order*, restrict the number of licenses within the entrepreneurs' block that a single entity may win at auction.²⁶⁸ Specifically, we impose a limitation that no single entity may win more than 10 percent of the licenses available in the entrepreneurs' blocks, or 98 licenses. We indicated that the 98 licenses may all be in frequency block C or all in frequency block F, or in some combination of the two blocks. We observed that such a limit would ensure that at least 10 winning bidders enjoy the benefits of the entrepreneurs' blocks, while also allowing bidders to effectuate aggregation strategies that include large numbers of licenses and extensive geographic coverage. We provided that the limit would apply only to the total number of licenses that may be won at auction on the C and F blocks. Furthermore, we indicated that for purposes of this restriction we will consider licenses to be won by the same entity if an applicant (or other entity) that controls, or has the power to control licenses won at the auction, controls or has the power to control another license at the auction.²⁶⁹

115. Petitioners. On reconsideration, the Small Business PCS Association (SBPCS) recommends that the maximum number of entrepreneurs' block licenses purchased by a single entity be limited to licenses that cover no more than a total of 10 percent of the national population, or approximately 25 million "pops." SBPCS expresses concern that the existing limit does not provide for enough diversity of ownership since it would allow a single entity to acquire the top 98 BTA licenses on the 30 MHz entrepreneurs' block.²⁷⁰

116. Decision. After considering SBPCS' concerns, we will retain the existing limit, which prevents any single entity from acquiring more than 10 percent of the entrepreneurs' block licenses.²⁷¹ We believe that changing the limit to 10 percent of the population or 25 million "pops" rule would be overly restrictive. We note, for example, that successful entrepreneurs will need to form coherent regional "cluster" strategies to compete against large communications companies, such as dominant cellular providers, and that such regional clusters may come together into a national alliance with common technology and marketing strategies, including a common brand name. A 25 million "pops" per entity limit would severely restrict entrepreneurs that win the New York BTA (with 18 million "pops") and the

²⁶⁸ *Id.* at ¶¶ 169-171.

²⁶⁹ *See id.* at ¶¶ 169-171. *See also* 47 C.F.R. § 24.710.

²⁷⁰ SBPCS Petition for Reconsideration (SBPCS Petition), filed Aug. 22, 1994, at 4.

²⁷¹ *See also* Media Communications Partners, et. al, *ex parte* comments, filed Oct. 11, 1994, at 11-12 (requesting that a designated be limited to acquiring licenses serving no more than 10 percent of the national population, rather than given a maximum of 98 licenses). *But see* BET Petition at 15 (opposing SBPCS' proposal).

Los Angeles BTA (with 15 million "pops") from any meaningful regional cluster strategy, given the size of adjoining markets.²⁷² In light of this concern, we want to be careful not to impose a restriction that would unfairly disadvantage C and F block new entrants in the new PCS marketplace. We are satisfied that the present limit achieves the proper balance between promoting fair distribution of benefits and ensuring that entrepreneur block winners have enough flexibility to develop competitive systems on a regional and nationwide basis.

b. Restrictions on Transfer or Assignment

117. Background. In the *Fifth Report and Order*, restrictions on the transfer or assignment of licenses were adopted to ensure that designated entities do not take advantage of special entrepreneurs' block provisions by immediately assigning or transferring control of their licenses to non-designated entities. We indicated that the "trafficking" of licenses in this manner would unjustly enrich the auction winners and would undermine the congressional objective of giving designated entities the opportunity to provide spectrum-based services. Thus, our rules prohibit licensees in the entrepreneurs' blocks from voluntarily assigning or transferring control of their licenses during the three years after the date of the license grant.²⁷³ For the subsequent two years (or the fourth and fifth years of the term), the licensee is permitted to assign or transfer control of its authorization only to an entity that satisfies the entrepreneurs' blocks entry criteria.

118. We also provided that during the five-year period licensees cannot assign an attributable interest in the license that would cause them to exceed the financial eligibility requirements.²⁷⁴ Additionally, we stated that a transferee or assignee who receives a C or F block license during the five-year holding period will remain subject to the transfer restrictions for the balance of the holding period. Thus, if a C-block authorization is assigned to an eligible business in year four of the license term, it will be required to hold that license until the original five-year period expires, subject to the same exceptions that applied to the original licensee. Moreover, we stated that we will conduct random pre- and post-auction audits to ensure that applicants receiving preferences are in compliance with the Commission's rules.²⁷⁵

²⁷² See Columbia PCS Opposition at 4-6.

²⁷³ See 47 C.F.R. § 24.839(d). We indicated that we would consider exceptions to the three-year holding period on a case-by-case basis in the event of a judicial order decreeing bankruptcy or a judicial foreclosure if the licensee proposes to assign or transfer its authorization to an entity that meets the financial thresholds for bidding in the entrepreneurs' blocks. See *Fifth Report and Order*, FCC 94-178 at ¶ 128 n. 101.

²⁷⁴ See 47 C.F.R. § 24.709(a)(3).

²⁷⁵ See *id.* at ¶ 128. See also 47 C.F.R. § 24.709(d).

119. In the *Fifth Report and Order*, we also adopted rules to prevent entrepreneur block license holders from realizing any unjust enrichment that is gained through a transfer or assignment that occurs during the original license term.²⁷⁶ Specifically, we provided that if, within the original license term, a licensee applies to assign or transfer control of a license to an entity that is not eligible for as high a level of bidding credit, then the difference between the bidding credit obtained by the assigning party and the bidding credit for which the acquiring party would qualify, must be paid to the U.S. Treasury as a condition of approval of the transfer or assignment.²⁷⁷

120. We adopted similar requirements with respect to repayment of installment payments. Specifically, if a licensee that was awarded installment payments seeks to assign or transfer control of its license during the term of a license to an entity not meeting the applicable eligibility standards, we require payment of the remaining principal and any interest accrued through the date of assignment as a condition of approval of the transfer or assignment. Accordingly, we explained that if an entity seeks to assign or transfer control of a license to an entity that does not qualify for as favorable an installment payment plan, the installment payment plan, if any, for which the acquiring entity qualifies will become effective immediately upon transfer or assignment of the license. Thus, a higher interest rate and earlier payment of principal may begin to be applied.²⁷⁸

121. Petitions. Two petitioners discussed the holding period and limited transfer restrictions imposed on entrepreneurs' block licenses. Specifically, AIDE requests the Commission repeal the five-year holding period, contending that the unjust enrichment provisions (to the extent they promote recovery of bidding credits and installment payments) eliminate the need for such a restriction. AIDE also argues that once a designated entity receives a spectrum-based license, the mandate of Congress to provide these entities with a fair opportunity to provide spectrum-based services is satisfied, and that there is no justification for any further restrictions beyond that point in time. AIDE also wants clarification of how our unjust enrichment provisions will apply if a transfer or assignment

²⁷⁶ While we indicated that the five-year holding and limited transfer requirements in the entrepreneurs' blocks limit the applicability of unjust enrichment provisions generally during the first five-years of the license term (*i.e.*, in cases where the license-holder has engaged in a permissible transfer or assignment where the buyer is eligible for comparable bidding credits or is qualified for installment payments), we indicated that such provisions were still useful, particularly since they are applicable for the full ten-year license term. *See Fifth Report and Order*, FCC 94-178 at ¶ 141 n. 119.

²⁷⁷ *See id.* at ¶ 134. *See also* 47 C.F.R. § 24.712(d).

²⁷⁸ *See Fifth Report and Order*, FCC 94-178, at ¶ 141. *See also* 47 C.F.R. § 24.711(e).

does occur during the five-year holding period.²⁷⁹

122. Additionally, CTIA requests that the Commission amend its transfer restrictions to allow all PCS licensees (including entrepreneurs' blocks and designated entities) to transfer 5 MHz of spectrum immediately after license grant. Alternatively, CTIA asks that transfer be permitted within one year after service is initiated by a new PCS entrant in the relevant PCS service area. CTIA contends that this change is needed to provide cellular carriers with reasonable flexibility to reach the 40 MHz PCS spectrum cap (especially in secondary market transactions), and may increase the value of spectrum at auction (*i.e.*, by providing designated entities with an added source of funding and ensuring that market forces place the spectrum in the hands of those who value it most highly).²⁸⁰

123. Decision. We will not modify our five-year holding period and limited transfer restrictions. While AIDE and CTIA ask us to eliminate or significantly relax our restrictions, many commenters generally support the idea of a holding and limited transfer period for entrepreneurs' block licenses.²⁸¹ BET, for example, contends that without a holding requirement, the opportunities for circumventing the Commission's rules are increased as non-designated entities weigh the benefits of sacrificing certain preferences (*e.g.*, bidding credits) in exchange for control of a valuable PCS license.²⁸² Contrary to AIDE's point of view, we believe that unjust enrichment provisions alone do not provide adequate safeguards for ensuring that designated entities retain *de jure* and *de facto* control over their licenses. We are satisfied that the five-year holding period and limited transfer restrictions adopted in the *Fifth Report and Order* are justified for our purposes in meeting our congressional mandate.

124. Additionally we reject CTIA's request to permit 5 MHz of spectrum to be transferred after the license grant because it would contradict our determinations in the PCS service rules docket (Gen. Docket 90-314) concerning the disaggregation of broadband PCS spectrum. In that docket, we decided that no disaggregation of spectrum should be allowed

²⁷⁹ See AIDE Petition at 17-19.

²⁸⁰ See CTIA Petition at 2-4.

²⁸¹ See Hernandez, Roland, *ex parte* comments, filed Oct. 11, 1994; NABOB *ex parte* comments, filed Nov. 3, 1994, at 2. *Bur see* Pacific Bell Opposition to Petitions for Reconsideration (Pacific Bell Opposition), filed Sept. 9, 1994, at 13 (supporting AIDE's position); The Marshall Company *ex parte* comments, Aug. 3, 1994 (opposing more than a five-year holding period).

²⁸² BET Petition at 2-3. See also Omnipoint Reply Comments (Omnipoint-Reply), Sept. 16, 1994, at 2; SBA Reply at 4-5; Hernandez *ex parte* comments (Oct. 14, 1994).

until a broadband PCS licensee had met our five-year construction requirements.²⁴³ We also determined that in-region cellular interests should not be permitted to acquire 10 MHz of broadband PCS spectrum until the year 2000 – when they would be eligible for an additional 5 MHz of spectrum in their service areas.²⁴⁴ CTIA's proposal would permit disaggregation sooner than is permissible under our PCS service rules, and should be rejected for reasons that we have previously established.²⁴⁵

125. In addition, we wish to clarify the application of our holding rule to our financial caps.²⁴⁶ As we have stated, under certain circumstances we will allow licensees to retain their eligibility during the holding period, even if the company has grown beyond our size limitations for the entrepreneurs' block and for small business eligibility. Thus, we will permit entrepreneurs' block licensees to transfer their licenses in years four through five to other entrepreneurs' block licensees even if it would result in growth beyond the permissible gross assets and total revenues caps, as long as it otherwise complies with our control group and equity requirements. We believe this encourages designated entities to grow, instead of penalizing them for their success, which was a concern expressed by some commenters.²⁴⁷

126. Further, we clarify that between years four and five we will allow licensees to transfer a license to any entity that either holds other entrepreneurs' block licenses (and thus at the time of auction satisfied the entrepreneurs' block criteria) or that satisfies the criteria at the time of transfer. Unjust enrichment penalties (as described above) apply if these requirements are not met, or if they qualified for different provisions at the time of licensing. For purposes of determining size eligibility for transfers or assignments that occur between the fourth and fifth years, we will use the most recently available audited financial statements in cases where the entity to whom the license is being transferred did not win a license in the

²⁴³ See *Broadband PCS Reconsideration Order*, FCC 94-144 at ¶¶ 69-70, *further recon. Third Memorandum Opinion and Order* in Gen. Docket 90-314, FCC 94-265 (released Oct. 19, 1994).

²⁴⁴ *Id.* at ¶ 67. See also 47 C.F.R. § 24.404.

²⁴⁵ See *Second Report and Order* in Gen. Docket 90-314, 8 FCC Rcd 7700 (1993), *recon. Memorandum Opinion and Order*, 9 FCC Rcd 4441 (1994), *Order on Reconsideration*, 9 FCC Rcd 4441 (1994), *on further recon. Third Memorandum Opinion and Order*, FCC 94-265 (released Oct. 19, 1994). See also BET Petition at 3 (opposing CTIA proposal); McCaw Opposition to Petitions for Reconsideration (McCaw Opposition), filed Sept. 9, 1994, at 2-3 (supporting CTIA proposal).

²⁴⁶ See *Fifth Report and Order*, FCC 94-178 at ¶ 167 (for a discussion of application of holding rule to the financial caps).

²⁴⁷ See, e.g., MasTec Opposition to Petitions for Reconsideration (MasTec Opposition), filed Sept. 9, 1994, at 8; MEANS/SDN Opposition at 9-10; Omnipoint at 3.

original entrepreneurs' block auction.

127. AIDE sought clarification concerning the application of our unjust enrichment provisions to our holding period and limited transfer rules. In response to their request, we reiterate that if a designated entity transfers or assigns its license before year five to a company that qualifies for no bidding credit, then such a sale will entail full payment of the bidding credit as a condition of transfer. If, however, the same transaction occurs (during the same time frame), but the buyer is eligible for a lesser bidding credit, then the difference between the bidding credit obtained by the seller and the bidding credit for which the buyer would qualify, must be paid to the U.S. Treasury for the transaction to be approved by the FCC. With respect to installment payments, we confirm that we expect that when the purchaser is not to an entity that qualifies for any installment payment plan, we will require payment of the unpaid balance in full before the sale will be approved.

F. Miscellaneous

1. Audits

128. In the *Fifth Report and Order*, we expressed our intention to conduct random pre- and post-auction audits to ensure that designated entities retain *de facto* and *de jure* control of their facilities and licenses and to ensure that all applicants receiving preferences are in compliance with the eligibility requirements.²⁸⁸ On reconsideration, we clarify on our own motion that the Commission's use of the term "random" in the *Fifth Report and Order* was generic and that the Commission does not intend to limit itself to conducting "random" audits. While random selection for audit may be one, acceptable enforcement technique in some cases, it may not be the most efficient. We expect that audits might also be undertaken on information received from third parties or on the basis of other factors.²⁸⁹ Since the audit process will involve the application of in-house and contract resources, we intend to pursue a course of audits that will be efficient as well as effective. Consequently, we are amending

²⁸⁸ See *Fifth Report and Order*, FCC 94-178 at ¶¶ 117, 128; 47 C.F.R. § 24.709(d). See also *Second Memorandum Opinion and Order*, FCC 94-215 at ¶ 135 (general auction rules); 47 C.F.R. § 1.2110(h); *Third Memorandum Opinion and Order*, FCC 94-219 at ¶¶ 56, 63 (general auction rules and narrowband PCS); 47 C.F.R. § 24.309(d).

²⁸⁹ While we anticipate that public scrutiny of entrepreneurs' block applications and the petition to deny process, together with audits, will assist the Commission in uncovering potentially unqualified applicants for the entrepreneurs' blocks, we will in no way condone the filing of frivolous complaints or petitions. We will take appropriate action against those who abuse our processes. We also emphasize that the initiation of an investigation by the Commission (whether pursuant to a complaint or on our own initiative) will not result in the suspension of construction or operation of a licensee's facilities pending the outcome of such investigation.

the rules to more fully reflect the variety of circumstances that might lead to an audit. We will also add an audit consent to the FCC short-form and other forms where eligibility must be established. Because the Commission's audit program will cover all auction applications, regardless of the service involved, we will promulgate conforming amendments to Subpart Q in Part 1 of the Commission's regulations in a separate Order.

129. Audits and other enforcement vehicles are a necessary adjunct to a self-certification process to implement the measures to assist designated entities adopted pursuant to Section 309(j) of the Communications Act. To facilitate our audit program and to provide preliminary assurances that those applicants claiming eligibility for such preferences are in compliance with the regulatory requirements concerning ownership and financial status, we will require that applicants list their control group members, affiliates, attributable investors, gross revenues, total assets and other basic ownership and eligibility information in an exhibit to their short-form applications. Additional, more detailed information concerning eligibility will be required of winning bidders. All applicants are required to maintain an updated file of documentary evidence supporting the information and the status claimed. Applicants that do not win the licenses for which they applied, shall maintain such records until final grant of the license(s) in question, or one year from the date of the filing of their short-form applications, whichever is earlier. Licensees shall maintain such records for the term of the license.

2. Defaults

130. Parties have asked questions about how the Commission would resolve issues associated with an entrepreneurs' block licensee becoming financially insolvent. In particular, there is concern about the status of the license when the licensee cannot make the required installment payments, and in the case of when a licensee enters bankruptcy.²⁹⁰

131. In the *Second Report and Order*, we clarified that "a designated entity that has defaulted or that anticipates default under an installment payment program" may request a three to six-month grace period before the Commission cancels its license.²⁹¹

"During this grace period, a defaulting licensee could maintain its construction efforts and/or operations while seeking funds to continue payments or seek from the Commission a restructured payment plan. We will evaluate requests for a grace period on a case-by-case basis . . . deciding whether to grant such requests or to pursue other measures, we may consider, for example, the licensee's payment history, including whether it has defaulted before and how

²⁹⁰ North American Wireless *ex parte* comments, filed Nov. 3, 1994, at 2-3; Nation's Bank and NationsBanc Capital Markets, Inc. *ex parte* comments, Nov. 3, 1994, at 2-3.

²⁹¹ See *Second Report and Order*, FCC 94-61 at ¶ 240.

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 a distress sale policy. Following a grace period without successful resumption of payment or upon denial of a grace period request, we will declare the license cancelled and take appropriate measures under the Commission's debt collection rules and procedures."²⁹²

132. Since several commenters (discussed *supra* at note 287) requested clarification as to what the Commission would allow in the event a licensee defaults on payment of its installment monies, we clarify that lenders and entrepreneurs' block licensees are free to agree contractually to their own terms regarding situations where the licensee has defaulted under the Commission's installment payment program, and possibly other obligations. As long as there is no transfer of control, we would not become involved in the particulars of a voluntary workout arrangement between a designated entity and a third-party lender.

133. Specifically, an entrepreneurs' block licensee and its lenders may agree that, in the event the licensee defaults on its installment payments, the lenders to that licensee will cure this default by assuming the designated entity's payments to the government. Barring any transfer of control, we would not object to such an arrangement.

134. In the event a transfer of control is sought under the terms of the workout, the licensee and its lenders must apply for Commission approval of the transfer, in accordance with Section 310(d) of the Communications Act. In a situation where the lender itself is the proposed buyer or transferee, we would scrutinize such an application to determine whether, by virtue of the loan agreement, an earlier transfer of control was effectuated. We clarify that we would also expect that any requirements that arise by virtue of a licensee's status as an entrepreneur or as a designated entity would be satisfied with respect to such a sale. Thus, for example, the transfer would need to be to another qualified entrepreneur if it is to occur within our five-year holding period.

135. In the event an entrepreneurs' block licensee becomes subject to bankruptcy, our existing rules and precedent clarify how the Commission would dispose of a license in such a circumstance. Specifically, transfer to a bankruptcy trustee is viewed as an involuntary transfer or assignment to another party under Section 24.839 of the Commission's Rules.²⁹³ In such a case therefore, there would be a *pro forma* involuntary assignment of the license to a court-appointed trustee in bankruptcy, or to the licensee, as a debtor-in-possession. Assuming the bankrupt estate is liquidated or the trustee finds a

²⁹² *Id.*

²⁹³ In the case of an involuntary transfer, FCC Form 490 shall be filed within thirty days following the event that gives rise to the transfer. *See* 47 C.F.R. § 24.839.

qualified purchaser for the licensee's system, and assuming payments to the Commission are maintained or a grace period granted, we will continue generally to defer to federal bankruptcy laws on many matters.²⁹⁴ We would, however, ultimately have to approve any final transfer of the license. As stated above, we would expect that any requirements that arise by virtue of a licensee's status as an entrepreneur or as a designated entity would be satisfied with respect to such a sale. Thus, for example, the transfer would need to be to another qualified entrepreneur if it is to occur within our five-year holding period.

IV. PROCEDURAL MATTERS

A. Final Regulatory Flexibility Analysis

136. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. § 604, the Commission's final analysis for the *Memorandum Opinion and Order* is as follows:

Need for, and Purpose of, this Action. As a result of new statutory authority, the Commission may utilize competitive bidding mechanisms in the granting of certain initial licenses. The Commission published an Initial Regulatory Flexibility Analysis, *see generally* 5 U.S.C. § 603, in the *Notice of Proposed Rule Making* in this proceeding and published Final Regulatory Flexibility Analyses in the *Second Report and Order* (at ¶¶ 299-302) and the *Fifth Report and Order* (at ¶¶ 219-222). As noted in these previous final analyses, this proceeding will establish a system of competitive bidding for choosing among certain applications for initial licenses, and will carry out statutory mandates that certain designated entities, including small entities, be afforded an opportunity to participate in the competitive bidding process and in the provision of spectrum-based services.

Summary of the Issues Raised by the Public Comments. No commenters responded specifically to the issues raised by the *Fifth Report and Order*. We have made some modifications to the proposed requirements as appropriate.

Significant Alternatives Considered and Rejected. All significant alternatives have been addressed in the *Fifth Report and Order* and in this *Memorandum Opinion and Order*.

B. Ordering Clauses

137. Accordingly, **IT IS ORDERED** that the Petitions for Reconsideration and/or Clarification of the *Fifth Report and Order* in this proceeding **ARE GRANTED** to the extent described above and **DENIED** in all other respects.

138. **IT IS FURTHER ORDERED** that the Petition for Rulemaking filed by David

²⁹⁴ See *LaRose v. FCC*, 494 F.2d 1145 (D.C.Cir. 1974). See also 47 C.F.R. § 24.839(d)(4).

J. Lieto on September 21, 1994 is hereby **DISMISSED**.

139. **IT IS FURTHER ORDERED** that the Petitions for Reconsideration of the *Order on Reconsideration*, FCC 94-217, adopted in this proceeding **ARE GRANTED** to the extent described above and **DENIED** in all other respects.

140. **IT IS FURTHER ORDERED** that Part 24 of the Commission's Rules **IS AMENDED** as set forth in Appendix B.

141. **IT IS FURTHER ORDERED** that these rule changes made herein **WILL BECOME EFFECTIVE** sixty (60) days after 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).

142. **IT IS FURTHER ORDERED** that the appropriate Bureau, in consultation with the Managing Director, is delegated authority to revise FCC Forms 175, 401 (and any successor forms) and to modify and create any additional forms to ensure that PCS applicants are in compliance with the requirements set forth in Parts 1 and 24 of the Commission's Rules, as amended.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Appendix A

List of Parties who Filed Petitions for Reconsideration of the Fifth Report and Order in PP Docket 93-253

American Personal Communications (APC)
Association of Independent Designated Entities (AIDE)
BET Holdings, Inc. (BET)
Cellular Telecommunications Industry Association (CTIA)
Century Telephone Enterprises, Inc. (Century)
Citizens Utilities Company (Citizens)
Columbia PCS, Inc. (Columbia PCS)
Cook Inlet Region, Inc. (Cook Inlet)
EATELCORP, Inc. (EATEL)
GTE Service Corporation (GTE)
Hernandez, Roland A. (Hernandez)
Hicks and Ragland Engineering Company, Inc. (Hicks and Ragland)
Karl Brothers, Inc. (Karl Brothers)
Lehman Brothers (Lehman)
MasTec, Inc. (MasTec)
McCaw Cellular Communications, Inc. (McCaw)
Metrex Communications Group, Inc. (Metrex)
Minnesota Equal Access Network Services, Inc. and
South Dakota Network, Inc. (Joint) (MEANS/SDN)
National Association of Black Owned Broadcasters, Inc. (NABOB)
National Paging and Personal Communications Association (NPPCA)
Omnipoint Communications, Inc. (Omnipoint)
Pacific Bell Mobile Services (Pacific Bell)
Pacific Telecom Cellular, Inc. (PTC)
Small Business PCS Association (SBPCS)
Telephone Electronics Corporation (TEC)
United States Interactive & Microwave Television Association (USIMTA)

Oppositions filed in Response to Petitions for Reconsideration

Association of Independent Designated Entities (AIDE)
American Personal Communications (APC)
BET Holdings, Inc. (BET)
Columbia PCS, Inc. (Columbia)
Cook Inlet Region, Inc. (Cook)
DCR Communications, Inc. (DCR)
Encompass, Inc. (Encompass)

Mankato Citizens Telephone Co. (Mankato)
MasTec (MasTec)
McCaw Cellular Communications, Inc. (McCaw)
Minnesota Equal Access Network Services, Inc. and South Dakota Network, Inc.
Omnipoint Communications, Inc. (Omnipoint)
Pacific Bell Mobile Services (PacBell)
Personal Communications Industry Association (PCIA)
Telephone and Data Systems, Inc. (TDS)
United States Telephone Association (USTA)
Vanguard Cellular Systems, Inc. (Vanguard)

Replies filed in Response to Petitions for Reconsideration

BET Holdings, Inc. (BET)
City of Dallas (Dallas)
GO Communications Corporation (formerly Columbia PCS, Inc.) (Columbia PCS)
McCaw Cellular Communications, Inc. (McCaw)
Minnesota Equal Access Equal Access Network Services, Inc.
and South Dakota Network, Inc. (Minnesota)
National Paging & Personal Communications Association (NPPCA)
Omnipoint Communications (Omnipoint)
Small Business Administration (SBA)

Ex parte filings in Response to Fifth Report and Order

Airtouch Communications (Airtouch)
Allied Communications, L.P.
Bachow & Associates
Bastion Capital Fund, L.P., LM Capital Fund II, L.P.
BellSouth Corporation (BellSouth)
BET Holdings, Inc. (BET)
Cellular Telecommunications Industry Association (CTIA)
Columbia PCS/Go Communications (Columbia/GO)
Columbus Grove Telephone Co. (CGTC)
Comcast Corp. (Comcast)
Congress of the United States
Cook Inlet Communications (Cook Inlet)
Cox Enterprises, Inc. (Cox)
DCR Communications (DCR)
EATELCORP, Inc. (EATEL)
Encompass, Inc. (Encompass)
Fidelity Capital
Fleischman and Walsh (F&W)
GTE Service Corporation (GTE)

Gurman et al. (Gurman)
Hart Engineers (Hart)
Hernandez, Roland, Interspan Communications, Corp.
Impulse Telecommuncations, Corp. (Impulse)
In-Flight Phone International (In-Flight)
Jordan, Vernon E.
Kraskin & Associates (Kraskin)
Lehman Brothers (Lehman)
Marshall Company (Forming New Communications Services, Inc. [NEWCOM])
MasTec, Inc. (MasTec)
Media Communications Partners (Providence, Fleet Equity, Spectrum)
Metro-Sound, USA (L.A. Sound)
Minority Business Enterprise Legal Defense and Education Fund, Inc. (MBELDEF)
Minority Media Ownership & Employment Council (MMOEC)
Montgomery Securities (Montgomery)
NationsBank and NationsBanc Capital Markets, Inc. (NationsBank)
North American Wireless, Incorporated
Murray, James B. Jr.
National Rainbow Coalition
Omnipoint Corporation (Omnipoint)
Pacific Bell (Pac Bell)
Pacific Telesis
Rakolta, Terry
Skadden, Arps, Slate, Meagher & Flom
Small Business Administration (SBA)
Small Business Advisory Committee (SBAC)
Small Business PCS Association (SBPCSA)
Telephone Electronics Corporation (TEC)
Unterberg Harris
U.S. Intelco Networks, Inc. (USIN)
Utilities, Inc. (Utilities)
Vanguard Cellular Systems, Inc. (Vanguard)
Venture Capital Representatives: The Carlyle Group, Daniels & Associates, Fleet Equity
Partners, Madison Dearborn, MC Partners, Providence Ventures Inc., Spectrum Equity
Investors. (Venture Capital Representatives)
Wiley, Rein & Fielding

Appendix B

Amended Rules

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

1. Section 24.709 is revised to read as follows:

§ 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.

(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, 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)(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 by *qualifying investors*, either unconditionally or in the form of stock options not subject to the restrictions of paragraph (b)(5)(i)(A) of this section, or by any of the following entities, which may not comply with section 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; or

(3) Individuals that are members of the applicant's (or licensee's) management, either unconditionally or in the form of stock options.

(D) Following termination of the three-year period specified in paragraph (b)(5)(i) of this section, *qualifying investors* must continue to own at least 10 percent of the applicant's (or licensee's) total equity, either unconditionally or in the form of stock options subject to the restrictions in paragraph (b)(5)(i)(A) of this section. The restrictions specified in paragraph (b)(5)(i)(C)(1)-(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 25 percent minimum equity requirements set forth in paragraph (b)(5)(i) of this section shall apply, except that only 10 percent of the applicant's (or licensee's) total equity must be held by *qualifying investors* and that the remaining 15 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 15 percent of the licensee's total equity no longer apply after termination of the three-year period specified in paragraph (b)(5)(i) of this section.

(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 minority and/or women 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 minority and/or women 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)(5)(i)(A) of this section, or by any of the following entities, which may not comply with section 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; or

(3) Individuals that are members of the applicant's (or licensee's) management, either unconditionally or in the form of stock options.

(D) Following termination of the three-year period specified in paragraph (b)(6)(i) of this section, *qualifying minority and/or women investors* must continue to own at least 20 percent of the applicant's (or licensee's) total equity, either 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)-(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 minority and/or women investors* and that the remaining 30.1 percent of the applicant's (or licensee's) total equity may be held by *qualifying minority and/or women 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 interests in an applicant (or licensee) that are *affiliates* of each other or have an identity of interests identified in § 24.720(l)(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: 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 and 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: ABC Corp. has a 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.

(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 the 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 identity 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 identity 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., §§ 24.204(f), 20.6(e), 20.9(b)), each applicant submitting a long-form application for license(s) for frequency blocks C and 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 through 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(s) (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 women*, *consortium of small businesses*, *control group*, *existing investor*, *gross revenues*, *institutional investor*, *members of minority groups*, *nonattributable equity*, *preexisting entity*, *publicly traded corporation with widely dispersed voting power*, *qualifying investor*, *qualifying minority and/or woman investor*, and *total assets* used in this section are defined in § 24.720.

2. Section 24.711 is amended to read as follows:

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

(a) Upfront Payments and Down Payments.

(1) Each eligible bidder for licenses on frequency Blocks C or F subject to auction shall pay an upfront payment of \$0.015 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.

(2) Each winning bidder shall make a down payment equal to ten percent of its winning bid (less applicable bidding credits); a winning bidder shall bring its total amount on deposit with the Commission (including upfront payment) to five percent of its net winning bid within five business days after the auction closes, and the remainder of the down payment (five percent) shall be paid within five business days after the application required by § 24.809(b) is granted.

(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(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, 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

(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 Groups 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 having 100,000 or fewer access lines, including all *affiliates*.

(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 calendar years preceding January 1, 1994, 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). For short-form applications filed after December 31, 1995, gross revenues shall be evidenced by audited financial statements for the preceding relevant number of calendar or fiscal years. 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.

(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.

(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 of 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: 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(l)(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

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.

(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 (*i.e.*, from sources whose *gross revenues* and *total assets* are not considered under § 24.709(b)), 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.

3. Section 24.712 is amended by revising paragraph (d) to read as follows:

§ 24.712 Bidding credits for licenses for frequency Blocks C and F.

* * * * *

(d) Unjust Enrichment.

(1) If during the term of the initial license grant (*see* § 24.15), a licensee that utilizes a bidding credit under this section seeks to assign or transfer control of its license to an entity not meeting the eligibility standards for bidding credits or seeks to make any other

change in ownership that would result in the licensee no longer qualifying for bidding credits under this section, the licensee must seek Commission approval and reimburse the government for the amount of the bidding credit as a condition of the approval of such assignment, transfer or other ownership change.

(2) If during the term of the initial license grant (*see* § 24.15), a licensee that utilizes a bidding credit under this section seeks to assign or transfer control of its license to an entity meeting the eligibility standards for lower bidding credits or seeks to make any other change in ownership that would result in the licensee qualifying for a lower bidding credit under this section, the licensee must seek Commission approval and reimburse the government for the difference between the amount of the bidding credit obtained by the licensee and the bidding credit for which the assignee, transferee or licensee is eligible under this section as a condition of the approval of such assignment, transfer or other ownership change.

4. Section 24.720 is revised to read as follows:

§ 24.720 Definitions.

(a) Scope. The definitions in this section apply to §§ 24.709 through 24.714, unless otherwise specified in those sections.

(b) Small Business: Consortium of Small Businesses.

(1) A *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 \$40 million for the preceding three years.

(2) 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, 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).

(3) 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)(2) 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

applicant") if such individual or entity :

- (i) Directly or indirectly controls or has the power to control the applicant, or
- (ii) Is directly or indirectly controlled by the applicant, or
- (iii) Is directly or indirectly controlled by a third party or parties that also controls or has the power to control the applicant, or
- (iv) Has an "identity of interest" with the applicant.

(2) Nature of control in determining affiliation.

(i) Every business concern is considered to have one or more parties who directly or indirectly control or have the power to control it. Control may be affirmative or negative and it is immaterial whether it is exercised so long as the power to control exists.

Example. An applicant owning 50 percent of the voting stock of another concern would have negative power to control such concern since such party can block any action of the other stockholders. Also, the bylaws of a corporation may permit a stockholder with less than 50 percent of the voting stock to block any actions taken by the other stockholders in the other entity. Affiliation exists when the applicant has the power to control a concern while at the same time another person, or persons, are in control of the concern at the will of the party or parties with the power to control.

(ii) Control can arise through stock ownership; occupancy of director, officer or key employee positions; contractual or other business relations; or combinations of these and other factors. A key employee is an employee who, because of his/her position in the concern, has a critical influence in or substantive control over the operations or management of the concern.

(iii) Control can arise through management positions where a concern's voting stock is so widely distributed that no effective control can be established.

Example. In a corporation where the officers and directors own various size blocks of stock totaling 40 percent of the corporation's voting stock, but no officer or director has a block sufficient to give him or her control or the power to control and the remaining 60 percent is widely distributed with no individual stockholder having a stock interest greater than 10 percent, management has the 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 in 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. 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. If company B holds an option to purchase a controlling interest in company A, who holds an attributable interest in a PCS application, the situation is treated as though company B had exercised its rights and had become owner of a controlling interest in company A. The gross revenues of company B must be taken into account in determining the size of the applicant.

Example 2. If a large company, BigCo, holds 70% (70 of 100 outstanding shares) of the voting stock of company A, who holds an attributable interest in a PCS application, and gives a third party, SmallCo, an option to purchase 50 of the 70 shares owned by BigCo, BigCo will be deemed to be an affiliate of company A, and thus the applicant, until SmallCo actually exercises its option to purchase such shares. In order to prevent BigCo from circumventing the intent of the rule which requires such options to be considered on a fully diluted basis, the option is not considered to have present effect in this case.

Example 3. If company A has entered into an agreement to merge with company B in the future, the situation is treated as though the merger has taken place.

(6) Affiliation under voting trusts.

(i) Stock interests held in trust shall be deemed controlled by any person who holds or shares the power to vote such stock, to any person who has the sole power to sell such stock, and to any person who has the right to revoke the trust at will or to replace the trustee at will.

(ii) If a trustee has a familial, personal or extra-trust business relationship to the grantor or the beneficiary, the stock interests held in trust will be deemed controlled by the grantor or beneficiary, as appropriate.

(iii) If the primary purpose of a voting trust, or similar agreement, is to separate voting power from beneficial ownership of voting stock for the purpose of shifting control of or the power to control a concern in order that such concern or another concern may meet the Commission's size standards, such voting trust shall not be considered valid for this purpose regardless of whether it is or is not recognized within the appropriate jurisdiction.

(7) Affiliation through common management. Affiliation generally arises where officers, directors, or key employees serve as the majority or otherwise as the controlling element of the board of directors and/or the management of another entity.

(8) Affiliation through common facilities. Affiliation generally arises where one concern shares office space and/or employees and/or other facilities with another concern, particularly where such concerns are in the same or related industry or field of operations, or where such concerns were formerly affiliated, and through these sharing arrangements one concern has control, or potential control, of the other concern.

(9) Affiliation through contractual relationships. Affiliation generally arises where one concern is dependent upon another concern for contracts and business to such a degree that one concern has control, or potential control, of the other concern.

(10) Affiliation under joint venture arrangements.

(i) A joint venture for size determination purposes is an association of concerns and/or individuals, with interests in any degree or proportion, formed by contract, express or implied, to engage in and carry out a single, specific business venture for joint profit for which purpose they combine their efforts, property, money, skill and knowledge, but not on a continuing or permanent basis for conducting business generally. The determination whether an entity is a joint venture is based upon the facts of the business operation, regardless of how the business operation may be designated by the parties involved. An agreement to share profits/losses proportionate to each party's contribution to the business operation is a significant factor in determining whether the business operation is a joint venture.

(ii) The parties to a joint venture are considered to be affiliated with each other.

(11) Exclusions from affiliation coverage.

(i) For purposes of § 24.709(a)(2) and paragraph (b)(2) 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 paragraph (b) 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*.

(ii) For purposes of § 24.709(a)(2) and paragraph (b)(2) of this section, an entity controlled by *members of minority groups* is not considered an *affiliate* of an applicant (or licensee) that qualify as a *business owned by members of minority groups and/or women* if *affiliation* would arise solely from control of such entity by members of the applicant's (or licensee's) control group who are *members of minority groups*. For purposes of this subparagraph, the term minority-controlled entity shall mean, in the case of a corporation, an entity in which 50.1 percent of the voting interests is owned by *members of minority groups* or, in the case of a partnership, all of the general partners are *members of minority groups* or entities controlled by *members of minority groups*; and, in all cases, one in which *members of minority groups* have both *de jure* and *de facto* control of the entity.

(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

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

DA 95-19

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

ERRATUM

Released: January 10, 1995

1. This Erratum revises the *Fifth Memorandum Opinion and Order* in the above-captioned proceeding, FCC 94-285 (Rel. Nov. 23, 1994). The revisions set forth below have been made prior to publication in the FCC Record and thus will be incorporated into the published document.

2. Paragraph 64 is revised to read as follows:

64. Specifically, we will retain the 25 percent minimum equity requirement for the control group, but we will require only 15 percent (*i.e.*, 60 percent of the control group's 25 percent equity holdings) to be held by qualifying, controlling principals in the control group (*i.e.*, minorities, women or small/entrepreneurial business principals).¹⁵⁸ For example, if the applicant seeks minority or women-owned status, the 15 percent equity, as well as 50.1 percent of the voting stock of the control group and all of its general partnership interests, must be owned by control group members who are minorities and/or women. If the applicant seeks small business status, 15 percent of the equity, as well as 50.1 percent of the control group's voting stock and all of its general partnership interests, must be held by control group members who, in the aggregate, qualify as a small business.¹⁵⁹ With regard to

¹⁵⁸ See Media Communications Partners *ex parte* comments, filed Oct. 11, 1994, at 7-8.

¹⁵⁹ For instance, if a preexisting company wants to qualify as a small business control group, its gross revenues and total assets will be added to the gross revenues and assets of each of its controlling shareholders and to those of all affiliates. The resulting sum must be under \$40 million in gross revenues and \$500 million in total assets. The gross revenues and total assets of the company's preexisting, noncontrolling shareholders will be ignored, however.

establishing control of the applicant by qualified investors, where the control group is composed of both qualifying and nonqualifying members, the qualifying members in the control group must have 50.1 percent of the voting stock and all general partnership interests within the control group, and maintain *de facto* control of the control group. The control group, in turn, must hold 50.1 percent of the voting stock and all general partnership interests of the PCS applicant. Thus, qualifying members of the control group will have *de jure* and *de facto* control of both the control group and, indirectly, the applicant. The composition of the principals of the control group and their legal and active control of the applicant determines whether the applicant qualifies for bidding credits, installment payments and reduced upfront payments. The 15 percent minimum equity amount may be held in the form of options, provided these options are exercisable at any time, solely at the holder's discretion, and at an exercise price equal to or less than the current market valuation of the underlying shares at the time of short-form filing. The remaining 10 percent (*i.e.*, 40 percent of the control group's minimum equity holdings) may be held in the form of either stock options or shares, and we will allow certain investors that are not minorities, women, small businesses or entrepreneurs to hold interests in such shares or options. Specifically, we will allow the 10 percent portion to be held in the form of shares or stock options by qualifying investors or by any of the following entities which may not comply with the entrepreneurs' block requirements (*e.g.* investors who are not minorities or women or investors, and/or their affiliates, that exceed the entrepreneurs' block or small business size thresholds): (1) individuals who are members of an applicant's management team; (2) existing investors of businesses in the control group that were operating and earning revenues for two years prior to December 31, 1994; or (3) noncontrolling institutional investors.¹⁶⁰

3. Paragraph 65 is revised to read as follows:

65. As discussed *supra* at paragraph 59, the Commission also adopted an alternative to the 25 percent minimum equity requirement for minority and women-owned businesses, which permits a single investor to hold as much as 49.9 percent of its equity, provided the control group holds at least 50.1 percent. Several petitioners have expressed similar concerns with respect to the need to revise the 50.1 percent requirement.¹⁶¹ Therefore, in tandem with, and for the same reasons as, the modifications to the 25 percent equity requirement, we make similar modifications to the rules governing the 50.1 percent minimum equity requirement. Accordingly, where a minority or women-owned business uses the 50.1 percent minimum equity option, we will require only 30 percent of the total equity to be held by the principals of the control group that are minorities or women. The 30 percent may be held in the form of options, provided these options are exercisable at any time, solely at the holder's discretion, and at an exercise price equal to or less than the current market valuation

¹⁶⁰ See note 162 *infra* (explaining definition of institutional investors).

¹⁶¹ See, *e.g.*, BET Petition at 16; Columbia PCS Petition at 2-3; Omnipoint Petition at 9.

of the underlying shares at the time of short-form filing. The remaining 20.1 percent may be made up of shares and/or options held by investors that are not women or minorities under similar criteria described in paragraph 64 above. That is, the 20.1 percent portion of the control group's equity may be held in the form of shares or stock options by qualifying investors or by any of the following entities which may not comply with the entrepreneurs' block requirements (e.g. investors who are not minorities or women or investors, and/or their affiliates, that exceed the entrepreneurs' block or small business size thresholds): (1) individuals who are members of an applicant's management team; (2) existing investors of businesses in the control group that were operating and earning revenues for two years prior to December 31, 1994; or (3) noncontrolling institutional investors.¹⁶²

4. Section 24.709(b)(5)(i)(B) is revised to read as follows:

(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;

5. Section 24.709(b)(5)(i)(C) is revised to read as follows:

(C) The remaining 10 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)(5)(i)(A) of this section, or by any of the following entities, which may not comply with section 24.720(n)(1):

¹⁶² For our purposes, we define institutional investors in a manner that is similar to the definition that is used by the Commission in the attribution rules applied to assess compliance with the broadcast multiple ownership rules. We modify that definition slightly, however, to fit this service. Specifically, we expect that investment companies will be important sources of capital formation for designated entities. Accordingly, we adopt a definition that specifically includes venture capital firms and other smaller investment companies that may not be included in the definition of investment companies found in 15 U.S.C. § 80a-3 (which is cited in our broadcast rules at 47 C.F.R. § 73.3555 Note 2(c)). Specifically, we define an *institutional investor* as an insurance company, a bank holding stock in trust accounts through its trust department, or an investment company as defined under 15 U.S.C. § 80a-3(a). We include in the 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) and we do so without regard to whether the entity is an issuer of securities. However, if the investment company is owned, in whole or in part, by other entities, the investment company, other entities and *affiliates* of 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. See Section 24.720(h).

(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; or

(3) Individuals that are members of the applicant's (or licensee's) management, either unconditionally or in the form of stock options.

6. Section 24.709(b)(6)(i)(B) is revised to read as follows:

(B) Such *qualifying minority and/or women 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;

7. Section 24.709(b)(6)(i)(C) is revised to read as follows:

(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)(5)(i)(A) of this section, or by any of the following entities, which may not comply with section 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; or

(3) Individuals that are members of the applicant's (or licensee's) management, either unconditionally or in the form of stock options.

8. Sections 24.711(b)(1) and 24.711(b)(2) are revised to read as follows:

(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.

9. Sections 24.712(d)(1) and 24.712(d)(2) are revised to read as follows:

(1) If during the term of the initial license grant (*see* § 24.15), a licensee that utilizes a bidding credit under this section seeks to assign or transfer control of its license to an entity not meeting the eligibility standards for bidding credits or seeks to make any other change in ownership that would result in the licensee no longer qualifying for bidding credits under this section, the licensee must seek Commission approval and reimburse the government for the amount of the bidding credit as a condition of the approval of such assignment, transfer or other ownership change.

(2) If during the term of the initial license grant (*see* § 24.15), a licensee that utilizes a bidding credit under this section seeks to assign or transfer control of its license to an entity meeting the eligibility standards for lower bidding credits or seeks to make any other change in ownership that would result in the licensee qualifying for a lower bidding credit under this section, the licensee must seek Commission approval and reimburse the government for the difference between the amount of the bidding credit obtained by the licensee and the bidding credit for which the assignee, transferee or licensee is eligible under this section as a condition of the approval of such assignment, transfer or other ownership change.

10. Section 24.720(h) is revised to read as follows:

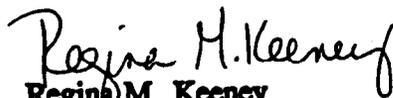
(h) ***Institutional Investor.*** An *institutional investor* is an insurance company, a bank holding stock in trust accounts through its trust department, or an investment company as defined in 15 U.S.C. § 80a-3(a), including within such definition any entity that would otherwise meet the definition 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.

11. Section 24.720(f) is revised to read as follows:

(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 calendar years preceding January 1, 1994, 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). For short-form applications filed after December 31, 1995, gross revenues shall be evidenced by audited financial statements for the

preceding relevant number of calendar or fiscal years. 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.

FEDERAL COMMUNICATIONS COMMISSION



Regina M. Keeney

Chief, Wireless Telecommunications Bureau

V. F. Partial Bibliography of FCC Rules and Regulations for Personal Communications Systems (PCS)

1. IMPLEMENTATION OF SECTIONS 309(J) OF THE COMMUNICATIONS ACT - COMPETITIVE BIDDING, PP Docket No. 93-253

FCC 94-61, **Second Report and Order**, 9 FCC Rcd 2348 (1994); 59 Fed. Reg. 22,980 (May 4, 1994) and **Erratum** (released May 12, 1994)

FCC 94-215, **Second Memorandum Opinion and Order**, 9 FCC Rcd 7245 (1994); 59 Fed. Reg. 44,272 (Aug. 26, 1994); **Erratum**, Mimeo No. 50278 (Oct. 19, 1994);

FCC 94-178, **Fifth Report and Order**, 9 FCC Rcd. 5532 (1994); 59 Fed. Reg. 37,566 (July 22, 1994);

FCC 94-217, **Order of Reconsideration**, 9 FCC Rcd 4493 (1994); 59 Fed. Reg. 43,062 (Aug. 22, 1994);

FCC 94-240, **Order of Reconsideration**, 9 FCC Rcd 5306 (1994); 59 Fed. Reg. 50,509 (Oct. 4, 1994);

FCC 94-264, **Fourth Memorandum Opinion and Order**, 9 FCC Rcd 6858 (1994); 59 Fed. Reg. 53,364 (Oct. 24, 1994);

FCC 94-285, **Fifth Memorandum Opinion and Order**, 10 FCC Rcd 403 (1994); 59 Fed. Reg. 63,210 (Dec. 7, 1994); **Erratum**, DA 95-19 (Jan. 10, 1995); 60 Fed. Reg. 5,333 (Jan. 27, 1995);

FCC 94-295, **Memorandum Opinion and Order**, 9 FCC Rcd 7684 (1994); 59 Fed. Reg. 64,159 (Dec. 13, 1994);

FCC 94-198. **Further Notice of Proposed Rule Making**, 9 FCC Rcd 6775 (1994); 59 Fed. Reg. 41,426 (Aug. 12, 1994);

2. AMENDMENT OF THE COMMISSION'S RULES TO ESTABLISH NEW PERSONAL COMMUNICATIONS SERVICES (PCS), General Docket No. 90-314 and ET Docket No. 92-100

FCC 92-333, **Notice of Proposed Rule Making and Tentative Decision**, 7 FCC Rcd 5676 (1992); 57 Fed. Reg. 40,672 (Sep. 4, 1992);

DA 93-1055, **Order**, 8 FCC Rcd 6675 (OET 1993);

FCC 93-451, **Second Report and Order**, 8 FCC Rcd 7700 (1993); 58 Fed. Reg. 59,174 (Nov. 8, 1993); **Erratum** (Nov. 22, 1993) (Broadband Licensed and Unlicensed);

FCC 94-144, **Memorandum Opinion and Order**, 9 FCC Rcd 4957 (1994); 59 Fed. Reg. 32,830 (June 24, 1994) and **Erratum**, Mimeo No. 44006 (July 22, 1994); **Correction**, 59 Fed. Reg. 40,835 (Aug. 10, 1994);

FCC 94-195, **Further Order on Reconsideration**, 9 FCC Rcd 4441 (1994); 59 Fed. Reg. 39,704 (Aug. 4, 1994);

FCC 94-265, **Third Memorandum Opinion and Order**, 9 FCC Rcd 6908 (1994); **Erratum**, Mimeo No. 50507 (Nov. 4, 1994); 59 Fed. Reg. 55,372 (Nov. 7, 1994); **Correction**, 60 Fed. Reg. 3,303 (Jan. 13, 1995);

3. IMPLEMENTATION OF SECTIONS 3(n) and 332 OF THE COMMUNICATIONS ACT- REGULATORY TREATMENT OF MOBILE SERVICES, General Docket No. 93-252; PR Docket No. 93-144; PR Docket No 89-553

FCC 94-31, **Second Report and Order**, 9 FCC Rcd 1411 (1994); 59 Fed. Reg. 18,493 (April 19, 1994); effective date:07/18/94; **Erratum**, DA 94-286, 9 FCC Rcd 2035 (1994)(corrects final rules); **Erratum**, DA 94-443, 9 FCC Rcd 2156 (1994);

FCC 94-212, **Third Report and Order**, 9 FCC Rcd 7988 (1994); 59 Fed. Reg. 59,945 (Nov. 21, 1994);

FCC 94-270, **Fourth Report and Order**, 9 FCC Rcd 7123 (1994); 59 Fed. Reg. 61,828 (Dec. 2, 1994);

4. REDEVELOPMENT OF SPECTRUM TO ENCOURAGE INNOVATION IN THE USE OF NEW TELECOMMUNICATIONS TECHNOLOGIES, EMERGING TECHNOLOGIES ET Docket No. 92-9 (Microwave Relocation)

FCC 92-437, First Report and Order and Third Notice of Proposed Rule Making, 7 FCC Rcd 6886 (1992); Erratum (Oct. 29, 1992); 57 Fed. Reg. 49,020 (Oct. 29, 1992);

FCC 93-350, Second Report and Order, 8 FCC Rcd 6495 (1993); 58 Fed. Reg. 49,220 (Sept. 22, 1993);

FCC 93-351, Third Report and Order and Memorandum Opinion and Order, 8 FCC Rcd 6589 (1993); 58 Fed. Reg. 46,547 (Sept. 2, 1993);

FCC 94-303, Second Memorandum Opinion and Order, 9 FCC Rcd 7797 (1994); 59 Fed. Reg. 65,501 (Dec. 20, 1994);

Shaded documents are included in this Bidder's Information Package under Tab V. All other documents can be ordered from International Transcription Service (ITS) at (202) 857-3800. Additionally, some of these documents can be retrieved from the FCC Internet node via *anonymous FTP@fcc.gov*.

