

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

In the Matter of	)	
	)	
Amendment of the Commission's Rules	)	GEN Docket No. 90-314
to Establish New Personal Communications	)	ET Docket No. 92-100
Services, Narrowband PCS	)	
	)	
Implementation of Section 309(j) of the	)	PP Docket No. 93-253
Communications Act - Competitive Bidding,	)	
Narrowband PCS	)	

**REPORT AND ORDER AND  
FURTHER NOTICE OF PROPOSED RULEMAKING**

**Adopted: April 17, 1997**

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**Comments Due: June 18, 1997**

**Reply Comments Due: July 7, 1997**

By the Commission:

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## I. INTRODUCTION

1. By this *Report and Order and Further Notice of Proposed Rulemaking* ("*R&O/Further Notice*"), we establish competitive bidding rules for awarding the remaining authorizations for narrowband Personal Communications Services (PCS). Furthermore, we decline to provide special relief for those affected by the Canadian Interim Sharing Arrangement.<sup>1</sup> The *Further Notice* seeks comment on a number of proposals relating to licensing and auctions issues. Specifically, we propose modifications to our existing spectrum allocation plan for narrowband PCS.<sup>2</sup> We also address eligibility and service area issues for the narrowband response channels, and tentatively conclude that the reserve narrowband PCS spectrum should be channelized and licensed.<sup>3</sup> We also propose changes to our build-out requirements, as well as modifications to certain provisions of our narrowband PCS competitive bidding rules, in light of the Supreme Court holding in *Adarand Constructors, Inc. v. Peña*.<sup>4</sup>

## II. EXECUTIVE SUMMARY

2. As the expert agency charged with management of the radio frequency spectrum, we continually seek to improve the efficiency of spectrum use, reduce the regulatory burden on spectrum users, encourage competition and provide service to the largest feasible number of users.<sup>5</sup> We believe the modifications and proposals we make below help further these goals. Accordingly, we modify or propose to modify our narrowband PCS rules as follows in this *R&O/Further Notice*.

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<sup>1</sup> See *Public Notice*, "Canadian Interim Sharing Arrangement for Narrowband PCS," DA 94-1183 (rel. Oct. 21, 1994) (*Canadian Interim Sharing Arrangement Public Notice*).

<sup>2</sup> Channels 18-26, in the 901 MHz band and the 930 - 941 MHz bands are the remaining channels currently allocated to be licensed as narrowband PCS. See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Third Report and Order*, PP Docket No. 93-253, 9 FCC Rcd 2941, 2945, . 10 (1994) (*Competitive Bidding Third Report and Order*).

<sup>3</sup> *Infra* at . 29-32. The eight 12.5 kHz unpaired response channels are currently allocated in the 901-902 MHz bands. Eligibility for these licenses is restricted to incumbent paging licensees authorized under Part 22 or Part 90 of our rules as of June 24, 1993. See 47 C.F.R. . 24.129(b).

<sup>4</sup> 115 S. Ct. 2091 (1995) (*Adarand*) (overruling aspects of *Metro Broadcasting v. FCC*, 497 U.S. 547 (1990), and requiring a strict scrutiny standard of review for Congressionally-mandated, race-conscious measures).

<sup>5</sup> 47 U.S.C. . 332(a). See 47 U.S.C. . 257 (1996). See also Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, *Notice of Inquiry*, GN Docket No. 96-113, 11 FCC Rcd 6280 (1996) (*Market Entry Notice of Inquiry*).

3. In the *Report and Order*, we adopt the following modifications to narrowband PCS service and auction rules:

We clarify that Section 24.132 of our rules applies to the regional service areas as well as Major Trading Area (MTA)<sup>6</sup> service areas. We amend paragraphs (d) and (e) of Section 24.132 to reflect that these rules apply to regional areas.

We decline to provide relief to parties affected by the Canadian Interim Sharing Arrangement.<sup>7</sup> We believe that parties were fully aware of the agreement at the time the regional narrowband PCS auction commenced and, therefore, relief is not necessary.

We modify the definition of members of minority groups to conform with the definition used in other contexts.

We decline to establish an entrepreneurs' block for narrowband PCS similar to our provisions in broadband PCS.

4. In the *Further Notice*, we propose changes as set forth below:

We propose to reallocate all of the Basic Trading Area (BTA)<sup>8</sup> channel blocks and some of the MTA channel blocks to create larger service areas. We believe that this reallocation will create additional flexibility for narrowband PCS service providers. In addition, reallocation will serve the public interest and promote competition in the wireless services market.

We propose to eliminate the restriction on paging response channels that limits eligibility for these channels to incumbent paging licensees. We believe elimination of the

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<sup>6</sup> Rand McNally is the copyright owner of the MTA/BTA listings, which list the BTAs contained in each MTA and the counties within each BTA, as embodied in Rand McNally's Trading Areas System MTA/BTA Diskette, and geographically represented in the Rand McNally 1992 Commercial Atlas and Marketing Guide (the "MTA map"), 123rd Edition at pp. 38-39. The conditional use of Rand McNally's copyrighted material by interested persons is authorized under a blanket license agreement dated February 10, 1994, which covers certain services, including PCS. Rand McNally organizes the 50 states and the District of Columbia in 47 MTAs and 487 BTAs. For PCS licensing purposes, we adopted service areas that separated Alaska from the Seattle MTA and added five insular areas: Puerto Rico, U.S. Virgin Islands, Guam, Northern Mariana Islands and American Samoa. In 1994, the number of BTAs was changed to 493 because Puerto Rico was reconfigured into 2 BTA-like service areas. See Amendment of the Commission's Rules to Establish New Narrowband PCS, *Second Memorandum Opinion and Order*, GEN Docket 90-314, 9 FCC Rcd 4519, 4523, . 18 (1994) (*PCS Second MO&O*).

<sup>7</sup> See *Canadian Interim Sharing Arrangement Public Notice*, *supra*, n.1.

<sup>8</sup> See *supra*, n.6.

eligibility restriction will increase the likelihood of awarding the licenses to those who value them most highly.

We propose to channelize and license the remaining one MHz of narrowband PCS spectrum. We believe that licensing this spectrum will facilitate competition by opening the market to new licensees and allowing incumbents to expand their systems.

We propose to modify our existing construction and minimum coverage requirements for both previously-licensed and as-yet unlicensed narrowband PCS spectrum by allowing licensees to meet a "substantial service" benchmark. We believe that allowing such an option will increase buildout flexibility for narrowband PCS licensees.

We propose a partitioning scheme similar to that recently adopted for broadband PCS. This scheme will facilitate the efficient use of narrowband PCS spectrum, increase competition, and expedite the provision of narrowband service to areas that may not otherwise receive narrowband PCS or other wireless services in the near term. We also ask whether disaggregation would be appropriate for narrowband PCS.

We propose to simplify ownership disclosure requirements for narrowband PCS auction applicants.

Additionally, in light of the strict scrutiny standard of review now required under *Adarand Constructors, Inc. v. Peña*, we propose the following modifications to the narrowband PCS auction rules:

We propose to limit eligibility for bidding credits and installment payments to small businesses.

We propose to make bidding credits available on a tiered basis for small businesses. Small businesses with average gross revenues that are not more than \$15 million for the preceding three years would receive a 15 percent credit, while small businesses with average gross revenues that are not more than \$40 million for the preceding three years would receive a 10 percent credit.

5. The Commission makes no representations or warranties about the use of this spectrum. Applicants should be aware that an FCC auction represents an opportunity to become a FCC licensee in this service, subject to certain conditions and regulations. An FCC auction does not constitute an endorsement by the FCC of this service or any particular technologies or products, nor does an FCC licensee constitute a guarantee of business success. Applicants should perform their individual due diligence before proceeding as they would with any new business venture.

### III. BACKGROUND

6. In the *PCS First Report and Order*, the Commission provided for the operation of new, narrowband PCS in the 900 MHz band.<sup>9</sup> We broadly defined PCS as mobile and fixed communications offerings that serve individuals and businesses, and can be integrated with a variety of competing networks.<sup>10</sup> In the *PCS First Report and Order*, we therefore declined to adopt a restrictive definition of narrowband PCS, such as limiting this category of PCS to advanced messaging and paging services, to promote other potential narrowband services.<sup>11</sup> We also adopted a spectrum allocation and channelization plan, licensing rules, and technical standards for narrowband PCS.<sup>12</sup> Consistent with Section 309(j) of the Communications Act of 1934, as amended, we have determined that PCS is subject to competitive bidding in the case of mutually exclusive applications.<sup>13</sup>

7. In the *Competitive Bidding Second Report and Order*, we adopted general competitive bidding rules for auctionable services.<sup>14</sup> In the *Competitive Bidding Third Report and Order*, we established competitive bidding rules specifically for narrowband PCS.<sup>15</sup> On reconsideration of that *Order*, we revised certain auction processing rules, expanded special provisions for designated entities in future narrowband auctions, and sought comment on additional designated entity provisions for the upcoming narrowband PCS auction.<sup>16</sup> Of the three MHz of 900 MHz spectrum allocated for narrowband PCS, two one-MHz blocks are currently divided into specific channels for immediate licensing.<sup>17</sup> The remaining one MHz of narrowband PCS spectrum

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<sup>9</sup> Amendment of the Commission's Rules to Establish New Personal Communications Services, *First Report and Order*, GEN Docket No. 90-314, 8 FCC Rcd 7162, 7162, . 1 (1993) (*PCS First Report and Order*), on recon., *Memorandum Opinion and Order*, GEN Docket No. 90-314, 9 FCC Rcd 1309 (1993) (*PCS MO&O*).

<sup>10</sup> *Id.* at 7164, . 13; *See also* 47 C.F.R. . 24.5.

<sup>11</sup> *Id.* at 7164, . 13.

<sup>12</sup> *Id.* at 7164-71, .. 15-37, 39-54.

<sup>13</sup> Implementation of Section 309(j) - Competitive Bidding, *Second Report and Order*, PP Docket 93-253, 9 FCC Rcd 2348, 2358, . 54 (1994) (*Competitive Bidding Second Report and Order*).

<sup>14</sup> *Id.* at 2358, .. 54-58.

<sup>15</sup> *Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2941, .. 1-3.

<sup>16</sup> Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, and Amendment of the Commission's Rules to Establish New Narrowband PCS, GEN Docket 90-314, *Third Memorandum Opinion and Order and Further Notice of Proposed Rule Making*, 10 FCC Rcd 175, 177, . 3 (1994) (*Competitive Bidding Third MO&O/Further Notice*). The term "designated entity" refers to small businesses, rural telephone companies, and businesses owned by minorities and/or women, collectively.

currently is reserved to accommodate future development of narrowband PCS.<sup>18</sup>

8. The Commission thus far has conducted two auctions for narrowband PCS licenses. As a result of these two auctions, ten nationwide narrowband PCS licenses and six regional narrowband PCS licenses in five different regions (totalling 30 regional licenses) have been granted.<sup>19</sup> Auctions have not yet been conducted for the narrowband PCS spectrum currently designated for licensing in 51 Major Trading Areas (MTAs)<sup>20</sup> and 493 Basic Trading Areas (BTAs).<sup>21</sup> In addition, the 204 MTA licenses and 1,968 BTA licenses designated as unpaired response channels have not been auctioned.<sup>22</sup>

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<sup>17</sup> See 47 C.F.R. § 24.129; see also *Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2944, ¶ 9.

<sup>18</sup> *Id.*

<sup>19</sup> See *Visitors Auction Guide*, Broadband Personal Communications Services, December 5, 1994 at Tab VIII ("Regional Narrowband PCS Auction Summary, October 26, 1994") (*Visitors Auction Guide*). The regional narrowband auction began on October 26, 1994 and closed on November 8, 1994 after 105 rounds. The nationwide narrowband auction commenced on July 25, 1994 and closed after 47 rounds of bidding over a five day period.

<sup>20</sup> See *supra*, n.6.

<sup>21</sup> *Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2952, ¶ 28. See 47 C.F.R. § 24.102.

<sup>22</sup> *Id.* at 2952, ¶ 29. See also 47 C.F.R. § 24.129.



9. In the *Competitive Bidding Third MO&O/Further Notice*, the Commission proposed to redesignate channels 25 and 26, which currently are licensed on a BTA basis, as regional licenses with the same service areas described in Section 24.102 of the Commission's rules.<sup>23</sup> The proposed redesignation of channels 25 and 26 was an outgrowth of our concern that designated entities interested in narrowband PCS licenses may desire service areas larger than MTAs and BTAs.<sup>24</sup> In this connection, we recognized that over half of the bidders who participated in the nationwide auction would have qualified for an entrepreneurs' block license if it had been available.<sup>25</sup> Thus, we sought comment on whether we should redesignate some or all of the channels licensed on a BTA basis, including the response channels licensed on a BTA basis, to be licensed on an MTA basis, or take other means to achieve larger license areas.<sup>26</sup> We also permitted MTA and BTA service areas to be aggregated up to and including nationwide coverage.<sup>27</sup> In response to the *Competitive Bidding Third MO&O/Further Notice*, the Commission received 14 comments and 4 reply comments.<sup>28</sup> In addition, in response to a Public Notice seeking additional comments on the Commission's narrowband PCS entrepreneurs' block proposals,<sup>29</sup> we received eight comments and three reply comments.

## IV. REPORT AND ORDER

### A. Service Rules

#### 1. Power and Antenna Height Limits

10. Background. In the *PCS MO&O* we created regional service areas for narrowband PCS.<sup>30</sup> Section 24.132 of our rules, which govern power and antenna height limits, currently applies to MTA and BTA service areas and does not mention regional service areas.<sup>31</sup>

<sup>23</sup> *Competitive Bidding Third MO&O/Further Notice*, 10 FCC Rcd at 209, . 77; see also 47 C.F.R. . 24.102.

<sup>24</sup> *Competitive Bidding Third MO&O/Further Notice*, 10 FCC Rcd at 228, . 122.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Appendix C provides the full and abbreviated names of the parties filing comments and reply comments.

<sup>29</sup> See *Public Notice*, "Additional Comment Sought on the Commission's Narrowband PCS Entrepreneur's Block Proposals," DA 94-1560 (rel. Dec. 21, 1994) (*Entrepreneur's Block Public Notice*).

<sup>30</sup> *PCS MO&O*, 9 FCC Rcd at 4522, . 14.

<sup>31</sup> See 47 C.F.R. . 24.132.

11. Discussion. We clarify that Section 24.132 of our rules applies to the regional service areas as well as MTA service areas. We amend paragraphs (d) and (e) of Section 24.132 to reflect that these rules apply to regional areas. Regional base stations, in addition to MTA base stations, must operate at reduced heights and power limits near service area borders in order to protect adjacent licensees from interference. In addition, we clarify that a narrowband PCS licensee holding a license for the same channel in an adjacent region or MTA is not required to reduce height and power to protect itself.

## 2. Canadian Interim Sharing Arrangement

12. Background. On September 22, 1994, the United States and Canada entered into an interim sharing arrangement with respect to use of narrowband PCS channels in border areas.<sup>32</sup> Under the Canadian Interim Sharing Arrangement ("Sharing Arrangement"), MTA and BTA licensees on certain narrowband PCS channels are not permitted to locate base stations within 75 miles of the U.S./Canadian border. These licensees are further prohibited from operating mobile stations in a manner that causes interference to the primary Canadian channels.<sup>33</sup> Because the Sharing Arrangement was not yet finalized before the regional narrowband PCS auction bidder package was released on August 22, 1994, the Sharing Arrangement was not included in the bidder package. However, by Public Notice, the Commission announced the Sharing Arrangement five days prior to the commencement of the regional narrowband PCS auction on October 26, 1994.<sup>34</sup> Additionally, a Public Notice released December 21, 1994 invited comment on the effect of the Sharing Agreement on narrowband PCS licensing.<sup>35</sup>

13. Comments. In response to the December 21 Public Notice, PCSD asserts that the Commission should give relief to affected parties because the Sharing Arrangement adversely affects the value of the affected licenses.<sup>36</sup> No other parties commented on this issue.

14. Discussion. We conclude that special relief for parties affected by the Sharing Arrangement is not necessary. Over the next year the Commission will negotiate vigorously with Canada for full coordination and accommodation of narrowband PCS license winners. Moreover, parties were fully aware of the Sharing Arrangement at the time of the regional auction, given that a Public Notice concerning it was released before the regional narrowband

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<sup>32</sup> See *Canadian Interim Sharing Arrangement Public Notice*, *supra*, n.1

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> See *Entrepreneur's Block Public Notice*, *supra*, n.29.

<sup>36</sup> PCSD Comments at 7-9.

auction commenced.<sup>37</sup> We believe that the operating restrictions resulting from the Sharing Arrangement are matters that should have been considered by potential bidders in their valuation of the licenses for competitive bidding purposes.

## B. Auction Rules

### 1. Establishment of Entrepreneurs' Block

15. Background. In authorizing the Commission to use competitive bidding under Section 309(j) of the Act, Congress mandated that the Commission "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in spectrum-based services."<sup>38</sup> Congress also mandated that we utilize competitive bidding to promote economic opportunity and competition and ensure that the new and innovative technologies are readily accessible to the American people.<sup>39</sup> When deciding which provisions to adopt to encourage designated entity participation in particular services, we have closely examined the specific characteristics of the service and have adopted a mix of provisions designed to balance the objectives of Congress set forth in Section 309(j). Thus, we have adopted measures designed to enhance the ability of designated entities to acquire licenses and to increase competition in the provision of wireless services generally. In narrowband PCS, for instance, we have provided installment payments for small businesses and bidding credits for minority-owned and women-owned businesses. In broadband PCS, we designated certain spectrum blocks for entrepreneurs' block licenses and provided bidding credits and installment plans for certain designated entities. In the 900 MHz Specialized Mobile Radio (SMR) service, we provided bidding credits, installment payments, and reduced down payments for small businesses. Most recently, we adopted provision for bidding credits and installment payments for the paging services.<sup>40</sup>

16. In the *Competitive Bidding Third MO&O/Further Notice*, the Commission proposed service-specific modifications to our competitive bidding rules for the award of narrowband PCS licenses with MTA and BTA service areas. In an effort to facilitate designated entity participation in providing narrowband PCS, we proposed to reserve both BTA frequency blocks

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<sup>37</sup> The regional narrowband auction commenced October 26, 1994, *supra*, n.19. See also *Canadian Interim Sharing Arrangement Public Notice*, *supra*, n.1.

<sup>38</sup> 47 U.S.C. . 309(j)(4)(D).

<sup>39</sup> 47 U.S.C. . 309(j)(4)(C).

<sup>40</sup> See Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems/Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Second Report and Order and Further Notice of Proposed Rulemaking*, WT Docket No. 96-18, PP Docket No. 93-253, FCC 97-59 (rel. Feb. 24, 1997), .. 165-187 (*Paging Second Report and Order*).

and up to four MTA frequency blocks for bidding exclusively by entities with annual gross revenues of no more than \$125 million in the preceding two years and total assets of no more than \$500 million ("entrepreneurs' blocks").<sup>41</sup> The entrepreneurs' block proposal would have added channels 21 and 25 to the channels allocated for MTA and BTA licenses for which designated entity provisions applied.<sup>42</sup> The Commission later sought additional comment on proposals for establishing narrowband PCS entrepreneurs' blocks in light of: (1) the results of the regional narrowband PCS auction; and (2) the Commission's reconsideration of its broadband PCS entrepreneurs' block rules in the *Competitive Bidding Fifth Memorandum Opinion and Order*.<sup>43</sup>

17. Comments. AirTouch and PCIA oppose the establishment of an entrepreneurs' block for narrowband PCS. AirTouch argues that the outcome of the nationwide narrowband PCS auction does not warrant an entrepreneurs' block in future MTA/BTA auctions and that the Commission's proposal (which would set aside 65% of the total narrowband spectrum) is excessive.<sup>44</sup> PageNet argues that any redesignation of paging response channels to entrepreneurs' blocks would be unfair to existing paging licensees.<sup>45</sup> AirTouch believes designated entities can win licenses without an entrepreneurs' block because (1) of their success in regional narrowband auctions; (2) smaller-sized service areas (MTAs/BTAs) will be less expensive and thereby less capital intensive to acquire; and (3) the success of a designated entity (Insta-Check Systems) in the regional auctions shows that such companies can garner licenses with an installment payment option as the only special provision for designated entities.<sup>46</sup> PCIA agrees with the comments of AirTouch.<sup>47</sup>

18. In contrast, SBA, SJPM, Essence, and PRTC all support establishment of entrepreneurs' blocks for narrowband PCS.<sup>48</sup> AIDE asserts that, given the lack of designated entity success in the nationwide PCS auction, the Commission should designate all the existing

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<sup>41</sup> *Competitive Bidding Third MO&O/Further Notice*, 10 FCC Rcd at 208, . 74.

<sup>42</sup> See *Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2970-71, . 72. A 25 percent bidding credit was already available to businesses owned by women and minorities bidding on, *inter alia*, all MTA licenses on channels 19, 22, and 24 and all BTA licenses on channel 26. See 47 C.F.R. . 24.129.

<sup>43</sup> See *Entrepreneur's Block Public Notice*, *supra*, n.29.

<sup>44</sup> AirTouch Comments at 6-7.

<sup>45</sup> PageNet Comments at 3-4.

<sup>46</sup> AirTouch Comments at 5-9.

<sup>47</sup> PCIA Comments at 2.

<sup>48</sup> SBA Comments at 2-3; SJPM Comments at 1; Essence Comments, at 5 and 12; PRTC Comments at 2.

frequency blocks eligible for bidding credits along with one additional MTA and one additional BTA, as part of the entrepreneurs' block.<sup>49</sup> MMTC endorses an entrepreneurs' block and, in the alternative, recommends adopting a "first option" procedure which would give designated entities an opportunity to bid on certain licenses first and open bidding to others only if a minimum bid is not met.<sup>50</sup> American Paging supports adoption of provisions to increase opportunities for women and minorities.<sup>51</sup> PageMart believes that the Commission should adopt more limited entrepreneurs' blocks so that medium-sized companies will have a chance to enter the market.<sup>52</sup> Pagenet opposes any redesignation of paging response channels to entrepreneurs' blocks on the basis that it would be unfair to existing paging licensees.<sup>53</sup> BMJ&D opposes AIDE's request to reserve even more blocks for entrepreneurs. If adopted, BMJ&D asserts that the entrepreneurs' block should include at most one BTA.

19. Discussion. Upon review of the record before us, we will not establish an entrepreneurs' block for narrowband PCS similar to our provisions in broadband PCS. We agree with AirTouch's view that the results of the narrowband regional auction demonstrate that bidding credits and installment payments alone can facilitate participation by designated entities in the competitive bidding process, as well as securing licenses for the provision of narrowband PCS. Additionally, we have the experience of other auctions, such as 900 MHz SMR, where we did not have an entrepreneurs' block but, nonetheless, had many successful designated entity applicants.<sup>54</sup>

20. Also, we consider narrowband PCS to be less capital intensive than broadband PCS, thereby making it more likely that small businesses, for example, can acquire the financing to win these licenses, particularly for MTAs. Thus, we conclude there is no need to insulate designated entities from other bidders and that bidding credits coupled with installment payments should satisfy our obligations under Section 309(j) of the Communications Act as they have in so many other auctions. We also point out that our partitioning proposal could provide for designated entities to acquire narrowband PCS licenses post-auction. Moreover, narrowband PCS licensees are free to transfer and assign licenses immediately (unlike broadband PCS), providing further flexibility to acquire licenses post- auction.<sup>55</sup>

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<sup>49</sup> AIDE Comments at 3.

<sup>50</sup> MMTC Reply Comments at 3-4.

<sup>51</sup> American Paging Comments at 1.

<sup>52</sup> PageMart Comments at 4.

<sup>53</sup> Pagenet Comments at 3-4.

<sup>54</sup> See *Press Release*, "Wireless Telecom Bureau Releases Progress Report" (rel. March 5, 1997) (*Wireless Bureau Progress Report*).

<sup>55</sup> See 47 C.F.R. . 24.839(d).

## 2. Definition of Minority Groups

21. Background. As discussed *infra* at .. 61-64, we propose to modify our designated entity rules to provide race- and gender-neutral provisions and establish eligibility criteria based on size. However, even if these modifications are adopted in the future, we will continue to request bidder information on the FCC Form 175 as to minority- and/or women-owned status, in addition to small business status, in order to monitor whether we have accomplished substantial participation by minorities and women through the broad provisions available to small businesses. Currently, the narrowband PCS rules define "members of minority groups" as "individuals of African-American, Hispanic-surnamed, American Eskimo, Aleut, American Indian and Asian American extraction."<sup>56</sup> In response to numerous inquiries, we revised this definition in our broadband PCS rules to conform with the definition used in other contexts.<sup>57</sup> Thus, Section 24.720(i) of our rules for broadband PCS now defines members of minority groups to include "Blacks, Hispanics, American Indians, Alaskan Natives, Asians, and Pacific Islanders."<sup>58</sup>

22. Discussion. In the *Competitive Bidding Fifth Memorandum Opinion and Order*, we noted that we would make the same definitional correction made in the broadband PCS context to the definition of minority groups used in the narrowband PCS auction rules.<sup>59</sup> We also recently amended our general competitive bidding definition of minority, Section 1.2110(b)(2), to adopt this definition of minority.<sup>60</sup> Thus, in an effort to maintain consistency throughout our auction rules for various services, we revise the definition of "members of minority groups" in our narrowband PCS auction rules to include "Blacks, Hispanics, American Indians, Alaskan Native, Asians, and Pacific Islanders."

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<sup>56</sup> 47 C.F.R. . 24.320.

<sup>57</sup> See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Fifth Memorandum Opinion and Order*, PP Docket No. 93-253, 10 FCC Rcd 403, 432, . 52 (1994) (*Competitive Bidding Fifth Memorandum Opinion and Order*) (citing *Broadcast Equal Employment Opportunity Rules and FCC Form 395*, 70 FCC 2d 1466, 1473 (1979); 47 C.F.R. . 1.1621(b); 47 U.S.C. . 309(i)(3)(c)(ii); Race and Ethnic Standards for Federal Statistics and Administration Reporting, OMB Statistical Policy Directive No. 15 (1977)).

<sup>58</sup> 47 C.F.R. . 24.720(i).

<sup>59</sup> *Competitive Bidding Fifth Memorandum Opinion and Order*, 10 FCC Rcd at 432, . 52, n.123.

<sup>60</sup> See Amendment of Part 1 of the Commission's Rules - Competitive Bidding Proceeding, *Order, Memorandum Opinion and Order and Notice of Proposed Rule Making*, WT Docket No. 97-82, FCC 97-60 at . 15 (rel. Feb. 28, 1997) (*Part One NPRM*). In this proceeding, the Commission seeks comment on the establishment of uniform rules for all auctionable services.

## V. FURTHER NOTICE OF PROPOSED RULEMAKING

### A. Service Rules

#### 1. Service Area Reallocation

23. Background. We believe that a flexible framework for narrowband PCS channelization will foster our goals of universality, speed of deployment, diversity of services, and competitive delivery.<sup>61</sup> In the *PCS First Report and Order*, we found that a mix of paired, unpaired, and varying bandwidths would provide the most flexible solution for meeting the stated needs of narrowband PCS providers.<sup>62</sup> We determined that while there appears to be interest in providing narrowband PCS services across a wide range of local, regional, and nationwide licensed service areas, the bulk of demand is for large regional or nationwide licensed service areas.<sup>63</sup>

24. Thus, in the *PCS First Report and Order*, we set aside the majority of narrowband PCS spectrum for nationwide and MTA-based licensing.<sup>64</sup> In addition, we recognized that a variety of narrowband PCS services could be offered on a local level.<sup>65</sup> As a result, our initial channelization plan for narrowband PCS consisted of 26 channels allocated as follows: 11 channels for nationwide use, 13 channels for use on an MTA basis, and two channels for use on a BTA basis.<sup>66</sup> We also set aside eight unpaired channels with BTA service areas for use by existing 900 MHz paging licensees as acknowledgement or response channels.<sup>67</sup>

25. In the *PCS MO&O*, we modified our initial channelization plan in two respects. First, we determined that while regional service areas based on MTAs contain sufficient population and geographic area to support economically viable PCS services, there was a continued need for an additional category of licenses with a service area smaller than a

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<sup>61</sup> *PCS First Report and Order*, 8 FCC Rcd at 7165, . 19.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 7166, . 26.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 7167, . 27.

<sup>66</sup> *Id.*; see also *PCS MO&O*, 9 FCC Rcd at 1310, . 7. See Appendix F for charts depicting narrowband channelization plans.

<sup>67</sup> *PCS First Report and Order*, 8 FCC Rcd at 7167, . 26.

nationwide area, but larger than an individual MTA.<sup>68</sup> Therefore, we designated six paired channels for licensing in five large regions to better reflect the technologies and business plans of the licensees desiring to implement large regional narrowband PCS systems.<sup>69</sup> Second, we determined that licensing some of the eight unpaired channels for use by existing paging licenses on an MTA basis would make it easier for operators of local and regional paging systems to upgrade and coordinate their operations.<sup>70</sup> Thus, four of the paging response channels are currently licensed using MTA service areas and four using BTA service areas.<sup>71</sup>

26. In the *Competitive Bidding Third MO&O/Further Notice*, the Commission proposed to redesignate channels 25 and 26, which currently are licensed on a BTA basis, as regional licenses with the same service areas described in Section 24.102 of the Commission's rules.<sup>72</sup> The proposed redesignation of channels 25 and 26 was an outgrowth of our concern that designated entities interested in narrowband PCS licenses may desire service areas larger than MTAs and BTAs.<sup>73</sup> In this connection, we recognized that over half of the bidders who participated in the nationwide auction would have qualified for an entrepreneurs' block license if it had been available.<sup>74</sup> Thus, we sought comment on whether we should redesignate some or all of the channels licensed on a BTA basis, including the response channels licensed on a BTA basis, to be licensed on an MTA basis, or take other means to achieve larger license areas.<sup>75</sup> We also permitted MTA and BTA service areas to be aggregated up to and including nationwide coverage.<sup>76</sup>

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<sup>68</sup> *PCS MO&O*, 9 FCC Rcd at 1311, . 14.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 1312, . 16.

<sup>71</sup> *Id.*

<sup>72</sup> *Competitive Bidding Third MO&O/Further Notice*, 10 FCC Rcd at 209, . 77; *see also* 47 C.F.R. . 24.102.

<sup>73</sup> *Competitive Bidding Third MO&O/Further Notice*, 10 FCC Rcd at 228, . 122.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*



27. Comments. Comments were mixed on the issue of reallocating BTA service areas into larger service areas. Many commenters argued that BTA license areas are too small to support the implementation of narrowband PCS. American Paging asserts that implementation of narrowband PCS on a BTA basis is impractical, and suggests MTA service areas instead.<sup>77</sup> The Personal Communications Industry Association ("PCIA") supports American Paging's proposal and argues that BTAs do not afford licensees the optimum combination of coverage and construction costs necessary for new entrants to be competitive in the market.<sup>78</sup> PCIA also contends that BTAs would burden designated entities with the additional complexity and transaction costs of aggregating licenses to achieve the minimum service area needed to establish a viable messaging alternative.<sup>79</sup> AirTouch Paging urges the Commission to license the remaining narrowband PCS spectrum on an MTA-or-greater basis.<sup>80</sup> Essence Communications ("Essence") asserts that the Commission should aggregate BTA licenses to create nationwide licenses within the entrepreneurs' block.<sup>81</sup> PageMart contends that the Commission should aggregate the remaining BTA and MTA licenses or, in the alternative, permit combinatorial bidding on those licenses.<sup>82</sup> PageMart argues that medium-sized firms easily could be squeezed out of the regional competition altogether.<sup>83</sup> PageMart also argues that the Commission should redesignate some of the response channels to create larger service areas to assist existing paging licensees in upgrading their networks.<sup>84</sup> PageMart further asserts that service providers cannot achieve the necessary economies of scale to offer advanced paging with local service alone.<sup>85</sup>

28. By contrast, PCS Development Corporation ("PCSD"), a minority-controlled small business that successfully bid for narrowband regional licenses, and Mobile Telecommunications Technologies Corporation ("Mtel") contend that redesignation of BTA blocks to MTA blocks would be fundamentally unfair to the successful bidders such as PCSD and Mtel in the regional

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<sup>77</sup> American Paging Comments at 3, n.2.

<sup>78</sup> PCIA Comment at 3.

<sup>79</sup> *Id.*

<sup>80</sup> AirTouch Paging Comments at 13.

<sup>81</sup> Essence Comments at 8-9.

<sup>82</sup> PageMart Comments at 9-11.

<sup>83</sup> PageMart Comments at 5.

<sup>84</sup> *Id.* at 9.

<sup>85</sup> *Id.*

narrowband auction.<sup>86</sup> PCS D argues that designated entities interested in areas larger than the BTAs had ample opportunity to bid in the regional auctions. Thus, PCS D contends, giving designated entities yet another opportunity to gain larger service areas would place PCS D and other winners at a disadvantage.<sup>87</sup> Other commenters maintain that the Commission should not reallocate any narrowband PCS spectrum on a regional or nationwide basis because the BTA channel blocks afford smaller companies a meaningful opportunity to participate in the provision of narrowband PCS.<sup>88</sup> Mtel contends that the results of the regional auction demonstrate that there is no need to reallocate channels, and that the nationwide narrowband auction results, which were unique, should not be used as a basis for revising the current allocations.<sup>89</sup> Mtel further contends that the prices bid at the narrowband regional auction demonstrate that licensee interest, as reflected by bid prices, has not been reduced despite the availability of only smaller service/license areas. According to Mtel, this lends further support to the argument that no demonstration of need for larger service areas has been made.<sup>90</sup>

29. Discussion. We believe the record provides support for reconfiguring the service area size of the remaining narrowband PCS channels. First, we share the concern of commenters that the BTA service areas in particular are too small to provide a viable narrowband service. Our experience with similar services suggests that larger licensing areas may be more suitable to the actual configuration of narrowband systems. For example, we recently adopted MTA-based licensing for the 929 MHz and 931 MHz paging bands, which are likely to be directly competitive with narrowband PCS.<sup>91</sup> We also believe that narrowband PCS could be licensed using larger areas without compromising the goal of ensuring entry for small businesses. An illustrative comparison is provided by the 900 MHz SMR auction, which was MTA-based, in which 60 out of 80 high bidders are small businesses.<sup>92</sup>

30. There may also be additional demand to provide narrowband PCS on a regional or nationwide basis. In the *PCS First Report and Order*, we agreed with commenting parties that regional and nationwide service areas in narrowband PCS would provide economies of scale and should alleviate some of the problems licensees have experienced when they have tried to

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<sup>86</sup> Mtel Comments at 2-4.

<sup>87</sup> PCS D Comments at 2-3.

<sup>88</sup> See, e.g., PCS D Comments at 2-3; Mtel Comments at 4-5; PCIA Comments at 4; PageMart Comments at 5; USIMTA/USIPCA Comments at 6.

<sup>89</sup> PCIA Comments at 6.

<sup>90</sup> Mtel Comments at 6.

<sup>91</sup> *Paging Second Report and Order*, FCC 97-59 at .. 23-25, 32-36, 40-43.

<sup>92</sup> See *Wireless Bureau Progress Report*, *supra*, n.54.

aggregate smaller license areas.<sup>93</sup> In the previous narrowband PCS auctions, a number of bidders for the regional licenses aggregated their licenses into nationwide service, and several nationwide licenses were aggregated by a single licensee. Moreover, the large number of regional and nationwide paging systems in the 929 and 931 MHz paging bands suggests that the market to provide this level of coverage is dynamic and competitive.<sup>94</sup>

31. Based on these factors, we believe that our prior proposal for reconfiguring the service areas of the remaining narrowband PCS channels should be expanded by eliminating all BTA licensing and instead using a combination of MTAs, regional licensing areas, and nationwide licensing. Specifically, we propose to (1) redesignate the two remaining 50 kHz paired channels as nationwide channels; (2) establish one nationwide, three regional, and one MTA-based channel pairs from the five 50/12.5 kHz channel pairs; and (3) convert the four BTA-based 12.5 kHz unpaired response channels to regional channels. By designating these service areas, we seek to give companies, including designated entities, the opportunity to establish a viable narrowband service and to provide regional and nationwide service if circumstances warrant. We request comment on this proposal and on any possible alternative service area combinations. In particular, commenters should comment on the effect of licensing in larger areas on opportunities for entry and competition by small businesses. We also seek comment on whether local participation in narrowband PCS by smaller businesses could occur through partitioning or disaggregation arrangements with MTA-based, regional, and nationwide PCS licensees, thus affording more opportunities to serve smaller areas.<sup>95</sup> We also note that the Commission recently used Major Economic Areas (MEAs) to license spectrum in the Wireless Communications Service (WCS).<sup>96</sup> MEAs consist of aggregations of Economic Areas (EAs) as defined by the Department of Commerce, with 46 MEAs in the continental United States, and an additional six areas covering Alaska, Hawaii, Guam, the Northern Mariana Islands, Puerto Rico, the U.S. Virgin Islands, American Samoa, and the Gulf of Mexico.<sup>97</sup> We note, however, that previously-licensed regional narrowband PCS licenses were configured by aggregating MTAs into larger regional areas. Using MEAs would cause some license inconsistencies between regional narrowband PCS boundaries and MEA-based boundaries. We therefore request

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<sup>93</sup> *PCS First Report and Order*, 8 FCC Rcd at 7167-68, . 26.

<sup>94</sup> Of the 75 channels available in the 931 and 929 MHz bands for exclusive licensing, 26 are licensed on a nationwide basis. *Paging Second Report and Order*, FCC 97-59 at .. 50-54. In addition, our licensing records show that regional systems are operating on 41 channels. In the 929 MHz band, approximately 70 percent of the total authorizations are to nationwide or regional licensees.

<sup>95</sup> *Id.* at 7167, . 27, n.20. See discussion of partitioning and disaggregation in the *Further Notice* at .. 88-99, *infra*.

<sup>96</sup> See Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service, *Report and Order*, GN Docket No. 96-228, FCC 97-50 (rel. Mar. 3, 1997) at . 54 (summarized in 62 Fed. Reg. 09,636) (*WCS Report and Order*).

<sup>97</sup> *Id.*

comment on whether using MEAs would be preferable to using MTAs to license narrowband PCS in the future.

32. We also seek comment on what effect increasing the service area size of as-yet unlicensed channels will have on existing narrowband PCS licenses. Although PCSD and MTel argue that using larger areas would devalue their licenses, we note that they were licensed over two years ago, which would appear to reduce the impact of subsequent licensing. In addition, as noted above, numerous paging licensees have established nationwide and regional systems that already provide competition for narrowband PCS. Finally, we note that the goal of our spectrum policy is not to preserve the value of the licenses that auction winners acquire, but to promote competition and service in the public interest. We therefore seek comment on whether our proposals are equitable to existing licensees, and whether they would assist new entrants in offering services to the public in a more efficient manner.<sup>98</sup>

## 2. Reserve Spectrum Reallocation

33. Background. In the *PCS First Report and Order*, the Commission allocated three MHz for narrowband PCS.<sup>99</sup> Specifically, the narrowband PCS spectrum was allocated into three one-MHz bands, with two MHz of this spectrum divided into specific channels and available for immediate licensing.<sup>100</sup> At that time, we determined that the service proposals for narrowband PCS did not require use of the entire narrowband PCS spectrum allocation.<sup>101</sup> We retained the flexibility to channelize and license the remaining one MHz of spectrum for expanded narrowband PCS licensing opportunities as the service developed.<sup>102</sup> Subsequently, several commenters to the *Competitive Bidding Third Memorandum Opinion and Order/Further Notice* raised the issue of the reserve narrowband PCS spectrum and requested that the Commission immediately channelize and license it.<sup>103</sup>

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<sup>98</sup> See, e.g., *Direct Broadcast Satellites*, 740 F.2d 1190, 1198 (D.C. Cir. 1984); *National Association of Independent Television Producers and Distributors v. FCC*, 502 F.2d 249, 257 (2d Cir. 1974).

<sup>99</sup> *PCS First Report and Order*, 8 FCC Rcd at 7165, . 19.

<sup>100</sup> *Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2944, . 9; see also 47 C.F.R. . 24.129.

<sup>101</sup> *PCS First Report and Order*, 8 FCC Rcd at 7165, . 19.

<sup>102</sup> *Id.*

<sup>103</sup> See American Paging Comments at 2; BMJ&D Reply Comments at 10. *But see* PCSD Reply Comments at 3 (arguing that the Commission should postpone its final decision on the use of reserve spectrum until after completion of the auction for the 26 frequencies in the original narrowband PCS allocation).

34. Discussion. We believe that channelizing and licensing the reserve narrowband PCS spectrum will serve the public interest by facilitating competition, opening the market to new entrants, and allowing existing narrowband PCS licensees to expand their systems through access to additional spectrum. Therefore, we tentatively conclude that the one MHz of spectrum that we reserved in the *PCS First Report and Order* should now be channelized and licensed. We seek comment on this tentative conclusion. We also seek comment on whether the reserve narrowband PCS spectrum should be channelized for narrowband PCS paired-channel use or narrowband PCS unpaired channels. We also seek comment on a channelization plan. For example, we could authorize three licenses: two 300-kHz licenses and one 400-kHz license. Would another allocation be preferable? Commenters should also address the appropriate service area size for licenses in this band.

35. Additionally, we request comment on the narrowband PCS aggregation limit and whether it should be modified in light of this proposal. Narrowband PCS is not subject to the 45 MHz commercial mobile radio service (CMRS) spectrum cap.<sup>104</sup> However, a single licensee is only permitted to hold licenses for up to three 50 kHz channels, either paired or unpaired.<sup>105</sup> This limit is based on the total narrowband PCS spectrum held by a licensee through nationwide, regional, and local licenses at any geographic point.<sup>106</sup> In light of our proposal to open and license the narrowband PCS reserve spectrum, we seek comment on whether these aggregation limits on narrowband PCS spectrum are appropriate, or if we need to modify, increase or eliminate such aggregation limits.

### 3. Eligibility for Response Channels

36. Background. In the *PCS MO&O* we determined that eligibility for the paging response licenses would be restricted to incumbent paging licensees authorized under Part 22 and Part 90 of our rules as of June 24, 1993, the adoption date of the *PCS First Report and Order*.<sup>107</sup> In addition, we determined that, to be eligible, the existing paging licensee must operate at least one base station in the MTA or BTA for which it is applying for a paging response channel.<sup>108</sup> In the *PCS Second MO&O*, we amended the eligibility criteria to permit any paging licensee to apply for response channels in a license area, as long as the licensee's paging system services some portion of that license area on the date the PCS application is filed.<sup>109</sup> However, response channels currently only can be used in paired communications with existing paging channels to provide mobile-to-base station communications.<sup>110</sup>

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<sup>104</sup> Implementation of Sections 3(n) and 332 of the Communications Act, *Third Report and Order*, 9 FCC Rcd 7988, 8111, . 267 (1994) (*CMRS Third Report and Order*).

<sup>105</sup> *PCS First Report and Order*, 8 FCC Rcd at 7168, . 34, n.21.

<sup>106</sup> *Id.*

<sup>107</sup> *PCS MO&O*, 9 FCC Rcd at 1313, . 26. Existing paging licensees are defined as licensees of conventional one-

37. Comments. Several parties have filed Petitions for Reconsideration of the *PCS Second MO&O*, asking that we reconsider our eligibility limitations for the response channels.<sup>111</sup> We incorporate into this proceeding Petitions for Reconsideration of the *PCS Second MO&O* filed by AirTouch, PCIA, and PRTC, and the pleadings filed in response to those petitions. In its Petition, AirTouch contends that it needs additional response spectrum in order to be able to compete effectively with other narrowband PCS licensees that won multiple channels at the nationwide auction, and that all eligibility restrictions on the response channels should be eliminated.<sup>112</sup> PRTC disagrees with AirTouch, stating that the Commission knew auctions were imminent when it instituted eligibility restrictions, and that the type of licensing procedure was not relevant to the imposition of such restrictions.<sup>113</sup> PRTC states that the sole reason for the restrictions was to allow existing paging licensees to upgrade their systems.<sup>114</sup> PRTC opposes AirTouch's and PCIA's petitions, and argues that only incumbent paging licensees should be eligible for response channels because these entities can immediately put the response channels to use.<sup>115</sup>

38. AirTouch also argues that we should allow response channels to be paired with any channel licensed under Part 22, Part 90, or Part 24 of our rules, and let market forces determine the optimal use for this spectrum.<sup>116</sup> PageMart, a nationwide private carrier paging licensee and

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way paging base stations licensed pursuant to Part 22 or Part 90 of our rules as of the application filing deadline for paging response channels. *Id.* at . 26.

<sup>108</sup> *Id.* We also limited each licensee to two paging response channels per geographic area. In the *PCS Second MO&O*, we amended this requirement to provide that the two response channels per market limit will expire two years after the date of initial license grant. *PCS Second MO&O*, 9 FCC Rcd at 4521, .12.

<sup>109</sup> *PCS Second MO&O*, 9 FCC Rcd at 4520, . 10.

<sup>110</sup> 47 C.F.R. . 24.130(a).

<sup>111</sup> Petitions for Reconsideration of the *PCS Second MO&O*, 9 FCC Rcd 4519 (1994), filed Oct. 7, 1994. In addition, we incorporate the record in response to the Petitions for Reconsideration: Oppositions to Petitions for Reconsideration, filed Nov. 3, 1994, by PageMart, Inc. ("PageMart"), Pegasus Communications, Inc. (Pegasus"), and PRTC; Replies to Oppositions to Petitions for Reconsideration, filed Nov. 14, 1994, by AirTouch, PageMart, PRTC and Radiofone Nation-wide Paging Services, Inc. ("Radiofone").

<sup>112</sup> AirTouch Petition at 4-5.

<sup>113</sup> PRTC Opposition to Petitions for Reconsideration at 4.

<sup>114</sup> *Id.*

<sup>115</sup> PRTC Opposition to Petitions for Reconsideration at 6-7.

<sup>116</sup> AirTouch Petition at 7-8.

a nationwide 50 kHz unpaired narrowband PCS licensee, agrees with AirTouch.<sup>117</sup> PageMart states that requiring that response channels be paired only with paging channels will unnecessarily and unfairly inhibit the development of a competitive, two-way service.<sup>118</sup> PCIA requests that geographic area licensees be permitted to file for a response channel in any BTA or MTA in which there is an overlap with the licensee's paging area.<sup>119</sup>

39. In its reply comments, AirTouch argues that expanded eligibility and more flexible use is consistent with the current regulatory philosophy that Part 22, Part 90, and Part 24 licensees be treated in a similar manner.<sup>120</sup> In its reply comments, Radiofone supports AirTouch's proposal to eliminate eligibility restrictions.<sup>121</sup> Radiofone further states that PageMart's and PRTC's assertions against lifting the eligibility restrictions amount to nothing more than complaints about the use of auctions to award licenses.<sup>122</sup> PageMart argues that a combination of the geographic area license eligibility threshold and a free pairing of response channels with narrowband PCS and traditional paging frequencies would both protect incumbent interests and assure the most efficient utilization of spectrum.<sup>123</sup> PageMart believes that PCIA's proposed alternative -- geographic area license eligibility -- is a prudent compromise that protects incumbent interests in an administratively efficient manner.<sup>124</sup>

40. Discussion. Our rules currently limit eligibility for acquiring narrowband PCS response channels to existing paging licensees and define existing paging licensees to be licensees of conventional one-way paging base stations licensed under Part 22 or Part 90 of our rules as of the application filing deadline for the paging response channels.<sup>125</sup> We agree that this definition unnecessarily excludes potential users of the response channels who are not paging

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<sup>117</sup> PageMart Inc.'s Partial Opposition to Petitions for Reconsideration at 2.

<sup>118</sup> *Id.*

<sup>119</sup> PCIA Petition at 3-4.

<sup>120</sup> AirTouch Reply to Opposition to Petition for Reconsideration at 7.

<sup>121</sup> Radiofone Reply to Oppositions to Petitions for Reconsideration at 3.

<sup>122</sup> *Id.* at 4.

<sup>123</sup> PageMart Reply to Oppositions to Petitions for Reconsideration at 3-4.

<sup>124</sup> *Id.* at 3-4.

<sup>125</sup> Additionally, existing paging licensees are only eligible for response channels in any BTA or MTA that encompasses an authorized base station or which is partly or wholly overlapped by the paging system's service area, which is generally defined as the area within 32.2 kilometers of the licensee's base station. In the case of "F", "G", "H", or "K" class stations under Sections 22.502(c) and 90.495(b)(1) of our rules, service area is defined as the area that is within the service area radius specified in Section 22.504(b)(2).

licensees, *e.g.*, other narrowband PCS licensees. In addition, our rules prevent these channels from being used by non-narrowband service providers, or for purposes other than mobile-to-base response transmissions. We question whether eligibility should be limited to this use alone rather than allowing the marketplace to determine the most efficient use of the channels. Therefore, we propose to lift all eligibility restrictions on applying for paging response channels currently designated as MTA licenses (A, B, C, and D) and the paging response channels we redesignate as regional licenses (E, F, G, and H). We believe that removal of eligibility restrictions will increase competition for these channels and thereby increase the likelihood that licenses for these channels will be awarded to those who value them most highly. Moreover, we tentatively conclude that these channels should not continue to be restricted to mobile-to-base transmissions, provided that licensees comply with the relevant rules regarding maximum transmitter power and interference.<sup>126</sup> We seek comment on our proposal and tentative conclusions. Commenters should address whether we should lift eligibility restrictions on all response channels or only on certain response channels. Commenters should also address the potential impact on eligibility of our recent *Paging Second Report and Order* which adopts geographic area licensing of paging systems.<sup>127</sup>

## B. Construction and Coverage Requirements

41. Section 309(j)(3) of the Communications Act states, in part, that when designing competitive bidding systems, "the Commission shall include safeguards to protect the public interest in the use of the spectrum . . . ."<sup>128</sup> In addition, Section 309(j)(4)(B) provides that the Commission shall "include performance requirements, such as appropriate deadlines and penalties for performance failures, to ensure prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services."<sup>129</sup> We have previously found that these objectives could be satisfied through build-out requirements.<sup>130</sup> We note, however, that we have never concluded that such requirements are mandated by Section 309(j).

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<sup>126</sup> See Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services, *First Report and Order and Further Notice of Proposed Rule Making*, WT Docket No. 96-6, 11 FCC Rcd 8965 (1996) (*CMRS Flex Report and Order*), in which the Commission allowed CMRS providers to offer fixed, as well as mobile radio services on a non-ancillary as well as ancillary basis.

<sup>127</sup> See *Paging Second Report and Order*, FCC 97-59.

<sup>128</sup> 47 U.S.C. . 309(j)(3).

<sup>129</sup> 47 U.S.C. . 309(j)(4)(B).

<sup>130</sup> See, *e.g.*, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Fifth Report and Order*, PP Docket No. 93-253, FCC 94-178, 9 FCC Rcd 5532, 5570 (1994) (*Competitive Bidding Fifth Report and Order*); Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Report and Order*, PP Docket No. 93-253 and MM Docket No. 94-131,



42. Pursuant to Section 309(j), we have previously adopted performance requirements in the form of minimum coverage requirements for narrowband PCS.<sup>131</sup> Specifically, nationwide narrowband PCS licensees must provide coverage to a composite area of 750,000 square kilometers or serve 37.5 percent of the U.S. population within five years of their license grants, and must provide coverage to a composite area of 1,500,000 square kilometers or serve 75 percent of the U.S. population within ten years of license grant. Regional licensees must cover 150,000 square kilometers or serve 37.5 percent of the population in their licensing areas within five years, and must cover 300,000 square kilometers or serve 75 percent of the regional population within ten years. MTA licensees must cover 75,000 square kilometers or serve 25 percent of the MTA population in five years, and must cover 150,000 square kilometers or serve 75 percent of the MTA population in ten years.<sup>132</sup>

43. Since we adopted these coverage requirements for narrowband PCS in 1994, we have moved towards a more flexible approach to coverage requirements in other services. For example, in our paging rulemaking, we provided that paging licensees can either meet population coverage benchmarks (one-third of licensing area population within three years of the license grant, and two-thirds of the population within five years) or may meet their performance requirement by demonstrating that they are providing "substantial service" in the licensing area within five years of the license grant.<sup>133</sup> Substantial service is defined as "service that is sound, favorable, and substantially above a level of mediocre service, which would barely warrant renewal."<sup>134</sup> In the Wireless Communications Service (WCS), we concluded that the unique circumstances in that case, including an aggressive deadline for auctions and exceedingly strict technical requirements necessary to prevent interference, necessitated still more flexible performance requirements. WCS licensees are thus required to provide substantial service to

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10 FCC Rcd 9589, 9659-60 (1995); Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, *Second Report and Order*, ET Docket No. 94-32, 11 FCC Rcd 624, 669-670 (1995).

<sup>131</sup> *PCS First Report and Order*, 8 FCC Rcd at 7168, . 37. We modified these coverage requirements slightly in the *PCS MO&O*, 9 FCC Rcd at 1313-14, .. 31-34; *see also* 47 U.S.C. . 24.103.

<sup>132</sup> 47 U.S.C. . 24.103.

<sup>133</sup> *Paging Second Report and Order*, FCC 97-59 at . 63. These build-out requirements apply to MTA and EA geographic area paging licenses. *Id.*

<sup>134</sup> *Id.* We have also adopted substantial service as an alternative to coverage requirements in 900 MHz SMR and for the 10 MHz blocks in broadband PCS. *See* 47 C.F.R. . 24.203(a); *see also* Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, *Memorandum Opinion and Order*, 9 FCC Rcd 4557, 5018-19, . 155 (1994); *see also* Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, PR Docket No. 89-553, *Second Order on Reconsideration and Seventh Report and Order*, 11 FCC Rcd 2637, 2651-52, . 31 (1995) (*900 MHz Second Order on Reconsideration*).

their service areas within ten years.<sup>135</sup> The substantial service standard may be met in WCS by providing coverage to 20 percent of the population where mobile service is provided, or four permanent links per one million people in its licensed service area, or by an alternative demonstration of substantial service by the licensee.<sup>136</sup>

44. In light of these developments in other services, we believe we should revisit the narrowband PCS coverage requirements to ensure that they continue to be justified. We believe it is appropriate at a minimum to treat narrowband PCS and paging similarly in this respect: narrowband PCS licensees operate on adjacent bands to the 900 MHz paging licensees, and we have previously observed the close, potentially competitive relationship between the two services.<sup>137</sup> We propose to conform our narrowband PCS rules to our paging rules by allowing narrowband PCS licensees to meet their performance requirements through a demonstration of substantial service as an alternative to meeting the coverage requirements provided under the existing rules. We seek comment on this proposal and whether an alternative coverage standard based on geographic areas remains necessary if we adopt a "substantial service" alternative as proposed above.

45. We also seek comment on whether, in addition to adopting a substantial service option, we should modify our existing narrowband PCS coverage benchmarks. One option would be to conform these requirements to our newly adopted requirements for geographic area paging. For example, the initial population coverage benchmark for narrowband PCS MTA licensees is 25 percent at five years, while the benchmark for MTA-based paging is two-thirds coverage at five years. We note that this may reflect differences in technology in the two services or that paging channels already are substantially built out by incumbents, whereas narrowband PCS licensees are only beginning their buildout process. At ten years, MTA-based narrowband PCS licensees must achieve 75 percent population coverage or cover 150,000 square kilometers, whereas paging licensees are not subject to any further coverage benchmark after five years. We seek comment on whether the existing benchmarks for MTA-based narrowband PCS licensees are appropriate compared to our paging requirements. Commenters should also discuss applicable coverage requirements for regional and nationwide narrowband PCS licensees.<sup>138</sup>

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<sup>135</sup> See *WCS Report and Order*, FCC 97-50 at . 111.

<sup>136</sup> *Id.* at . 113.

<sup>137</sup> See *Paging Second Report and Order*, FCC 97-59 at . 4; see also *PCS First Report and Order*, 8 FCC Rcd at 7163-64, .. 7-15.

<sup>138</sup> There is no counterpart to regional narrowband PCS in our paging rules; therefore, we do not have specific paging coverage requirements for comparison in this instance. We also have not adopted coverage requirements for nationwide paging licensees, but note that under our former rules, 929 MHz nationwide were required to build at least 300 sites, and 931 MHz nationwide licensees were required to construct in at least 15 markets. 47 C.F.R. 22.527(b)(5) (1987). We sought comment in the *Paging Second Report and Order* on whether nationwide paging licensees should be subject to buildout requirements similar to those applicable to narrowband PCS. *Paging Second Report and Order*,

46. We also seek comment on whether we should eliminate all coverage requirements for narrowband PCS. As wireless competition evolves, narrowband PCS is likely to face significant competition not only from other narrowband CMRS providers, including paging and 220 MHz licensees, but also from broadband CMRS providers who have the ability to use a portion of their spectrum to offer "narrowband" services such as paging and messaging. Commenters should address whether market forces alone will provide sufficient incentives for narrowband PCS licensees to construct facilities and provide valuable new services to the public. In this regard, we note that build-out requirements may encourage the provision of service to areas that would not necessarily receive service expeditiously solely through the operation of market forces. In addition, build-out requirements may also prevent stockpiling or warehousing of spectrum by allowing licenses to be recovered and made available to entities more willing and able to provide service expeditiously. On the other hand, simply requiring construction by itself does not ensure that licenses are put to use in an efficient and procompetitive manner. Moreover, construction requirements alone may not be effective to ensure the provision of service to rural areas, because they can have the unintended consequence of causing licensees to build first in urban areas where the mandatory benchmarks could be met most cheaply, and thus may actually slow the development of service to rural areas.

47. We are obligated under Section 309(j) of the Communications Act to take sufficient measures to "ensure prompt delivery of service to rural areas."<sup>139</sup> Because narrowband PCS has already been licensed on a nationwide and regional basis, and other competing services such as paging are widely available throughout the U.S, including rural areas, imposing coverage requirements with the specific intent of promoting rural service may be unnecessary. In addition, our decisions relating to partitioning and disaggregation in narrowband PCS should increase the potential for service to rural or underserved areas.<sup>140</sup> We seek comment on the potential impact of eliminating coverage benchmarks on service to rural or underserved areas. Commenters should address whether the auction and service rules that we are adopting and proposing here constitute effective safeguards and performance requirements for narrowband PCS licensing.

### C. Auction Design

48. The *Competitive Bidding Third Report and Order* established simultaneous multiple

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FCC 97-59 at . 209.

<sup>139</sup> 47 U.S.C. . 309(j)(4)(B).

<sup>140</sup> See *CMRS Flex Report and Order*, *supra*, n.124; see generally Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Service Licensees, *Report and Order and Notice of Proposed Rulemaking*, WT Docket No. 96-148 and GN Docket No. 96-113, FCC 96-474 (rel. Dec. 20, 1996) (summarized in 62 Fed. Reg. 00,696) (*Partitioning and Disaggregation Report and Order*).

round auctions as the methodology for awarding narrowband PCS licenses.<sup>141</sup> In light of the experience gained from the nationwide narrowband PCS auction, we later revised or clarified provisions governing minimum opening bids, activity rules, pre-auction procedures, the release of bidder information, and collusion.<sup>142</sup> We generally reaffirm the auction methodology adopted for narrowband PCS, but seek comment on whether modifications should be made to the overall auction design adopted for narrowband PCS. Additionally, having now completed thirteen auctions under the competitive bidding authority granted by Congress and recently having initiated a rule making to revise our general auction rules,<sup>143</sup> we revisit in this *Further Notice* certain provisions governing the general bidding procedures for narrowband PCS that we believe require revision.

### 1. Activity Rules

49. Background. In order to ensure that simultaneous multiple round auctions close within a reasonable period of time and to increase the information conveyed by bid prices during the auction, it is necessary to impose an activity rule to prevent bidders from waiting until the end of the auction before participating.<sup>144</sup> We determined in the *Competitive Bidding Third Report & Order* that the Milgrom-Wilson activity rule would be used in conjunction with a simultaneous stopping rule to award narrowband PCS licenses.<sup>145</sup>

50. We determined in the *Competitive Bidding Third Report and Order* that a waiver procedure would apply, whereby bidders would be permitted five automatic waivers from the activity rule during the course of an auction.<sup>146</sup> In the *Competitive Bidding Third*

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<sup>141</sup> *Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2948, . 18.

<sup>142</sup> *See generally Competitive Bidding Third MO&O/Further Notice*, 10 FCC Rcd 175.

<sup>143</sup> *See Part One NPRM*, FCC 97-60.

<sup>144</sup> *Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2955, . 36.

<sup>145</sup> *Id.* at 2956, . 40. Under the three-stage Milgrom-Wilson approach, bidders are encouraged to participate in early rounds by limiting their maximum participation to some multiple of their minimum participation level. Bidders are required to declare their maximum eligibility in terms of MHz-pops, and make an upfront payment equal to \$0.02 per MHz-pops. That is, bidders will be limited to bidding on licenses encompassing no more than the number of MHz-pops covered by their upfront payment. The term "MHz-pops" is defined as the number of megahertz of the spectrum block multiplied by the population of the relevant service area. This measurement may also be referred to as "bidding units." The bidding units/MHz-pops measurement is used to describe the activity rules, stage transition rules, and bid increment rules.

<sup>146</sup> *Id.* A waiver permits a bidder to maintain its eligibility at the same level as in the round for which the waiver is submitted, regardless of the bidder's level of bidding activity in that round. A proactive waiver is submitted by the bidder during the bid submission period. In contrast, an automatic waiver is applied by the auction system software if a bidder's activity level is below the required level and it has waivers remaining.

*MO&O/Further Notice* we modified the waiver procedure for the narrowband PCS auctions and allowed one automatic waiver during each stage of an auction, or one automatic waiver during a number of bidding rounds specified by Public Notice. We noted that while proactive waivers would keep the bidding open, under no circumstances would an automatic waiver prevent an auction from closing.<sup>147</sup>

51. With respect to broadband PCS auctions, we initially determined that only proactive waivers, and not automatic waivers, would keep an auction open.<sup>148</sup> In that context, however, we later modified the rule by retaining the discretion to keep an auction open even if no new acceptable bids and no proactive waivers are submitted in a single round.<sup>149</sup> We observed that this would facilitate the rapid completion of the auction by permitting the Commission to use larger bid increments, thereby speeding the auction pace without risking a premature auction close.<sup>150</sup>

52. Discussion. We propose for narrowband PCS that we retain the same discretion as we have in the broadband PCS auctions to keep an auction open even if no new acceptable bids and no proactive waivers are submitted in a single round. We tentatively conclude that this provision will allow the completion of the narrowband PCS auction in a timely and efficient manner. We seek comment on whether this modification of our activity and stopping rules is appropriate.

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<sup>147</sup> *Competitive Bidding Third MO&O/Further Notice*, 10 FCC Rcd at 182, . 14.

<sup>148</sup> Implementation of Section 309(j) - Competitive Bidding, *Fourth Memorandum Opinion and Order*, PP Docket No. 93-253, 9 FCC Rcd 6858, 6861, . 15 (1994) (*Competitive Bidding Fourth Memorandum Opinion and Order*).

<sup>149</sup> Implementation of Section 309(j) - Competitive Bidding, *Memorandum Opinion and Order*, PP Docket No. 93-253, 9 FCC Rcd 7684, 7685, . 3 (1994).

<sup>150</sup> *Id.*

## 2. License Grouping

53. Background. In the *Competitive Bidding Third Report and Order* we determined that choosing which licenses to auction simultaneously requires a judgment about the degree of interdependence of the licenses, *i.e.*, the extent to which the amount the bidders are willing to pay for one license depends on the price of another.<sup>151</sup> We auctioned the nationwide narrowband PCS licenses in a simultaneous multiple round auction.<sup>152</sup> We then auctioned the five regional blocks (30 licenses) together in one simultaneous multiple round auction.<sup>153</sup> We decided to conduct a third simultaneous multiple round auction for all of the 50/50 kHz paired, 50/12.5 kHz paired, and the 50 kHz unpaired MTA licenses (357 licenses) and, after the MTA licenses are auctioned, to conduct another simultaneous multiple round auction for the 50/12.5 kHz paired BTA licenses (986 licenses).<sup>154</sup>

54. Comments. USIMTA/USIPCA states that auctioning the BTAs last would give the larger companies a head start in providing PCS to the public. USIMTA/USIPCA suggests that the Commission auction BTA licenses before auctioning the MTA licenses.<sup>155</sup>

55. Discussion. In light of the channel reallocation we propose herein (*see supra* at .. 29-32), we tentatively conclude that we will conduct one auction for the remaining narrowband PCS spectrum that has been allocated. We reserve the right, however, to auction each category (*i.e.*, nationwide, regional, MTA) of the channels adopted separately. As a result of our proposal, we consider the issue raised in USIMTA/USIPCA's argument that BTAs should be auctioned before MTAs to be moot. We seek comment on this proposal. We also seek comment on whether we should auction certain categories together if we decide to conduct more than one auction for the remaining narrowband PCS spectrum (*e.g.*, nationwide and regional).

## 3. Auction Design for Response Channels

56. Background. There are 204 MTA 12.5 kHz unpaired response channel licenses and

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<sup>151</sup> *Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2951, . 26.

<sup>152</sup> *Competitive Bidding Third MO&O/Further Notice*, 10 FCC Rcd at 178, . 4. This auction was the first instance where we used a simultaneous multiple round auction design and our provisions for designated entities.

<sup>153</sup> *Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2951, . 27.

<sup>154</sup> *Id.* at 2951, .. 27-28.

<sup>155</sup> USIMTA/USIPCA Comments at 7-8. The comments regarding this issue were filed in response to our request for comments on the entrepreneurs' block proposal, despite the fact that we did not seek comment on the issue at that time.

1,968 BTA 12.5 kHz unpaired response channel licenses. In the *Competitive Bidding Third Report and Order* we decided to auction the 12.5 kHz unpaired MTA and BTA response channel licenses in a single round sealed bid auction because we determined the value of the licenses to be low relative to the cost of conducting more complex auctions.<sup>156</sup> Moreover, because only incumbent paging licensees are eligible to bid on these licenses, we believed that sealed bid auctions would help to reduce the chances of collusion among the limited number of bidders.<sup>157</sup> However, petitioners<sup>158</sup> convinced us that paging response channel licenses may have more interdependency and higher value than was apparent at the time of our decision in the *Competitive Bidding Third Report and Order*.<sup>159</sup> In addition, we stated in the *Competitive Bidding Third MO&O/Further Notice* that the nationwide narrowband auction demonstrated simultaneous multiple round auctions are easier and less expensive to implement than anticipated.<sup>160</sup> Thus, we deferred our decision regarding auction design for the paging response channels.<sup>161</sup>

57. Discussion. We propose to auction the paging response channels in one simultaneous multiple round auction but reserve the option of auctioning these channels with the remaining narrowband PCS licenses. We now have the experience necessary to conduct a large simultaneous multiple round auction in an administratively efficient manner. In addition, in balancing the advantages of simultaneous multiple round bidding with the greater complexity that this method entails, we believe that it is the most appropriate auction methodology for these auctions, because of the high value of most narrowband PCS licenses and the significant interdependence between spectrum blocks and geographic regions. We note also that the potential reallocation of the MTA and BTA channels and paging response channels discussed above, makes a single simultaneous multiple round auction even more administratively feasible. We seek comment on this proposal.

#### 4. Auction Design for Reserved Spectrum

58. We seek comment on the manner in which we should auction the one MHz of reserved spectrum. Specifically, we seek comment on whether we should use our current narrowband PCS rules, as set forth in Part 24, or whether other rules should be adopted to

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<sup>156</sup> *Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2952, . 29.

<sup>157</sup> *Id.*

<sup>158</sup> *See* Paging Network, Incorporated and Tri-State Radio Company Comments.

<sup>159</sup> *Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2952, . 29.

<sup>160</sup> *Competitive Bidding Third MO&O/Further Notice*, 10 FCC Rcd at 181, . 9.

<sup>161</sup> *Id.*

auction this spectrum. In addition, we seek comment on whether or not we should auction the reserve spectrum in conjunction with other narrowband spectrum. We additionally seek comment on whether there should be any special provisions for small businesses, and if so, whether to adopt the small business size definition and the special provisions proposed herein. (See .. 61-64, *infra*.)

#### D. Treatment of Designated Entities

##### 1. Overview of *Adarand Constructors, Inc. v. Peña*

59. Background. We have employed in our narrowband PCS auction rules a wide range of special provisions and eligibility criteria designed to meet the statutory objectives of providing opportunities to small businesses, rural telephone companies, and businesses owned by members of minority groups and women, collectively known as "designated entities."<sup>162</sup> Notably, the special provisions adopted for designated entities in the two narrowband PCS auctions completed thus far produced varied results. In the nationwide narrowband PCS auction, we provided a 25 percent bidding credit for businesses owned by members of minority groups and/or women.<sup>163</sup> No designated entities won licenses in this auction. Although other factors could have caused this result, the bidding credit of 25 percent proved insufficient to assist designated entities in obtaining nationwide narrowband PCS licenses when no other provisions were provided. We considered the results of the nationwide narrowband auction when contemplating the provisions that would govern the regional narrowband PCS auction and raised the bidding credit to 40 percent for businesses owned by members of minority groups and/or women.<sup>164</sup> In addition, we implemented an installment payment plan for businesses owned by members of minority groups and women.<sup>165</sup> Designated entities were more successful in the regional narrowband PCS auction, winning all of the licenses for which a bidding credit was provided for designated entities. In total, designated entities won 11 of the 30 licenses offered in the regional narrowband auction. Specifically, four of the nine winners in the entire auction were designated entities that qualified as small businesses owned by members of minority groups and/or women.

60. At the time our narrowband PCS rules were adopted an intermediate scrutiny standard of review was applied to federal race- and gender-based programs.<sup>166</sup> In *Adarand*, the

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<sup>162</sup> See generally 47 U.S.C. .. 309(j)(3)-(4).

<sup>163</sup> *Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2970, . 72.

<sup>164</sup> *Competitive Bidding Third MO&O/Further Notice*, 10 FCC Rcd at 201, . 58.

<sup>165</sup> See Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Order on Reconsideration*, 9 FCC Rcd 5306 at . 8 (1994) (*Order on Reconsideration*). Installment payment plans already were provided for small businesses bidding on regional licenses.

<sup>166</sup> *Metro Broadcasting v. FCC*, 497 U.S. 547, 564-65 (1990).



Supreme Court held that all racial classifications, whether imposed at the federal, state or local government level, must be analyzed by a reviewing court under a strict scrutiny standard of review. This standard requires such classifications to be narrowly tailored to further a compelling governmental interest.<sup>167</sup> In *VMI*, the Supreme Court reviewed a state program containing gender classification and held it was unconstitutional under an intermediate scrutiny standard of review.<sup>168</sup> This standard requires that "[p]arties who seek to defend gender-based government action must demonstrate an .exceedingly persuasive justification. for that action."<sup>169</sup> Under this test, the government must show "at least that the [challenged] classification serves .important governmental objectives and that the discriminatory means employed. are .substantially related to the achievement of those objectives."<sup>170</sup> While the Supreme Court has not directly addressed constitutional challenges to federal gender-based programs since *Adarand* and *VMI*,<sup>171</sup> our review of the relevant broad language in *VMI* indicates that the Court does not differentiate between federal and state official actions in its equal protection analysis.<sup>172</sup> Similarly, the *Adarand* decision definitively eliminated any distinction between federal and state race-based programs in setting its strict scrutiny standard of judicial review.<sup>173</sup> Therefore, we conclude that any gender-based preference maintained in the narrowband PCS auction rules would need to meet the *VMI* intermediate scrutiny standard of review.

61. Discussion. The *Adarand* decision potentially affects three race- and gender-based

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<sup>167</sup> *Adarand*, 115 S. Ct. at 2113.

<sup>168</sup> *United States v. Commonwealth of Virginia*, \_\_\_U.S. \_\_\_, 116 S.Ct. 2264 (1996).

<sup>169</sup> *VMI*, 116 S. Ct. at 2274 (citing *J.E.B. v. Alabama ex rel. T. B.*, 511 U.S. 127, 136-37 & n.6 (1994) and *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

<sup>170</sup> *Id.* at 2275 (quoting *Mississippi Univ. for Women*, 458 U.S. at 724 (quoting *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 150 (1980))).

<sup>171</sup> *But see Lamprecht v. FCC*, 958 F.2d 382, 391, 393 n.3 (D.C. Cir. 1992), a pre-*Adarand/VMI* decision in which Justice Thomas (a member of the D.C. Circuit panel to which the case was presented) invokes the "exceedingly persuasive justification" standard in striking down a federal gender-preference policy. As the dissent in *Lamprecht* confirmed, Justice Thomas applied "the more exacting scrutiny of Justice O'Connor's dissent [in *Metro*, 497 U.S. at 602-31]," *id.* at 404 (Mikva, C.J., dissenting), which formed the core of Justice O'Connor's majority opinion in *Adarand*.

<sup>172</sup> "Since [*Reed v. Reed*, 404 U.S. 71 (1971)], the Court has repeatedly recognized that *neither federal nor state government* acts compatibly with the equal protection principle when a law or official policy denies . . . equal opportunity . . ." *VMI*, 116 S. Ct. at 2275 (emphasis added); "To summarize the Court's current directions for cases of *official* classification based on gender: . . . the reviewing court must determine whether the proffered justification is .exceedingly persuasive." *Id.* (emphasis added). *See also Heckler v. Mathews*, 458 U.S. 728, 744-45 (1984) (reviewing a federal statute containing gender classification under the same standard the Court used to review the state statute in *Mississippi Univ. for Women*); *Califano v. Westcott*, 443 U.S. 76, 85 (1979) (same).

<sup>173</sup> *Adarand*, 115 S. Ct. at 2113.

measures in our narrowband PCS auction rules and proposals.<sup>174</sup> First, our attribution rules enable an applicant in which women or minorities hold 50.1 percent of the equity while another investor holds 49.9 percent of the equity to obtain special status as a business owned by minorities or women.<sup>175</sup> Second, businesses owned by minorities or women and small businesses owned by minorities or women receive larger bidding credits than other designated entities.<sup>176</sup> Finally, the *Competitive Bidding Third MO&O/Further Notice* proposes that small businesses owned by minorities or women receive the most favorable installment payment options available.<sup>177</sup> The purpose of these provisions was to address the lack of access to capital problem that our record showed women and minorities face.<sup>178</sup>

62. We tentatively conclude that the present record in support of our race-based narrowband PCS rules lack sufficient evidentiary support to withstand strict scrutiny. We seek comment on our tentative conclusion and whether our provisions promote a compelling governmental interest and, more particularly, whether compensating for discrimination in lending practices and in practices in the communications industry constitutes such an interest. We also ask interested parties to comment on nonremedial objectives that could be furthered by the minority-based provisions of our rules and whether they could be considered compelling governmental interests, such as increased diversity in ownership and employment in the communications industry or increased industry competition. In commenting, we ask parties to submit statistical data, personal accounts, studies, or any other data relevant to the entry of specific racial groups into the field of telecommunications. Examples of relevant evidence could include discrimination against minorities trying to obtain FCC licenses; discrimination against minorities seeking positions of ownership or employment in communications or related businesses; discrimination against minorities attempting to obtain capital to start up a telecommunications enterprise, including terms and conditions; and discrimination against minorities operating telecommunications businesses, including treatment by vendors and suppliers.

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<sup>174</sup> In the *Competitive Bidding Third Report and Order*, we also adopted a tax certificate program for minority and women-owned businesses under 26 U.S.C. § 1071. 9 FCC Rcd at 2976, ¶ 81. Congress subsequently repealed Section 1071. H.R. 831, 104th Cong. 1st Sess. ¶ 2. As a result of this action by Congress, the specific tax certificate provision in our narrowband rules is void.

<sup>175</sup> *Competitive Bidding Third MO&O/Further Notice*, 10 FCC Rcd at 198, ¶¶ 49-50.

<sup>176</sup> *Id.* at ¶ 58.

<sup>177</sup> *Competitive Bidding Third MO&O/Further Notice*, 10 FCC Rcd at 219-20, ¶¶ 94-97. In this reconsideration of the *Competitive Bidding Third Report and Order*, we proposed that businesses owned by women and/or minorities would be able to make interest-only payments for three years (as opposed to only the first two years for all other small businesses).

<sup>178</sup> See *Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2971-72, ¶¶ 75-76; see also *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5579-80.

63. With respect to our gender-based provisions, we seek comment on whether there are remedial or nonremedial goals that would satisfy the "important governmental objective" requirement of the intermediate scrutiny standard. Are our gender-based rules "substantially related" to the achievement of such objectives? Just as we requested above, in addressing evidence to support the narrowband race-based provisions, we ask parties to submit statistical data, personal accounts, studies, or any other data relevant to the entry of women into the field of telecommunications. We are also interested in supplementing the current record to support race- and gender-based provisions in our other rules. In this regard, the Commission initiated a comprehensive rule making proceeding to explore market barriers to women- and minority-owned businesses, as well as small businesses, pursuant to Section 257 of the Communications Act.<sup>179</sup> The record created in response to this *R&O/Further Notice* will also be incorporated into that docket.

64. Based on our tentative conclusions, we propose to offer only race- and gender-neutral provisions for narrowband PCS. We propose that bidding credits and installment payments should be made available to small businesses -- including those owned by minorities and women.

## 2. Eligibility for Bidding Credits and Installment Payments

### a. Small Business Definition

65. Background. In the *Competitive Bidding Second Memorandum Opinion & Order*, we stated that we would define eligibility requirements for small businesses on a service-specific basis, taking into account the capital requirements and other characteristics of each particular service.<sup>180</sup> In the recently adopted *Part One NPRM*, we proposed to continue this practice.<sup>181</sup> Once small business eligibility requirements are defined, however (*i.e.*, on a service specific basis) we proposed in the *Part One NPRM* to adopt uniform schedules of bidding credits and installment payments that would determine the level of benefits provided to small businesses. For the regional narrowband PCS and broadband PCS auctions, we believed that build-out and operational costs would be high and adopted a small business threshold of \$40 million.<sup>182</sup> More

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<sup>179</sup> See generally, *Market Entry Notice of Inquiry*, *supra*, n.5.

<sup>180</sup> *Competitive Bidding Second Memorandum Opinion & Order*, 9 FCC Rcd at 7269, . 145.

<sup>181</sup> *Part One NPRM*, FCC 97-60 at .. 32-40.

<sup>182</sup> Specifically, for the purposes of narrowband PCS, we defined a small business as any firm, together with affiliates and certain large investors, with average gross revenues for the three preceding years of less than \$40 million. *Competitive Bidding Third MO&O/Further Notice*, 10 FCC Rcd at 196, . 46; see also *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5608, . 175 (establishing \$40 million threshold for broadband PCS).

recently, we have adopted a "tiered" approach for determining small business eligibility. For instance, for the 900 MHz SMR service we adopted a two-tiered system for determining eligibility for bidding credits, reduced down payments, and installment payment plans.<sup>183</sup>

66. Discussion. We propose to limit eligibility for bidding credits and installment payments to small businesses. We propose a "two-tiered" approach in defining small businesses, based on a \$40 million and \$15 million definition.<sup>184</sup> Currently, we have a \$40 million small business definition. Businesses with gross revenues of not more than \$40 million may have significantly greater difficulty in obtaining capital than larger enterprises.<sup>185</sup> At the same time, a company with \$40 million in revenue is sufficiently large that it could survive in a competitive wireless communications market.<sup>186</sup> We believe that "small businesses," as defined by our proposal, will be at a disadvantage in competing against large companies. Accordingly, we propose to enhance special provisions for small businesses by creating an additional category, very small business entities, with a \$15 million threshold.

67. We seek comment on these proposals. Specifically, are \$40 million and \$15 million appropriate thresholds? Are such tiers necessary to ensure that small businesses, including those owned by minorities and women, have the opportunity to participate in providing service on an MTA, regional, and nationwide basis? Should the thresholds be higher or lower, based on the types of companies that are likely to benefit from the special provisions proposed below? Also, should different definitions of small businesses be used for different channel blocks? For example, should the threshold for nationwide licenses be higher than the threshold for regional licenses?

#### **b. Attribution**

68. Background. To ensure that only *bona fide* small businesses avail themselves of the special provisions provided to them, the narrowband PCS rules require us to consider the gross revenues of the applicant, its affiliates, and all "attributable" investors in the applicant on a cumulative basis. The attribution rules established for narrowband PCS count the gross revenues of all investors in, and affiliates of, an applicant on a cumulative, fully-diluted basis for purposes of determining whether the \$40 million gross revenue threshold for small businesses has been

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<sup>183</sup> See *900 MHz Second Order on Reconsideration*, 11 FCC Rcd at 2700, . 153.

<sup>184</sup> In response to our proposal for entrepreneurs' blocks in the *Competitive Bidding Third MO&O/Further Notice*, parties varied in their suggestions regarding the appropriate financial threshold for eligibility. See USIMTA/USIPCA Comments at 2; PCSD Reply Comments; AIDE Comments at 6.

<sup>185</sup> See *Competitive Bidding Third MO&O/Further Notice*, 10 FCC Rcd at 195-96, . 45.

<sup>186</sup> *Id.*

exceeded.<sup>187</sup> In addition, an applicant will not qualify as a small business if any one attributable investor in, or affiliate of, the entity has \$40 million or more in personal net worth.<sup>188</sup> There are two exceptions, however. First, applicants that meet the definition of a small business may form consortia of small businesses that, on an aggregate basis, exceed the gross revenue cap.<sup>189</sup> Second, if the applicant forms a "control group," the gross revenues, personal net worth, and affiliations of any investor in the applicant are not considered so long as the investor holds 25 percent or less of the applicant's passive equity, is not a member of the applicant's control group, and the control group holds at least 25 percent of the applicant's equity.<sup>190</sup>

69. We also established in the *Competitive Bidding Third MO&O/Further Notice* a relaxed attribution standard for women- and minority-owned businesses. Under this standard, the gross revenues or net worth of any single investor in a minority- or woman-owned small business applicant that is not a member of the applicant's control group is not attributable unless it holds more than 49.9 percent of the passive equity of the applicant. The control group must (1) own at least 50.1 percent of the applicant's equity, (2) retain control and hold at least 50.1 percent of the voting stock, and (3) consist entirely of minorities and/or women or entities 100 percent owned and controlled by minorities and/or women.<sup>191</sup> The gross revenues and net worth of each member of the control group and each member's affiliates are counted toward the gross revenue threshold or the individual \$40 million individual net worth limitation, regardless of the size of the member's total interest in the applicant.<sup>192</sup> These provisions were intended to address the special problems of women and minorities in obtaining financing due, in part, to discriminatory lending practices by private financial institutions.

70. Discussion. We propose replacing the "control group" structure established for narrowband PCS in the *Competitive Bidding Third Memorandum Opinion and Order* with simpler structural and control requirements. Consistent with our proposal adopted in the *Part One NPRM*, we propose that in order to determine whether an applicant qualifies as a small business in the narrowband PCS auction, we will consider the gross revenues of the small business applicant, its affiliates, and certain investors in the applicant.<sup>193</sup> Specifically, for

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<sup>187</sup> *Competitive Bidding Third MO&O/Further Notice*, 10 FCC Rcd at 196, . 47.

<sup>188</sup> *Id.* at 196, . 46; *see also* 47 C.F.R. . 24.320(b)(2)(iv)(a).

<sup>189</sup> 47 C.F.R. . 24.320(b)(2)(iii).

<sup>190</sup> *Id.*; *see also* 47 C.F.R. . 24.320(b)(2)(iv)(a).

<sup>191</sup> *Competitive Bidding Third MO&O/Further Notice*, 10 FCC Rcd at 198, . 49.

<sup>192</sup> *Id.*

<sup>193</sup> *See Part One NPRM*, FCC 97-60 at .. 19-29. *See also Paging Second Report and Order*, FCC 97-59 at .. 178-181.

purposes of determining small business status, we will attribute the gross revenues of all controlling principals in the small business applicant as well as the gross revenues of affiliates of the applicant. We also choose not to impose specific equity requirements on the controlling principals that meet our small business definition.

71. We will still require, however, that in order for an applicant to qualify as a small business, qualifying small business principals must maintain "control" of the applicant. The term "control" would include both *de facto* and *de jure* control of the applicant. For this purpose, we would borrow from certain SBA rules that are used to determine when a firm should be deemed an affiliate of a small business.<sup>194</sup> Typically, *de jure* control is evidenced by ownership of 50.1 percent of an entity's voting stock. *De facto* control is determined on a case-by-case basis. An entity must demonstrate at least the following indicia of control to establish that it retains *de facto* control of the applicant: (1) the entity constitutes or appoints more than 50 percent of the board of directors or partnership management committee; (2) the entity has authority to appoint, promote, demote and fire senior executives that control the day-to-day activities of the licensees; and (3) the entity plays an integral role in all major management decisions.<sup>195</sup> While we are not imposing specific equity requirements on the small business principals, the absence of significant equity could raise questions about whether the applicant qualifies as a *bona fide* small business. The existence of special small business provisions requires us to adopt the provisions set forth herein in order to prevent their improper use. Accordingly, we seek comment on whether we should count the gross revenues and assets only of controlling principals in the applicant to determine small business eligibility. We also seek comment on whether there is a more appropriate attribution standard for determining size.

72. We also propose to eliminate the \$40 million individual net worth limitation currently applicable in our narrowband PCS rules. We eliminated the personal net worth limits for broadband PCS.<sup>196</sup> In that context, we determined that the obstacles faced by minorities and minority-controlled businesses in raising capital are not necessarily confined to minorities with limited personal net worth. Rather than eliminating the personal net worth limits for minorities only, however, we eliminated the requirement for all applicants because such limits are difficult to apply and enforce.<sup>197</sup> We seek comment on whether the individual net worth limitation should be eliminated for narrowband PCS.

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<sup>194</sup> See 13 C.F.R. . 121.401.

<sup>195</sup> See *Competitive Bidding Fifth Memorandum Opinion and Order*, 10 FCC Rcd at 447, . 80.

<sup>196</sup> *Id.* at 421, . 30.

<sup>197</sup> *Id.*

### 3. Bidding Credits

73. Background. Bidding credits allow eligible designated entities to receive a payment discount for their winning bid in an auction. In the *Competitive Bidding Third Report and Order*, we determined that women and minorities would receive a 25 percent bidding credit for three nationwide channels, two regional channels, three MTA channels, and one BTA channel.<sup>198</sup>

After considering the outcome of the nationwide narrowband auction in which no designated entities won licenses, we increased the bidding credit on the designated regional licenses from 25 percent to 40 percent.<sup>199</sup> In addition, we proposed in the *Competitive Bidding Third MO&O/Further Notice* to provide bidding credits in the proposed entrepreneurs' blocks that would give small businesses a 10 percent bidding credit, women and minority-owned businesses a 15 percent credit, and small businesses owned by women and minorities an aggregate credit of 25 percent.<sup>200</sup>

74. Discussion. Taking into account the recent *Adarand* decision and our decision to redesignate the remaining narrowband channel blocks into larger license areas, we propose to eliminate the bidding credit scheme adopted in the *Competitive Bidding Third Report and Order* and subsequently modified in the *Competitive Bidding Third MO&O/Further Notice*. We propose instead to extend a bidding credit to all small businesses on a "tiered" basis, consistent with our proposals in the *Part One NPRM*.<sup>201</sup> Therefore, we propose that small businesses with gross revenues of not more than \$15 million for the preceding three years be entitled to a 15 percent credit and small businesses with gross revenues of not more than \$40 million for the preceding three years be entitled to a 10 percent bidding credit. Bidding credits for small businesses will not be cumulative. Thus, a \$15 million small business will be eligible for only a 15 percent credit, not a 25 percent credit.

75. We recognize that this proposal would enhance the competitiveness of small businesses, which will receive a bidding credit that they did not receive previously. We tentatively conclude, however, that extending the bidding credit to small businesses will achieve the objectives of Congress by providing small businesses, including women-owned and minority-owned small businesses, with a meaningful opportunity to obtain licenses in the narrowband PCS auction. We tentatively conclude that the redesignation of channel blocks into larger geographic license areas would increase the value of the licenses by allowing larger firms to bid on licenses that will enable wide-area service. As a result, we believe that small businesses would require

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<sup>198</sup> *Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2970, . 72.

<sup>199</sup> *Competitive Bidding Third MO&O/Further Notice*, 10 FCC Rcd at 201, . 58.

<sup>200</sup> *Id.* at 216, . 87.

<sup>201</sup> See *Part One NPRM*, FCC 97-60 at . 40.

additional bidding enhancements in order to participate in the auction.

76. We further recognize that this bidding credit would be less than the bidding credit previously made available to minority- and women-owned businesses in the *Competitive Bidding Third Report and Order* and the *Competitive Bidding Third MO&O/Further Notice* (i.e., 25 percent for selected nationwide and 40 percent for selected regional licenses). However, we believe that a lower bidding credit, combined with the installment payments (see discussion *infra* at .. 79-82) will provide sufficient opportunities for small businesses to compete for some of the licenses. Furthermore, tiered bidding credits are narrowly tailored to the varying abilities of businesses to access capital. Thus, we believe that tiering will account for the fact that smaller businesses, which often include businesses owned by minorities and women, have more difficulty accessing capital and thus need a more substantial bidding credit.

#### 4. Payment Matters

77. Background. The current narrowband PCS rules provide installment payments for small businesses and businesses owned by members of minority groups and/or women bidding for any of the BTA, MTA, or regional narrowband PCS licenses.<sup>202</sup> The terms and conditions of the installment payments follow those set forth in our general Part 1 rules, entitling eligible licensees to pay their winning bid amount in installments over the term of the license, with interest charges to be fixed at the time of licensing at a rate equal to the rate for ten-year U.S. Treasury obligations. Qualified licensees would make interest-only payments during the first two years of the license term.<sup>203</sup>

78. In light of the *Adarand* decision, for other services we have adopted a "tiered" approach to implementing installment payment plans, which is based solely on the financial status of licensees. Most recently, in the *Paging Second Report and Order*, we adopted bidding credits and an installment payment plan for entities qualifying as small businesses.<sup>204</sup> In the *Broadband PCS Report and Order*, we adopted a tiered installment plan for the D, E, and F block broadband PCS licenses, but limited the interest payment period to two years.<sup>205</sup> In the earlier *900 MHz Second Order on Reconsideration/Seventh Report and Order*, we adopted a

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<sup>202</sup> *Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2978, .. 86; *Order on Reconsideration*, 9 FCC Rcd 5306 at .. 8.

<sup>203</sup> *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5593, .. 138-39.

<sup>204</sup> See *Paging Second Report and Order* FCC 97-59 at .. 165-187.

<sup>205</sup> Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, *Report and Order*, WT Docket No. 96-59, GN Docket No. 90-314, FCC 96-278, 11 FCC Rcd 7824, .. 41-48 (1996) (*Broadband PCS Report and Order*).



tiered installment payment plan for 900 MHz SMR licensees.<sup>206</sup>

79. Discussion. We tentatively conclude that quarterly installment payments are appropriate for small businesses acquiring licenses for narrowband PCS. Installment payments will provide financial assistance to all small businesses. By allowing payment in installments, the government is in effect extending credit to licensees, thus reducing the amount of private financing needed prior to the auction. Such government financing will promote participation by small businesses that, because of their size and lack of access to capital, need such incentives to participate in new spectrum opportunities such as narrowband PCS.

80. The installment payment plan we propose today is consistent with the plans set out in the proposed schedule in the *Part One NPRM*.<sup>207</sup> Small businesses with gross revenues that do not exceed \$40 million for the preceding three years would be permitted to pay interest only for the first two years of the license term at the Treasury note rate plus 2.5 percent. Very small businesses with gross revenues that do not exceed \$15 million for the preceding three years would be able to make interest-only payments for two years at the Treasury note rate with an additional 1.5 percent. The rate for U.S. Treasury obligations will be determined by taking the coupon rate of interest on the ten-year U.S. Treasury notes most recently auctioned by the Treasury Department before licenses are conditionally granted. In both cases (*i.e.*, small businesses with gross revenues that do not exceed \$40 million and do not exceed \$15 million), payment of principal and interest will be amortized over the remaining eight years of the license term and be payable in equal, quarterly payments. Timely payment of all quarterly installments would be a condition of the license grant, and failure to make such timely payment could ultimately be grounds for revocation of the license. We seek comment on this proposal. We also seek comment on alternative installment payment plans.<sup>208</sup>

81. Consistent with our recent proposal in the *Part One NPRM*, we seek comment on whether we should adopt a late payment fee on any installment payment that is overdue.<sup>209</sup> Payments would be applied in the following order: late charges, interest charges, principal payments. Thus, a licensee who makes payment after the due date but does make payment sufficient to pay the late fee, interest, and principal (only if principal is due), will be deemed to have failed to make full payment and will be subject to license cancellation pursuant to the Commission's rules. We tentatively conclude that such a late payment provision is necessary to ensure that licensees have an adequate financial incentive to make installment payments on time. We note that licensees would continue to have 90 days before a payment is deemed delinquent

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<sup>206</sup> 900 MHz Second Order on Reconsideration, 11 FCC Rcd at 2706, . 169.

<sup>207</sup> *Part One NPRM*, FCC 97-60 at . 36.

<sup>208</sup> See generally, *Market Entry Notice of Inquiry*, *supra*, n.5.

<sup>209</sup> See *Part One NPRM*, FCC 97-60 at . 70.

but a late payment fee would be assessed during this period. We also note that in the *Part One NPRM* we proposed that where a winning bidder misses the second down payment deadline and fails to remit the required payment (plus the applicable late fee) by the end of the late payment period, it would be declared in default and subject to applicable default payments.<sup>210</sup> We seek comment on the applicability of this proposal within the context of narrowband PCS.

82. Under Section 1.2110(e)(4)(ii) of the Commission's rules, interest that accrues during a grace period will be amortized over the remaining term of the license.<sup>211</sup> Amortizing interest in this way has the effect of changing the amount of all future payments and requiring the Commission, or its designee, to generate a new payment schedule for the license. Changing the amount of the installment payment has, in turn, created uncertainty about the interest schedule, and increased the administrative burden by requiring formulation of a new amortization schedule. In order to avoid potential problems associated with changing the amount of installment payments and consistent with our proposal in the *Part One NPRM*, we propose to require all current licensees who avail themselves of the grace period to pay all fees, all interest accrued during the grace period, and the appropriate scheduled payment with the first payment made following the conclusion of the grace period.<sup>212</sup> We seek comment on this proposal.

## 5. Unjust Enrichment, Holding Period and Transfer Restrictions

83. Background. Under our current rules for narrowband PCS, licensees that receive bidding credits and installment payments, and choose to transfer their licenses to entities not eligible for these benefits, are subject to certain restrictions. Entities seeking to transfer a license acquired through a bidding credit are required to repay the amount of the bidding credit on a graduated basis until six years after the license grant.<sup>213</sup> Similarly, if a small business making installment payments seeks to transfer a license to a non-small business entity during the term of the license, it must pay the remaining principal balance as a condition of the license transfer. The ineligible transferee would not have the benefit of installment payments.<sup>214</sup>

84. We later sought comment on revising these provisions in the *Competitive Bidding Third MO&O/Further Notice*. With regard to bidding credits, we proposed that if, within the original 10 year term, a licensee applies to assign or transfer control of a license to an entity that

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<sup>210</sup> *Id.* at . 61.

<sup>211</sup> 47 C.F.R. . 1.2110(e)(4)(ii).

<sup>212</sup> *See Part One NPRM*, FCC 97-60 at .. 71-74.

<sup>213</sup> *Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2975-76, .80.

<sup>214</sup> *Competitive Bidding Third Report and Order*, 9 FCC Rcd at 2979, . 89. This approach also was adopted for the 900 MHz SMR service. *See 900 MHz Second Order on Reconsideration*, 11 FCC Rcd at 2707-8, .. 173-74.

is not eligible for as high a level of bidding credit, then the assignor would be required to pay to the U.S. Treasury the difference between the bidding credit obtained by the assignor and the bidding credit for which the acquiring party would qualify as a condition of transfer. Similarly, a sale to an entity that would not qualify for bidding credits would entail full repayment of the original bidding credit as a condition of transfer.<sup>215</sup> With regard to installment payments, we proposed to retain the unjust enrichment provisions adopted in the *Competitive Bidding Third Report and Order* and clarified these provisions, noting 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 for which the acquiring entity qualifies would become effective immediately upon transfer. Thus, a higher interest rate and earlier payment of principal may begin to be applied.<sup>216</sup>

85. In the *Competitive Bidding Third MO&O/Further Notice*, we also proposed that entrepreneurs' block licensees be prohibited from voluntarily assigning or transferring control of their licenses for a period of three years from the date of grant.<sup>217</sup> We asked commenters whether, for the next two to seven years of the license term, we should permit the licensee to assign or transfer control of its authorization only to an entity that satisfies the entrepreneurs' blocks entry criteria. During this limited transfer period, licensees would continue to be bound by the financial eligibility requirements, and a transferee or assignee who receives an entrepreneurs' block license during this period would remain subject to the transfer restrictions for the balance of the holding period.<sup>218</sup> We recognized that in order to provide significant opportunities for entrepreneurs and small businesses, applicants require flexibility. We were concerned, however, that such flexibility would undermine the more fundamental objective to ensure that designated entities retain *de facto* and *de jure* control of their companies. Thus, we proposed a holding and limited transfer period to address this concern.<sup>219</sup>

86. Discussion. We now seek further comment on the applicability of unjust enrichment, assignment, and transfer restrictions to our proposed narrowband PCS rules, as they apply to designated entities. We tentatively conclude that the unjust enrichment provisions already applicable to narrowband PCS will ensure that large businesses do not become the unintended beneficiaries of provisions intended to benefit small firms. We thus propose unjust enrichment restrictions as applied to bidding credits and installment payments, similar to the existing restrictions for narrowband PCS. Specifically, we propose that if a small business that has

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<sup>215</sup> *Competitive Bidding Third MO&O/Further Notice*, 10 FCC Rcd at 217, . 91.

<sup>216</sup> *Id.* at 220, . 98.

<sup>217</sup> *Id.* at 214-15, . 85.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

received bidding credits or is making installment payments seeks to transfer a license to a non-small business entity during the term of the license, it will be required to reimburse the government for the amount of the bidding credit plus interest or the remaining principal balance on the license, respectively, as a condition of the license transfer. We seek comment on this proposal. We also seek comment on whether we should eliminate the service-specific unjust enrichment rule for narrowband PCS in favor of the rule proposed in our *Part One NPRM*, which conforms with our broadband PCS unjust enrichment rules.<sup>220</sup> Furthermore, in light of our decision not to establish an entrepreneurs' block for narrowband PCS, we tentatively conclude that it is not necessary to propose holding and transfer restrictions for the licenses. We seek comment on this tentative conclusion.

## 6. Partitioning

87. Background. We recently adopted a detailed framework for revising the geographic partitioning and spectrum disaggregation rules for broadband PCS.<sup>221</sup> In particular, we modified our rules to (1) allow broadband PCS licensees in the non-entrepreneurs' blocks to partition any portion of their license area or disaggregate any portion of their spectrum post-auction to entities that are eligible to be a broadband licensee, (2) allow entrepreneurs' block licensees to partition and/or disaggregate during the first five years of the license term any portion of their licensed geographic area and/or spectrum post-auction to entities that qualify as "entrepreneurs" and are eligible to be broadband PCS licensees, (3) establish license term provisions that permit partitioned license holders (partitionees) to hold partitioned licenses for the duration of the original ten year license term, and (4) establish flexible construction requirements to ensure expedient access to broadband PCS service in partitioned areas. We concluded that these rules would facilitate the efficient use of the broadband PCS spectrum, increase competition, and expedite the provision of broadband PCS service to areas that may not otherwise receive broadband PCS or other wireless services in the near term.<sup>222</sup>

88. Discussion. In light of our proposal to redesignate narrowband PCS MTA and BTA channel blocks to create larger service areas (*see* discussion *supra* at .. 29-32), we believe that a partitioning proposal for narrowband PCS is warranted. We propose a geographic partitioning scheme similar to that adopted for broadband PCS. Under this proposal, anyone eligible to be a narrowband PCS licensee (*i.e.*, "qualifying entity") would be allowed to acquire a partitioned license. This more liberal partitioning policy would allow spectrum to be used more efficiently, speed service to underserved areas, and increase competition.<sup>223</sup> We seek comment on this

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<sup>220</sup> *Part One NPRM*, FCC 97-60 at . 43.

<sup>221</sup> *See Partitioning and Disaggregation Report and Order*, FCC 96-474.

<sup>222</sup> *Id.* at . 1.

<sup>223</sup> 47 C.F.R. . 257.

proposal. Specifically, we seek comment on whether a partitioning scheme should be available to all qualifying entities, or limited to rural telephone companies as in the initial broadband PCS rules.

89. We propose to allow all narrowband PCS licensees to partition at any time to any entity eligible for an narrowband PCS license. We note that small businesses and others may face certain barriers to entry into the provision of spectrum-based services which, we believe, may be addressed by changes in our partitioning rules. We tentatively conclude that providing narrowband PCS licensees with the flexibility to partition their geographic service areas would create smaller areas that could be licensed to small businesses, including those entities which previously may not have had the resources to participate successfully in spectrum auctions. We also tentatively conclude that partitioning may provide a funding source that would enable licensees to construct their systems and provide the latest in technological enhancements to the public.<sup>224</sup> We seek comment on these tentative conclusions. In particular, commenters are invited to address whether the partitioning scheme will help eliminate market entry barriers for small businesses pursuant to Section 257 of the Communications Act.<sup>225</sup>

90. We further propose that a partitionee be authorized to hold its license for the remainder of the original ten-year license term. We tentatively conclude that this term is appropriate because a licensee, through partitioning, should not be able to confer greater rights than it was awarded under the terms of its license grant.<sup>226</sup> We solicit comment on this proposal.

91. We seek comment on what should be the respective obligations of the participants in a partitioning arrangement. First, with respect to scope of narrowband PCS partitioned areas, we tentatively conclude that a flexible approach, similar to the one we adopted for broadband PCS, is appropriate for narrowband PCS licenses. Therefore, we propose to permit partitioning of narrowband PCS licenses based on any geographic area defined by the parties to a partitioning arrangement. We seek comment on this proposal, and in particular on whether this proposal is consistent with our licensing of narrowband PCS spectrum, and whether there are any technical or other issues unique to narrowband PCS that might impede the adoption of a flexible approach to defining partitioned license areas.

92. Second, with respect to construction requirements, we seek comment as to which party should be held responsible for satisfying outstanding construction requirements. In this *Further Notice*, we have proposed construction requirements for geographic narrowband PCS

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<sup>224</sup> See *Partitioning and Disaggregation Report and Order*, FCC 96-474.

<sup>225</sup> 47 U.S.C. . 257.

<sup>226</sup> See 47 C.F.R. . 24.15 (establishing 10-year licensing term for PCS).

licensees at the five-year and ten-year benchmarks, including a "substantial service" benchmark. In the *Partitioning and Disaggregation Report and Order*, we adopted two construction options for partitioning broadband PCS licensees which give the parties the flexibility to choose how to apportion the responsibility to build out the partitioned license areas. We tentatively conclude that a similar approach is appropriate for the narrowband PCS context. Thus, we propose two options for meeting the applicable narrowband PCS construction requirements in a partitioning arrangement: (1) the partitionee can certify that it will satisfy the same construction requirements as the original licensee with the partitionee meeting the requirements in its partitioned area and the partitioner being responsible for satisfying the requirements in the area it has retained; or (2) the original licensee can certify that it has already met or will meet its five-year construction requirement and that it will meet the 10-year requirement for the entire market involved. We also propose to require that the parties to such partitioning arrangements file supporting documentation showing compliance with the applicable construction requirements. We seek comment on these proposals. We also seek comment on whether, and if so, how the option of partitioning could be extended to incumbent narrowband PCS licensees as well.

93. Consistent with our rules for broadband PCS, we propose to establish separate installment payment and default obligations for the small business licensees and partitionees.<sup>227</sup> When a licensee paying its winning bid through installment payments partitions to a party that would qualify for installment payments, the partitionee will be permitted to make installment payments of its *pro rata* portion of the remaining government obligation. The payments will be based on the ratio of the population of the partitioned area to the population of the entire license area calculated on the latest available census data. Partitionees that do not qualify for installment payments will be required to pay their entire *pro rata* share with 30 days of the Public Notice conditionally granting the partitioning transaction. We request comment on our proposals.

94. We also propose that in cases where a licensee that has qualified as a small business has received a bidding credit partitions a portion of its licenses to an entity that would not meet the eligibility standards for a bidding credit, we will require that the licensee reimburse the government for the amount of the bidding credit calculated on a proportional basis based on the ratio of the population. If a small business licensee that received a bidding credit partitions to an entity that would qualify for a lower bidding credit, we will require that the licensee reimburse the government for the difference between the amount of the bidding credit obtained by the licensee and the bidding credit for which the partitionee is eligible calculated on a proportional basis based upon the ratio of population of the partitioned area. We request comment on our proposal.

95. We also seek comment on the type of unjust enrichment requirements that should be placed as a condition for approval of an application for a partial transfer of a license owned by a qualified small business to a non-small business entity. We tentatively conclude that these unjust

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<sup>227</sup> See *Partitioning and Disaggregation Report and Order*, FCC 96-474 at .. 31-36.

enrichment provisions would include accelerated payment of bidding credits, unpaid principal, and accrued unpaid interest, and would be applied on a proportional basis. We seek comment on how such unjust enrichment amounts should be calculated, especially in light of the difficulty of devising a methodology or formula that will differentiate the relative market value of the opportunities to provide service to various partitioned areas within a geographic or market area. We seek comment on whether we should consider the price paid by the partitionee in determining the percentage of the outstanding principle balance to be repaid.

## **7. Disaggregation**

96. We seek comment on the feasibility of spectrum disaggregation for narrowband PCS. Commenters should provide technical justifications and other relevant support in responding to this issue. Commenters should address whether minimum disaggregation standards are necessary for narrowband PCS services. Commenters should also address whether we should permit nationwide licensees to disaggregate spectrum.

97. We also seek comment on what the respective obligations of the participants in a disaggregation transfer should be, and whether each party should be required to guarantee a proportionate amount of the disaggregator's original auctions-related obligation in the event of default or bankruptcy by any of the parties to the disaggregation transfer. We seek comment on whether the disaggregator (the original licensee) should have an continuing obligation with respect to the entire initial license. Alternatively, should the parties have available a choice of options, ranging from an accelerated payment based on purchase price to a guarantee for a larger payment by one party in the event another party defaults? Parties are invited to comment on whether the disaggregating parties should be able to determine which party has a continuing obligation with respect to the original license area.

98. We propose to allow all small business licensees to disaggregate to similarly qualifying parties as well as parties not eligible for small business provisions. We tentatively conclude that if we permit a qualified small business licensee to disaggregate to a non-small business entity, the disaggregating licensee should be required to repay any benefits it received from the small business special provisions on a proportional basis. This would include accelerated payment of bidding credits, unpaid principal, and accrued unpaid interest. We seek comment on how such repayment amounts should be calculated. We also seek comment on whether we should consider the price paid by the disaggregatee in determining the percentage of the outstanding principal balance to be repaid.

99. We tentatively conclude that if we permit a small business licensee to disaggregate to another qualified small business that would not qualify for the same level of bidding credit as the disaggregating licensee, the disaggregating licensee should be required to repay a portion of the benefit it received. We seek comment on how that amount should be calculated. Finally, we seek comment on what provisions, if any, we should adopt to address the situation of a small business licensee's disaggregation followed by default in payment of a winning bid at auction.

## E. Ownership Disclosure Requirements

100. Background. The rules for narrowband PCS currently require applicants to disclose on their short-form applications (FCC Form 175) and long-form applications (FCC Form 600) certain ownership information. Section 24.413(a) of our rules provides that parties filing the short-form application to participate in the narrowband PCS auction and auction winners filing the long-form application shall include in an exhibit, *inter alia*, (1) a list of its subsidiaries, if any,<sup>228</sup> (2) a list of its affiliates, if any,<sup>229</sup> and (3) in the case of partnerships, the name and address of each partner, each partner's citizenship and the share or interest participation in the partnership, and a signed and dated copy of the partnership agreement.<sup>230</sup>

101. The broadband PCS rules similarly contained ownership disclosure requirements for both the short-form and long-form applications.<sup>231</sup> We waived the five percent ownership disclosure requirements, however, for the broadband PCS A, B, and C block auctions.<sup>232</sup> In that context, we reasoned that requiring applicants to list all businesses in which each attributable stockholder owns at least 5 percent would necessitate reporting of interests in firms with no relation to the services for which licenses are being auctioned, and for many companies, particularly investment firms with diverse holdings, might be extremely burdensome. We therefore waived Sections 24.813(a)(1) and 24.813(a)(2) of the rules. Disclosure of direct, attributable ownership interests in other CMRS licensees or applicants, however, is still required under Section 20.6 of the Commission's rules. Similarly, we waived the requirement that partnerships submit a signed and dated copy of partnership agreements with the short-form

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<sup>228</sup> "Subsidiary" means any business five percent or more whose stock, warrants, options or debt securities are owned by the applicant or an officer, director, stockholder or key management personnel of the applicant. 47 C.F.R. . 24.413(a)(1).

<sup>229</sup> "Affiliate" means any business which holds a five percent or more interest in the applicant, or any business in which a five percent or more interest is held by another company which holds a five percent interest in the applicant. 47 C.F.R. . 24.413(a)(2).

<sup>230</sup> 47 C.F.R. . 24.413(a).

<sup>231</sup> See 47 C.F.R. . 24.813(a)(1), (2), (4).

<sup>232</sup> See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Order*, PP Docket No. 93-253, DA No. 94-1198 (rel. Oct. 25, 1994) (waiving certain ownership disclosure and partnership agreement disclosure requirements of 47 C.F.R. . 24.813(a) for short-form applications to be filed for A and B block licenses) (*Waiver Order I*); Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Order*, PP Docket No. 93-253, DA No. 95-507 (rel. Mar. 22, 1995) (waiving certain ownership disclosure for long-form applications to be filed for A and B block licenses) (*Waiver Order II*); Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, *Order*, PP Docket No. 93-253, DA No. 95-1130 (rel. May 19, 1995) (waiving certain ownership disclosure and partnership agreement disclosure requirements of 47 C.F.R. . 24.813(a) for short-form applications to be filed for C block licenses) (*Waiver Order III*).



application.<sup>233</sup> In waiving this requirement, we noted that partnership agreements often discuss strategic business objectives and financial and business obligations, including bidding strategies, which might be highly sensitive.

102. Discussion. We propose to modify the ownership disclosure requirements for narrowband PCS as we modified those requirements for broadband PCS through waiver. Consistent with our proposal for a uniform ownership disclosure requirement in our general competitive bidding rules, we tentatively conclude that relaxing the disclosure requirements in this regard serves the public interest by reducing the administrative burdens associated with the auction process.<sup>234</sup> We seek comment on this proposal. Furthermore, we seek comment on whether a separate schedule to the FCC Form 175 should be designed, which would formalize the ownership disclosure requirements for the short-form application that are presently reported in separate exhibits to the FCC Form 175.

#### **F. Construction Prior to Grant of Licenses for Narrowband and Broadband PCS**

103. Background. In the *Third Report and Order* in GN Docket No. 93-252, we determined that all commercial mobile radio service applicants should be subject to the same rules governing the construction of facilities prior to grant of pending applications.<sup>235</sup> We later clarified that such rules would extend to successful broadband PCS bidders that had filed a long-form application.<sup>236</sup> Thus, 35 days after the date of the Public Notice announcing the Form 600 applications accepted for filing, PCS applicants listed therein may, at their own risk, commence construction of facilities, provided that 1) no petitions to deny the application have been filed; 2) the application does not contain a request for a rule waiver; 3) the applicant complies fully with the antenna structure provisions of 47 C.F.R. .. 24.416, 24.816, including FAA notification and Commission filing requirements; 4) the application indicates that the facilities for which construction is commenced would not have a significant environmental effect (*see* 47 C.F.R. .. 24.413(f), 24.813(f)); and 5) international coordination of the facility for which construction is commenced is not required.<sup>237</sup>

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<sup>233</sup> *See Waiver Order III*, at . 6 (waiving partnership agreement disclosure requirement for short-form applications for C block licenses); *Waiver Order I*, at . 5 (waiving partnership agreement disclosure requirement for short-form applications for A and B block licenses).

<sup>234</sup> *See Part One NPRM*, FCC 97-60 at .. 51-52.

<sup>235</sup> *CMRS Third Report and Order*, 9 FCC Rcd at 8153. There, we extended the pre-grant construction rule applicable to Part 22 licensees to all CMRS providers. *See* 47 C.F.R. . 22.143.

<sup>236</sup> *See Public Notice*, "Personal Communications Service Information, Broadband," Report No. CW-95-02 (rel. Apr. 12, 1995).

<sup>237</sup> *Id.*

104. Discussion. We propose to modify our pre-licensing construction requirements for both broadband and narrowband PCS in order to expedite service to the public.<sup>238</sup> Specifically, we propose that long-form applicants may begin construction of facilities at their own risk regardless of whether petitions to deny have been filed. In adopting pre-grant construction rules for CMRS applicants in general, we favored a more liberal approach, urged by the industry's comments that granting applicants authority to engage in pre-grant construction could advance the date on which the public receives service.<sup>239</sup> We continue to believe that liberal pre-grant construction rules could speed the deployment of services to the public. We also believe that applicants that begin construction pursuant to these provisions before receiving a final license grant do so at their own risk and, thus, they assume the risk that their licenses may not be granted as a result of pending petitions to deny. We propose to retain the remaining restrictions, however, in light of the specific public interest considerations they promote. We seek comment on these tentative conclusions and proposals.

## VI. CONCLUSION

105. We believe that the rules and proposals set forth for narrowband PCS in this *Report and Order and Further Notice of Proposed Rulemaking* will promote the public policy goals set forth by Congress. We conclude that we will auction three nationwide licenses, three regional licenses and three MTA licenses in each geographic area. In addition, eight response channels, four designated as regional licenses and four designated as MTA licenses, will be offered by auction.

## VII. PROCEDURAL MATTERS

### A. Regulatory Flexibility Act

106. The Final Regulatory Flexibility Analysis, pursuant to the Regulatory Flexibility Act, 5 U.S.C. Section 604, is contained in Appendix E. The Initial Regulatory Flexibility Analysis, pursuant to the Regulatory Flexibility Act, 5 U.S.C. Section 603, is contained in Appendix D. Written public comments are requested on the Initial Regulatory Flexibility Analysis. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Further Notice of Proposed Rulemaking*, but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Secretary shall send a copy of this *Report and Order and Further Notice of Proposed Rulemaking*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel

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<sup>238</sup> *Part One NPRM*, FCC 97-60 at . 104.

<sup>239</sup> *CMRS Third Report and Order*, 9 FCC Rcd at 8152-53, . 376.

for Advocacy of the Small Business Administration in accordance with the Regulatory Flexibility Act. *See* 47 U.S.C. . 603(a).

### **B. Ex Parte Rules -- Non-Restricted Proceeding**

107. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's rules. *See generally* 47 C.F.R. .. 1.1202, 1.1203, and 1.1206(a).

### **C. Initial Paperwork Reduction Act of 1995 Analysis**

108. This *Further Notice* contains either a proposed or modified information collection. As part of its continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget ("OMB") to take this opportunity to comment on the information collections contained in this *Report and Order and Further Notice*, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due at the same time as other comments on this *Further Notice*; OMB comments are due 60 days from the date of publication of this *Further Notice* in the Federal Register. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

### **D. Comment Dates**

109. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. .. 1.415 and 1.419, interested parties may file comments on or before June 18, 1997, and reply comments on or before July 7, 1997. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center of the Federal Communications Commission, Room 239, 1919 M Street, N.W., Washington, D.C. 20554.

**E. Ordering Clauses**

110. Accordingly, IT IS ORDERED that Part 24 of the Commission's Rules IS AMENDED as specified in Appendix A, effective 60 days after publication in the Federal Register.

111. IT IS FURTHER ORDERED that the Petitions for Reconsideration of the *Second Memorandum Opinion and Order* in GN Docket 90-314 and ET Docket 92-100 filed by AirTouch Paging, PCIA, and the Puerto Rico Telephone Company, and the responses to the Petitions for Reconsideration filed by PageMart, Inc., Pegasus Communications, Inc., the Puerto Rico Telephone Company, and Radiofone Nation-wide Paging Services, Inc. ARE DISMISSED.

112. Authority for issuance of this *Report and Order and Further Notice of Proposed Rulemaking* is contained in Section 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).

**F. Contacts for Information**

113. For further information concerning this proceeding, contact Mark Bollinger or Alice Elder at (202) 418-0660 (Wireless Telecommunications Bureau, Auctions Division) or David Furth or Rhonda Lien at (202) 418-0620 (Wireless Telecommunications Bureau, Commercial Wireless Division).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton  
Acting Secretary

**APPENDIX A -- FINAL RULES**

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

**Part 24 -- PERSONAL COMMUNICATIONS SERVICES**

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

**AUTHORITY:** Secs. 4, 301, 302, 303, 309, and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. .. 154, 301, 302, 303, 309 and 332, unless otherwise noted.

\* \* \* \* \*

2. Section 24.132 is revised to read as follows:

**. 24.132 Power and antenna height limits.**

\* \* \* \* \*

Paragraphs (d) and (e) are revised as follows:

(d) MTA and regional base stations located between 200 kilometers (124 miles) and 80 kilometers (50 miles) from their licensed service area border are limited to the power levels in the following table:

Antenna HAAT in meters (feet) (see . 24.53 for HAAT HAAT calculation method)	Effective radiated power (e.r.p.) (watts)
183 (600) and below	3500
183 (600) to 208 (682)	3500 to 2584
208 (682) to 236 (775)	2584 to 1883
236 (775) to 268 (880)	1883 to 1372
268 (880) to 305 (1000)	1372 to 1000
305 (1000) to 346 (1137)	1000 to 729
346 (1137) to 394 (1292)	729 to 531
394 (1292) to 447 (1468)	531 to 387
447 (1468) to 508 (1668)	387 to 282
508 (1668) to 578 (1895)	282 to 206
578 (1895) to 656 (2154)	206 to 150
656 (2154) to 746 (2447)	150 to 109
746 (2447) to 848 (2781)	109 to 80
848 (2781) to 963 (3160)	80 to 58
963 (3160) to 1094 (3590)	58 to 42
1094 (3590) to 1244 (4080)	42 to 31
1244 (4080) to 1413 (4636)	31 to 22
Above 1413 (4636)	16

For heights between the values listed above, linear interpolation shall be used to determine maximum e.r.p.

(e) MTA, BTA and regional base stations located less than 80 kilometers (50 miles) from the licensed service area border must limit their effective radiated power in accordance with the following formula:

$$PW = 0.0175 \times dkm^{**6.6666} \times hm^{**-3.1997}$$

PW is effective radiated power in watts.

dkm is distance in kilometers.

hm is antenna HAAT in meters; see . 24.53 for HAAT calculation method.

\* \* \* \* \*

3. Section 24.320(e) is revised to read as follows:

**. 24.320 Definitions.**

(a) \* \* \* \* \*

(b) \* \* \* \* \*

(c) \* \* \* \* \*

(d) \* \* \* \* \*

(e) *Members of Minority Groups.* *Members of minority groups* include Blacks, Hispanics, American Indians, Alaskan Natives, Asians and Pacific Islanders.

\* \* \* \* \*

**APPENDIX B -- PROPOSED RULES****Part 24 -- PERSONAL COMMUNICATIONS SERVICES**

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

**Subpart C - Technical Standards**

1. Add a new section 24.54, as follows:

**24.54 Construction Prior to License Grant.**

Applicants may construct facilities prior to grant of their licenses, subject to the provisions of this section, but must not operate such facilities until the Commission grants a final license. If the conditions stated in this section are not met, applicants must not begin to construct facilities.

(a) *When applicants may begin construction.* An applicant may begin construction of a facility thirty-five (35) days after the date of the Public Notice listing the long form (FCC Form 600) application for that facility as acceptable for filing.

(b) *Notification to stop.* If the Commission for any reason determines that construction should not be started or should be stopped while an application is pending, and so notifies the applicant, orally (followed by written confirmation) or in writing, the applicant must not begin construction or, if construction has begun, must stop construction immediately.

(c) *Assumption of risk.* Applicants that begin construction pursuant to this section before receiving a final license grant do so at their own risk and have no recourse against the United States for any losses resulting from:

- (1) Applications that are not granted;
- (2) Errors or delays in issuing Public Notices;
- (3) Having to alter, relocate, or dismantle the facility; or
- (4) Incurring whatever costs may be necessary to bring the facility into compliance with applicable laws, or Commission rules and orders.

(d) *Conditions.* Except as indicated, all pre-grant construction is subject to the following conditions:

- (1) The application is not mutually exclusive with any other application. Applicants whose FCC Form 600 applications have been accepted for filing will have satisfied this condition;



(2) The application does not include a request for a waiver of one or more Commission rules;

(3) The applicant complies fully with the antenna structure provisions of 47 C.F.R. .. 24.416, 24.816, and for any construction or alteration that would exceed the requirements of . 17.7 of this chapter, the applicant has notified the appropriate Regional Office of the Federal Aviation Administration (FAA Form 7460-1), filed a request for antenna height clearance and obstruction marking and lighting specifications (FCC Form 854) with the Commission;

(4) The applicant has indicated in the application that the proposed facility would not have a significant environmental effect, in accordance with .. 1.301 *et seq.*; and,

(5) Under applicable international agreements and rules in this part, individual coordination of the proposed channel assignment(s) with a foreign administration is not required.

\* \* \* \* \*

#### **Subpart D - Narrowband PCS**

2. Section 24.103(d) is revised to read as follows:

##### **. 24.103 Construction requirements.**

(a) \* \* \* \* \*

(b) \* \* \* \* \*

(c) \* \* \* \* \*

(d) As an alternative to the coverage requirements in paragraphs (a), (b) and (c), the narrowband PCS licensee may demonstrate that, no later than five years after the initial grant of its narrowband PCS authorization, it provides substantial service to the narrowband PCS license area. "Substantial service" means service that is sound, favorable, and substantially above a level of mediocre service that would barely warrant renewal.

\* \* \* \* \*

3. Section 24.129 is revised to read as follows:

##### **Sec. 24.129 Frequencies.**

The following frequencies are available for narrowband PCS. All licenses on channels indicated with an (\*\*) will be eligible for bidding credits as set forth in Section 24.309(b) of this Part if competitive bidding is used to award such licenses.

(a) \* \* \* \* \*

(b) \* \* \* \* \*

(c) Seven frequencies are available for assignment on a nationwide, regional, and MTA basis as follows:

(1) Two 50 kHz channels paired with 50 kHz channels are available for assignment on a nationwide basis:

Channel 18: 940.35-940.40 and 901.35-901.40 MHz; and,  
Channel 19: 940.40-940.45 and 901.40-901.45 MHz.\*\*

(2) One 50 kHz channels paired with 12.5 kHz channels is available for assignment on an MTA basis as follows:

Channel 20: 930.75-930.80 and 901.8375-901.8500 MHz.\*\*

(3) Two 50 kHz channels paired with 12.5 kHz channels are available for assignment on a regional basis as follows:

Channel 21: 930.80-930.85 and 901.8500-901.8625 MHz; and,  
Channel 22: 930.85-930.90 and 901.8625-901.8750 MHz.\*\*

(4) Two 50 kHz unpaired channels are available for assignment on an MTA basis as follows:

Channel 23: 940.90-940.95 MHz; and,  
Channel 24: 940.95-941.00 MHz.\*\*

(d) Two 50 kHz channels paired with 12.5 kHz channels are available for assignment on a nationwide and regional basis:

(1) One 50 kHz channel paired with a 12.5 kHz channel is available for assignment on a regional basis as follows:

Channel 25: 930.90-930.95 and 901.8750-901.8875 MHz;\*\* and,

(2) One 50 kHz channel paired with a 12.5 kHz channel is available for assignment on a nationwide basis as follows:

Channel 26: 930.95-931.00 and 901.8875-901.9000 MHz.\*\*

\* \* \* \* \*

4. Section 24.130 is revised to read as follows:

**. 24.130 Paging response channels.**

(a) The channels listed in paragraphs (b) and (c) of this section are available to all potential bidders. All qualified potential bidders are eligible to bid for any response channel in any MTA or regional license. Until two years after the date of initial license grant, winning bidders are limited to a maximum of two response channels within the same geographic area. Licenses for paging response channels are not counted toward the multiple ownership restrictions of Section 24.101.

(b) The following four 12.5 kHz unpaired channels are available for assignment on a MTA basis:

- A: 901.9000-901.9125 MHz;
- B: 901.9125-901.9250 MHz;
- C: 901.9250-901.9375 MHz; and
- D: 901.9375-901.9500 MHz.

(c) The following four 12.5 kHz unpaired channels are available for assignment on a regional basis:

- E: 901.9500-901.9625 MHz;
- F: 901.9625-901.9750 MHz;
- G: 901.9750-901.9875 MHz; and
- H: 901.9875-902.0000 MHz.

\* \* \* \* \*

Subpart F - Competitive Bidding Procedures for Narrowband PCS

5. Section 24.309 is revised to read as follows:

**. 24.309 Designated entity provisions**

(a) Designated entities entitled to preferences in the narrowband PCS service are small businesses and very small businesses as defined in . 24.320(b).

(b) Designated entities that are winning bidders for narrowband PCS licenses will be eligible for certain special provisions as follows:

(1) *Installment payments.*

Each winning bidder that qualifies as a small business, a very small business or a consortium of small businesses, as defined in . 24.320, and is a winning bidder for licenses may pay the remaining 90 percent of the net auction price for the license in quarterly installment payments made each year pursuant to . 1.2110(e) of this Chapter. Payments shall include both principal and interest amortized over the term of the license. A license issued to an eligible small business that elects installment payments will be conditioned on the full and timely performance of the license holder's quarterly payments. The additional following terms apply:

(i) An eligible licensee qualifying as a very small business under Section 24.320(b)(2) may make interest-only payments for two years. Interest will accrue at the Treasury note rate plus an additional 1.5 percent. Payments of interest and principal shall be amortized over the remaining eight years of the license term.

(ii) An eligible licensee qualifying as a small business under Section 24.320(b)(1) may make interest-only payments for two years. Interest will accrue at the Treasury note rate plus an additional 2.5 percent. Payments of interest and principal shall be amortized over the remaining eight years of the license term.

(2) *Bidding Credits.* A winning bidder that qualifies as a small business or a consortium of small businesses, as defined in . 24.320(b)(2), may use a bidding credit of 10 percent to lower the cost of its winning bid. A winning bidder that qualifies as a very small business or a consortium of very small businesses, as defined in . 24.320(b)(1) may use a bidding credit of 15 percent to lower the cost of its winning bid.

(c) *Short-Form Application Certification; Long-Form Application Disclosure.*

(1) All applicants for licenses under the designated entity provisions set forth in this section shall certify on their short-form applications (FCC Form 175) that they are eligible for those preferences pursuant to this section.

(2) In addition to the requirements in subpart I, all designated entity applicants that are winning bidders shall, in an exhibit to their long-form applications--

(i) Disclose separately and in the aggregate the gross revenues, computed in accordance with . 24.320, for each of the following: the applicant; the applicant's affiliates; the applicant's attributable investors, affiliates of its attributable investors, and, if a consortium of small businesses, the members of the joint venture;

(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 as a small business, including the establishment of *de facto* and *de jure* control; such agreements and instruments include articles of incorporation and bylaws, shareholder agreements, voting or other trust agreements, franchise agreements, and any other relevant agreements (including letters of intent), oral or written; and

(iii) List and summarize any investor protection agreements, including rights of first refusal, supermajority clauses, options, veto rights, and rights to hire and fire employees and to appoint members to boards of directors or management committees.

(d) *Audits.*

(1) Applicants and licensees claiming eligibility under this section shall be subject to random audits by the Commission.

(2) Consent to such audits is part of the certification included in the short- form application (FCC Form 175). Such consent shall include consent to the audit of the applicant's or licensee's books, documents and other material (including accounting procedures and practices) regardless of form or type, sufficient to confirm that such applicant's or licensee's representations are, and remain, accurate. Such consent shall include inspection at all reasonable times of the facilities, or parts thereof, engaged in providing and transacting business, or keeping records regarding licensed narrowband 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, consortium of small businesses, gross revenues, small business and very small business used in this section are defined in . 24.320.

(f) \* \* \* \* \*

\* \* \* \* \*

6. A new Section 24.310 is added, to read as follows:

**. 24.310 Eligibility for Licenses under Designated Entity Provisions**

(a) *General Rule.* Authorizations will be granted upon proper application if:

- (1) The applicant is qualified under the applicable laws and the regulations, policies and decisions issued under those laws;
- (2) There are frequencies available to provide satisfactory service; and
- (3) The public interest, convenience or necessity would be served by a grant.

(b) *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 any documents necessary to establish eligibility under this section or under the definition of *small business*. Licensees (and their successors in interest) shall maintain such files for the term of the license. Applicants that do not obtain the license(s) for which they applied shall maintain such files until the grant of such license(s) is final, or one year from the date of the filing of their short-form application (Form 175), whichever is earlier.

(c) *Audits.*

(1) Applicants and licensees claiming eligibility under this section or shall be subject to audits by the Commission, using in- house and contract resources. Selection for audit may be random, on information, or on the basis of other factors.

(2) Consent to such audits is part of the certification included in the short- form application (FCC

Form 175). Such consent shall include consent to the audit of the applicant's or licensee's books, documents and other material (including accounting procedures and practices) regardless of form or type, sufficient to confirm that such applicant's or licensee's representations are, and remain, accurate. Such consent shall include inspection at all reasonable times of the facilities, or parts thereof, engaged in providing and transacting business, or keeping records regarding licensed narrowband PCS service and shall also include consent to the interview of principals, employees, customers and suppliers of the applicant or licensee.

(d) *Definitions.* The terms *affiliate, consortium of small businesses, gross revenues, publicly traded corporation with widely dispersed voting power, small business, very small business and total assets* used in this section are defined in . 24.320.

\* \* \* \* \*

7. A new Section 24.311 is added, to read as follows:

**. 24.311 Geographic Partitioning and Spectrum Disaggregation; Unjust Enrichment; Construction Requirements**

(a) *Eligibility*

(1) Parties seeking approval for partitioning and disaggregation shall request an authorization for partial assignment of license pursuant to . 24.439.

(b) *Technical Standards*

(1) *Partitioning.* In the case of partitioning, requests for authorization for partial assignment of a license must include, as attachments, a description of the partitioned service area and a calculation of the population of the partitioned service area and the licensed geographic service area. The partitioned service area shall be defined by coordinate points at every 3 seconds along the partitioned service area unless an FCC recognized service area is utilized (i.e., Major Trading Area, Basic Trading Area, Metropolitan Service Area, rural Service Area or Economic Area) or county lines are followed. The geographic coordinates must be specified in degrees, minutes, and second to the nearest second of latitude and longitude and must be based upon the 1927 North American Datum (NAD27). Applicants may supply geographical coordinates based on the 1983 North American Datum (NAD83) in addition to those required (NAD27). In the case where an FCC recognized service area or county lines are utilized, applicants need only list the specific area(s) (through use of FCC designations or county names) that constitute the partitioned area.

(2) *Disaggregation.* Spectrum maybe disaggregated in any amount.

(3) *Combined Partitioning and Disaggregation.* The Commission will consider requests for

partial assignments of licenses that propose combinations of partitioning and disaggregation.

(c) *Unjust Enrichment*

(1) *General.* Designated entities using installment plans and/or bidding credits to obtain narrowband license(s) and partition the license(s) or disaggregate their spectrum to entities not meeting the eligibility standards for installment payments, will be subject to the following unjust enrichment provisions:

(2) *Apportioning Unjust Enrichment Payments.* Unjust enrichment payments for partitioned license areas shall be calculated based upon the ratio of the population of the partitioned license area to the overall population of the license area and by utilizing the most recent census data. Unjust enrichment payments for disaggregated spectrum shall be calculated based upon the ratio of the amount of spectrum disaggregated to the amount held by the licensee.

(d) *Installment Payments.*

(1) *Apportioning the Balance on Installment Payment Plans.* When a winning bidder elects to pay for its license through an installment payment plan pursuant to 47 CFR 1.2110(e) or 24.309(1), and partitions its licensed area or disaggregates spectrum to another party, the outstanding balance owed by the licensee on its installment payment plan (including accrued and unpaid interest) shall be apportioned between the licensee and partitionee or disaggregatee. Both parties will be responsible for paying their proportionate share of the outstanding balance to the U.S. Treasury. In the case of partitioning, the balance shall be apportioned based upon the ratio of the population of the partitioned area to the population of the original license area calculated on the latest available census data. In the case of disaggregation, the balance shall be apportioned based on the ratio of the amount of spectrum disaggregated to the amount of spectrum allocated to the license area.

(2) *Parties Not Qualified For Installment Payment Plans.*

(i) When a winning bidder elects to pay for its license through an installment payment plan, and partitions its license or disaggregates spectrum to another party that would not qualify for an installment payment plan or elects not to pay for its share of the license through installment payments, the outstanding balance owed by the licensee (including accrued and unpaid interest) shall be apportioned according to 24.311(d)(1).

(ii) The partitionee or disaggregatee shall, as a condition of the approval of the partial assignment application, pay its entire *pro rata* amount within 30 days of Public Notice conditionally granting the partial assignment application. Failure to meet this condition will result in a rescission of the grant of the partial assignment application; *or*

(iii) The licensee shall be permitted to continue to pay its *pro rata* share of the outstanding balance and shall receive new financing documents (promissory note, security agreement) with a revised payment obligation, based on the remaining amount of time on the original installment payment schedule. These financing documents will replace the licensee's existing financing documents which shall be marked "superseded" and returned to the licensee upon receipt of the

new financing documents. The original interest rate, established pursuant to . 1.2110(e)(3)(i) at the time of the grant of the initial license in the market, shall continue to be applied to the licensee's portion of the remaining government obligation.

(iv) A default on the licensee's payment obligation will only affect the licensee's portion of the market.

(3) *Parties Qualified For Installment Payment Plans.*

(i) Where both parties to a partitioning or disaggregation agreement qualify for installment payments, the partitionee or disaggregatee will be permitted to make installment payments on its portion of the remaining government obligation.

(ii) Each party will be required, as a condition to approval of the partial assignment application, to execute separate financing documents (promissory note, security agreement) agreeing to pay their *pro rata* portion of the balance due (including accrued and unpaid interest) based upon the installment payment terms for which they qualify under the rules. The financing documents must be returned to the U.S. Treasury within thirty (30) days of the Public Notice conditionally granting the partial assignment application. Failure by either party to meet this condition will result in the automatic cancellation of the grant of the partial assignment application. The interest rate, established pursuant to . 1.2110(e)(3)(i) at the time of the grant of the initial license in the market, shall continue to be applied to both parties' portion of the balance due. Each party will receive a license for their portion of the partitioned market.

(iii) A default on an obligation will only affect that portion of the market area held by the defaulting party.

(iv) Partitionees or disaggregatees that qualify for installment payment plans may elect to pay some of their *pro rata* portion of the balance due in a lump sum payment to the U.S. Treasury and to pay the remainder in installments as set forth in 24.309(1).

(e) *Construction Requirements.*

(1) *Requirements for Partitioning.* Parties seeking authority to partition must meet one of the following construction requirements:

(i) The partitionee may certify that it will satisfy the applicable construction requirements set forth in . 24.103 for the partitioned license area; *or*

(ii) The original licensee may certify that it has or will meet its construction requirements, as set forth in 24.103, for the entire license area. In that case, the partitionee must only satisfy the requirements for "substantial service," as set forth in . 24.103, for the partitioned license area by the end of the original ten-year license term of the licensee.

(iii) Applications requesting partial assignments of license for partitioning must include a certification by each party as to which of the above construction options they select.

(iv) Partitionees must submit supporting documents showing compliance with the respective construction requirements within the appropriate construction benchmarks set



forth in . 24.103.

(v) Failure by any partitionee to meet its respective construction requirements will result in the automatic cancellation of the partitioned license without further Commission action.

(2) *Requirements for Disaggregation.* Parties seeking authority to disaggregate must submit with their partial assignment application a certification signed by both parties stating which of the parties will be responsible for meeting the construction requirements for narrowband PCS as set forth in . 24.103. Parties may agree to share responsibility for meeting the construction requirements. Parties that accept responsibility for meeting the construction requirements and later fail to do so will be subject to license forfeiture without further Commission action.

\* \* \* \* \*

8. Section 24.320 is revised, to read as follows:

**. 24.320 Definitions.**

(a) *Scope.* The definitions in this section apply to .. 24.309-24.315 of this subpart, 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, persons or entities that hold attributable interests in such entity, and their affiliates, has average gross revenues that are not more than \$40 million for the preceding three years; or

(2) A *very small business* is an entity that, together with its *affiliates*, persons or entities that hold attributable interests in such entity, and their *affiliates*, has average gross revenues that are not more than \$15 million for the preceding three years.

(3) *Attribution and Aggregation of Gross Revenues .*

(i) For purposes of determining whether an entity meets either the \$15 million or \$40 million average annual gross revenues size standard set forth in paragraphs (b)(1) and (b)(2) of this section, the gross revenues of the entity, its affiliates, persons or entities holding interests in the entity and their affiliates shall be considered on a cumulative basis and aggregated.

(ii) Where an applicant (or licensee) is a consortium of small businesses, the gross revenues of each small business shall not be aggregated.

(4) A *small business consortium* is a conglomerate organization formed as a joint venture between mutually-independent business firms, each of which individually satisfies either definition of a small business in paragraph (b)(1) of this section. In a consortium of small businesses, each individual member must establish its eligibility as a small business, as defined in this section.

(5) A *very small business consortium* is a conglomerate organization formed as a joint venture between mutually-independent business firms, each of which individually satisfies either

definition of a very small business in paragraph (b)(2) of this section. In a consortium of small businesses, each individual member must establish its eligibility as a small business, as defined in 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 owned by members of minority groups and/or women in which minorities and/or women who are U.S. citizens control the applicant, have at least 50.1 percent equity ownership and, in the case of a corporate applicant, a 50.1 percent voting interest. For applicants that are partnerships, every general partner either must be a minority and/or woman (or minorities and/or women) who are U.S. citizens and who individually or together own at least 50.1 percent of the partnership equity, or an entity that is 100 percent owned and controlled by minorities and/or women who are U.S. citizens. The interests of minorities and women are to be calculated on a fully-diluted basis; agreements such as stock options and convertible debentures shall be considered to have a present effect on the power to control an entity and shall be treated as if the rights thereunder already have been fully exercised. However, upon a demonstration that options or conversion rights held by non-controlling principals will not deprive the minority and female principals of a substantial financial stake in the venture or impair their rights to control the designated entity, a designated entity may seek a waiver of the requirement that the equity of the minority and female principals must be calculated on a fully-diluted basis.

(d) *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 quarterly financial statements for the relevant period.

(e) \* \* \* \* \*

(f) *Affiliate.*

(1) *Basis for Affiliation.* An individual or entity is an affiliate of an applicant or of a person holding an attributable interest in an applicant (both referred to herein as "the applicant") if such individual or entity:

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

(2) *Nature of control in determining affiliation.*

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

*Example for paragraph (g)(2)(i).* An applicant owning 50 percent of the voting stock of another concern would have negative power to control such concern since such party can block any action of the other stockholders. Also, the bylaws of a corporation may permit a stockholder

with less than 50 percent of the voting to block any actions taken by the other stockholders in the other entity. Affiliation exists when the applicant has the power to control a concern while at the same time another person, or persons, are in control of the concern at the will of the party or parties with the power of control.

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

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

*Example for paragraph (g)(2)(iii).* In a corporation where the officers and directors own various size blocks of stock totaling 40 percent of the corporation's voting stock, but no officer or director has a block sufficient to give him or her control or the power to control and the remaining 60 percent is widely distributed with no individual stockholder having a stock interest greater than 10 percent, management has the power to control. If persons with such management control of the other entity are persons with attributable interests in the applicant, the other entity will be deemed an affiliate of the applicant.

(3) *Identity of interest between and among persons.* Affiliation can arise between or among two or more persons with an identity of interest, such as members of the same family or persons with common investments. In determining if the applicant controls or is controlled by a concern, persons with an identity of interest will be treated as though they were one person.

Example 1. Two shareholders in Corporation Y each have attributable interests in the same narrowband PCS application. While neither shareholder has enough shares to individually control Corporation Y, together they have the power to control Corporation Y. The two shareholders with these common investments (or identity of interest) are treated as though they are one person and Corporation Y would be deemed an affiliate of the applicant.

Example 2. One shareholder in Corporation Y, shareholder A, has an attributable interest in a narrowband PCS application. Another shareholder in Corporation Y, shareholder B, has a nonattributable interest in the same narrowband 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 narrowband PCS application, Corporation Y would still be deemed an affiliate of the applicant.

(i) *Spousal Affiliation.* Both spouses are deemed to own or control or have the power to control interests owned or controlled by either of them, unless they are subject to a legal separation recognized by a court of competent jurisdiction in the United States.

(ii) *Kinship Affiliation.* Immediate family members will be presumed to own or control or have the power to control interests owned or controlled by other immediate family members. In this context "immediate family member" means father, mother, husband, wife, son, daughter, brother, sister, father- or mother-in-law, son- or daughter-in-law, brother- or sister-in-law, step-father, or -mother, step-brother, or -sister, step-son, or -daughter, half brother or sister. This presumption may be rebutted by showing that

(A) The family members are estranged,

(B) The family ties are remote, or

(C) The family members are not closely involved with each other in business matters.

*Example for paragraph (g)(3)(ii).* A owns a controlling interest in Corporation X. A's sister-in-law, B, has an attributable interest in an narrowband PCS application. Because A and B have a presumptive kinship affiliation, A's interest in Corporation X is attributable to B, and thus to the applicant, unless B rebuts the presumption with the necessary showing.

(4) *Affiliation through stock ownership.*

(i) An applicant is presumed to control or have the power to control a concern if he or she owns or controls or has the power to control 50 percent or more of its voting stock.

(ii) An applicant is presumed to control or have the power to control a concern even though he or she owns, controls or has the power to control less than 50 percent of the concern's voting stock, if the block of stock he or she owns, controls or has the power to control is large as compared with any other outstanding block of stock.

(iii) If two or more persons each owns, controls or has the power to control less than 50 percent of the voting stock of a concern, such minority holdings are equal or approximately equal in size, and the aggregate of these minority holdings is large as compared with any other stock holding, the presumption arises that each one of these persons individually controls or has the power to control the concern; however, such presumption may be rebutted by a showing that such control or power to control, in fact, does not exist.

(5) *Affiliation arising under stock options, convertible debentures, and agreements to merge.*

Stock options, convertible debentures, and agreements to merge (including agreements in principle) are generally considered to have a present effect on the power to control the concern. Therefore, in making a size determination, such options, debentures, and agreements will generally be treated as though the rights held thereunder had been exercised. However, neither an affiliate nor an applicant can use such options and debentures to appear to terminate its control over another concern before it actually does so.

*Example 1 for paragraph (g)(5).* If company B holds an option to purchase a controlling interest in company A, who holds an attributable interest in an narrowband PCS application, the situation is treated as though company B had exercised its rights and had become owner of a controlling interest in company A. The gross revenues of company B must be taken into account in determining the size of the applicant.

*Example 2 for paragraph (g)(5).* If a large company, BigCo, holds 70% (70 of 100 outstanding shares) of the voting stock of company A, who holds an attributable interest in a narrowband PCS application, and gives a third party, SmallCo, an option to purchase 50 of the 70 shares owned by BigCo, BigCo will be deemed to be an affiliate of company A, and thus the applicant, until SmallCo actually exercises its options to purchase such shares. In order to prevent BigCo from circumventing the intent of the rule which requires such options to be considered on a fully diluted basis, the option is not considered to have present effect in this case.

*Example 3 for paragraph (g)(5).* If company A has entered into an agreement to merge with company B in the future, the situation is treated as though the merger has taken place.

(6) *Affiliation under voting trusts.*

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

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

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

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

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

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

(10) *Affiliation under joint venture arrangements.*

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

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

(g) *Publicly Traded Corporation with Widely Dispersed Voting Power.* A publicly traded corporation with widely dispersed voting power is a business entity organized under the laws of the United States:

(1) Whose shares, debt, or other ownership interests are traded on an organized securities exchange within the United States;

(2) In which no person

(i) Owns more than 15 percent of the equity; or

(ii) Possesses, directly or indirectly, through the ownership of voting securities, by contract or otherwise, the power to control the election of more than 15 percent of the members of the board of directors or other governing body of such publicly traded corporation; and

(3) Over which no person other than the management and members of the board of directors or other governing body of such publicly traded corporation, in their capacities as such, has *de facto*

control.

(4) The term *person* shall be defined as in section 13(d) of the Securities and Exchange Act of 1934, as amended (15 U.S.C. 78(m)), and shall also include investors that are commonly controlled under the indicia of control set forth in the definition of *affiliate* in paragraph (h) of this section.

(h) *Attributable Interests.* Partnership and other ownership interests and any stock interest amounting to 5 percent or more of the equity, or outstanding stock, or outstanding voting stock of a licensee or applicant will be attributable.

## APPENDIX C

**Comments and Replies Filed in Response to Competitive Bidding Third MO&O/Further Notice****Comments (September 16, 1994)**

AirTouch Paging (AirTouch)  
American Paging, Inc. (American Paging)  
Association of Independent Designated Entities (AIDE)  
Blooston, Mordkofsky, Jackson & Dickens (BMJ&D)  
Essence Communications, Inc. (Essence)  
Lieto, David J. (Lieto)  
Mobile Telecommunications Technologies Corp. (Mtel)  
Paging Network, Inc. (PageNet)  
PageMart, Inc. (PageMart)  
Puerto Rico Telephone Company (PRTC)  
Personal Communications Industry Association (PCIA)  
San Juan Pacific Management (SJPM)  
Small Business Administration (SBA)  
Women of Wireless (WOW)

**Reply Comments (October 3, 1994)**

Blooston, Mordkofsky, Jackson & Dickens (BMJ&D)  
Essence Communications, Inc. (Essence)  
Minority Media and Telecommunications Council (MMTC)  
Paging Network, Inc. (PageNet)

**Comments Filed in Response to Public Notice Seeking Additional Comment on Commission's Narrowband PCS Entrepreneurs' Blocks Proposals****Comments (January 13, 1995)**

AirTouch Paging (AirTouch)  
American Paging, Inc. (American Paging)  
Eatelcorp, Inc. (Eatel)  
Mobile Telecommunication Technologies Corp. (Mtel)  
Pagemart, Inc.  
PCS Development Corporation (PCSD)  
Personal Communications Industry Assoc. (PCIA)  
USIMTA/USIPCA

**Reply Comments (January 23, 1995)**

Mobile Telecommunication Technologies Corp. (Mtel)  
Pagemart, Inc. (Pagemart)

PCS Development Corporation (PCSD)



**APPENDIX D****INITIAL REGULATORY FLEXIBILITY ANALYSIS**  
***Further Notice of Proposed Rulemaking***

As required by the Regulatory Flexibility Act, *see* 3 U.S.C. . 603, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the policies and rules proposed and adopted in the *Further Notice* section of this *Report and Order and Further Notice of Proposed Rulemaking (FNPRM)*. Written public comments are requested on the IRFA and must be filed by the deadlines for comments on the *Report and Order and Further Notice of Proposed Rulemaking*, provided above in paragraph 109.

***A. Reason for Action:***

This *FNPRM* was initiated to secure comment on proposals for revising rules for narrowband PCS. Such changes to the rules for the narrowband PCS service would promote efficient licensing and enhance the service's competitive potential in the Commercial Mobile Radio Service marketplace. The adopted and proposed rules are based on the competitive bidding authority of Section 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. . 309(j), which authorized the Commission to use auctions to select among mutually exclusive initial applications in certain services, including narrowband Personal Communications Services (PCS).

***B. Objectives of this Action:***

The Omnibus Budget Reconciliation Act of 1993 (Budget Act), Pub. L. No. 103-66, Title VI, . 6002, and the subsequent Commission actions to implement it are intended to establish a system of competitive bidding for choosing among certain applications for initial licenses, and to carry out statutory mandates that certain designated entities, including small businesses, are afforded an opportunity to participate in the competitive bidding process and in the provision of narrowband PCS services.

***C. Legal Basis:***

The proposed action is authorized under the Budget Act and in Sections 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. .. 154(i), 303(r) and 309(j).

***D. Reporting, Recordkeeping, and Other Compliance Requirements:***

The proposals under consideration in this *FNPRM* include the possibility of new reporting and recordkeeping requirements for a number of small business entities, as follows.

We request comment on these proposals.

1. Service Area Reallocation. The Commission proposes revising its current channelization plan to ensure that it provides sufficient opportunities for all interested parties, including small businesses, to establish a viable narrowband PCS system. The Commission is concerned that such opportunities may not be meaningful if a single Basic Trading Area (BTA)<sup>240</sup> is not a sufficiently large service area for implementation of narrowband PCS. The Commission has previously stated that the larger Major Trading Area licenses (MTAs)<sup>241</sup> will provide for more reasonable and homogeneous license areas for the provision of PCS. In addition, the Commission reiterates that local participation in narrowband PCS could occur through franchising or partitioning arrangements with nationwide and regional PCS licensees, thus affording more opportunities to serve smaller areas. As a result, the Commission tentatively concludes that it will redesignate certain narrowband PCS frequencies for larger service areas and will thus provide additional opportunities for designated entities, including small businesses. The Commission proposes that the remaining narrowband PCS channel blocks will be redesignated as follows: (1) MTA licenses on channel blocks 18 and 19, and BTA licenses on channel block 26, will be redesignated as nationwide licenses; (2) MTA licenses on channel blocks 21 and 22, and BTA licenses on channel block 25, will be redesignated as regional licenses; and (3) the four BTA response channels (E, F, G and H) will be redesignated as regional channels. The Commission does not anticipate any additional reporting or recordkeeping requirements from this proposal.

2. Response Channel Redesignation. The Commission tentatively concludes that the paging response channels should be reallocated for use in larger service areas. The Commission agrees with commenters who argue that reallocating some of the response channels for use in larger service areas will facilitate the upgrade of existing paging networks, and enhance narrowband PCS systems. The Commission therefore proposes to redesignate the four 12.5 kHz unpaired response channels currently licensed as BTA channel blocks as regional channel blocks,<sup>242</sup> and retain the four MTA paging response channels. Additionally, the Commission

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<sup>240</sup> Rand McNally is the copyright owner of the MTA/BTA listings, which list the BTAs contained in each MTA and the counties within each BTA, as embodied in Rand McNally's Trading Areas System MTA/BTA Diskette, and geographically represented in the Rand McNally 1992 Commercial Atlas and Marketing Guide (the "MTA map"), 123rd Edition at pp. 38-39. The conditional use of Rand McNally's copyrighted material by interested persons is authorized under a blanket license agreement dated February 10, 1994, which covers certain services, including PCS. Rand McNally organizes the 50 states and the District of Columbia in 47 MTAs and 487 BTAs. For PCS licensing purposes, we adopted service areas that separated Alaska from the Seattle MTA and added five insular areas: Puerto Rico, U.S. Virgin Islands, Guam, Northern Mariana Islands and American Samoa. In 1994, the number of BTAs was changed to 493 because Puerto Rico was reconfigured into 2 BTA-like service areas. See Amendment of the Commission's Rules to Establish New Narrowband PCS, *Second Memorandum Opinion and Order*, GEN Docket 90-314, 9 FCC Rcd 4519, 4523, . 18 (1994) (*PCS Second MO&O*).

<sup>241</sup> See n.1, *supra*.

<sup>242</sup> The five regions for licensing of narrowband PCS consist of the following MTAs: Region 1 (Northeast): Boston-

does not redesignate response channels to an entrepreneurs' block. Instead, as discussed in the *Further Notice of Proposed Rulemaking* accompanying this *Report and Order*, the Commission proposes to open eligibility for these channels to all applicants, not just incumbent paging licensees. The Commission does not anticipate any additional reporting or recordkeeping requirements from this proposal.

3. Construction Requirements. The proposals in the *FNPRM* include the possibility of imposing reporting and recordkeeping requirements for new narrowband PCS licensees to establish compliance with the coverage requirements, if such requirements are adopted.

4. Geographic Partitioning and Spectrum Disaggregation. The proposals in the *FNPRM* include the possibility of imposing reporting and recordkeeping requirements for small businesses seeking licenses through the proposed partitioning and disaggregation rules. The information requirements would be used to determine whether the licensee is a qualifying entity to obtain partitioned or disaggregated spectrum. This information will be a one-time filing by any applicant requesting such a license. The information will be submitted on the FCC Forms 490 (or 430 and/or 600 filed as one package under cover of the Form 490) which are currently in use and have already received OMB clearance. The Commission estimates that the average burden on the applicant is three hours for the information necessary to complete these forms. The Commission estimates that 75 percent of the respondents, which may include small businesses, will contract out the burden of responding. The Commission estimates that it will take approximately 30 minutes to coordinate information with those contractors. The remaining 25 percent of respondents, which may include small businesses, are estimated to employ in-house staff to provide the information. Applicants, including small businesses, filing the package under cover of FCC Form 490 electronically will incur a \$2.30 per minute on-line charge. On-line time would amount to no more than 30 minutes. The Commission estimates that 75 percent of the applicants may file electronically. The Commission estimates that applicants contracting out the information would use an attorney or engineer, with an average cost of \$200 per hour, to prepare the information.

5. Construction Prior to Grant of Licenses for Narrowband and Broadband PCS. The proposals in the *FNPRM* include the possibility of changing existing Commission pre-licensing construction requirements for narrowband PCS. The proposal in the *FNPRM* would allow long-

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Providence, Buffalo-Rochester, New York, Philadelphia, and Pittsburgh; Region 2 (South): Atlanta, Charlotte-Greensboro-Greenville-Raleigh, Jacksonville, Knoxville, Louisville-Lexington-Evansville, Nashville, Miami-Fort Lauderdale, Richmond-Norfolk, Tampa-St. Petersburg-Orlando, Washington-Baltimore, Puerto Rico and the United States Virgin Islands; Region 3 (Midwest): Chicago, Cincinnati-Dayton, Cleveland, Columbus, Des Moines-Quad Cities, Detroit, Indianapolis, Milwaukee, Minneapolis-St. Paul, and Omaha; Region 4 (Central): Birmingham, Dallas-Fort Worth, Denver, El Paso-Albuquerque, Houston, Kansas City, Little Rock, Memphis-Jackson, New Orleans-Baton Rouge, Oklahoma City, San Antonio, St. Louis, Tulsa, and Wichita; Region 5 (West): Honolulu, Los Angeles-San Diego, Phoenix, Portland, Salt Lake City, San Francisco-Oakland-San Jose, Seattle, Spokane-Billings and Alaska; and American Samoa, Guam, and the Northern Mariana Islands.

form applicants to begin construction of facilities at their own risk, regardless of whether any petitions to deny have been filed. The Commission does not anticipate any additional reporting or recordkeeping requirements from this proposal.

6. Small Business Definition. The *FNPRM* proposes a two-tiered definition to define small businesses: (1) a small business is a business with average gross revenues for each of the preceding three years that do not exceed \$40 million, and (2) a very small business is one which has less than an average of \$15 million in gross revenues in each of the last three years. Qualifying entities will be eligible for bidding credits and installment plans. In order to qualify as small business under either tier, an entity must demonstrate that its gross revenues fall within the proposed thresholds. The information will be submitted on the FCC Form 600, which is currently in use and which has received OMB clearance. Such entities will also need to maintain supporting documentation at their principal place of business.

7. Ownership Disclosure Requirements. The proposals in the *FNPRM* include the possibility of changing the ownership disclosure requirements for all applicants. The information requirements would be used to determine whether the licensee is a qualifying entity under the Commission's ownership rules. The proposals include relaxing the disclosure requirements, such as the required submittal of partnership agreements, which would reduce the administrative burdens associated with the auction process. The Commission also seeks comment on whether a separate schedule to FCC Form 175 should be designated, which would formalize the disclosure requirements to the current FCC Form 175. The proposal in the *FNPRM* would decrease the amount of information that a narrowband PCS applicant would be required to file. This information will be a one-time filing by any applicant requesting such a license. The information will be submitted on the FCC Forms 600 and FCC Form 175, which are currently in use and have already received OMB clearance.

***E. Federal Rules Which Overlap, Duplicate or Conflict With These Rules:*** None.

***F. Description, Potential Impact, and Number of Small Entities Involved:***

The *FNPRM* would establish certain narrowband PCS spectrum blocks for bidding by smaller entities as well as larger entities, and would provide installment payments and bidding credits to certain eligible entities bidding within those blocks. The Commission is required to estimate in its Final Regulatory Flexibility Analysis the number of small entities to which a rule will apply, provide a description of such entities, and assess the impact of the rule on such entities. To assist the Commission in this analysis, commenters are requested to provide information regarding how many total entities, existing and potential, would be affected by the proposed rules in the *FNPRM*. In particular, the Commission seeks estimates of how many such entities will be considered small businesses.

Geographic Partitioning and Spectrum Disaggregation. The partitioning and disaggregation rule changes proposed in this proceeding will affect all small businesses which

avail themselves of these rule changes, including small businesses currently holding narrowband PCS licenses who choose to partition and/or disaggregate and small businesses who may acquire licenses through partitioning and/or disaggregation.

The Commission is required to estimate in its Final Regulatory Flexibility Analysis the number of small entities to which a rule will apply, provide a description of such entities, and assess the impact of the rule on such entities. To assist the Commission in this analysis, commenters are requested to provide information regarding how many total entities, existing and potential, would be affected by the proposed rules in the *FNPRM*. In particular, the Commission seeks estimates of how many such entities will be considered small businesses. As explained in the Final Regulatory Flexibility Analysis for the *Second Report and Order*, the Commission is utilizing the SBA definition applicable to radiotelephone companies, *i.e.*, an entity employing less than 1,500 persons.<sup>243</sup> The Commission seeks comment on whether this definition is appropriate for narrowband PCS licensees in this context. Additionally, the Commission requests each commenter to identify whether it is a small business under this definition. If a commenter is a subsidiary of another entity, this information should be provided for both the subsidiary and the parent corporation or entity.

The Commission estimates that the approximately 30 current regional narrowband PCS licensees and 11 nationwide narrowband PCS licensees could take the opportunity to partition and/or disaggregate a license or obtain an additional license through partitioning or disaggregation.<sup>244</sup> New entrants could obtain narrowband PCS licenses through the competitive bidding procedure, and take the opportunity to partition and/or disaggregate a license or obtain an additional license through partitioning or disaggregation. Additionally, entities that are neither incumbent licensees nor geographic area licensees could enter the market by obtaining a narrowband PCS license through partitioning or disaggregation. The Commission cannot estimate how many licensees or potential licensees could take the opportunity to partition and/or disaggregate a license or obtain a license through partitioning and/or disaggregation, because it has not yet determined the size or number of narrowband PCS licenses that will be granted in the future. Given the fact that nearly all radiotelephone companies have fewer than 1,000 employees, and that no reliable estimate of the number of future narrowband PCS licensees can be made, the Commission assumes for purposes of this IRFA that all of the licenses will be awarded to small businesses. It is possible that a significant number of the potential licensees who could take the opportunity to partition and/or disaggregate a license or who could obtain a license through partitioning and/or disaggregation will be small businesses.

***G. Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives:***

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<sup>243</sup> 13 C.F.R. . 121.201, Standard Industrial Classification Code 4812.

<sup>244</sup> See *Visitors Auction Guide*, Broadband Personal Communications Services, December 5, 1995 at Tab VIII.

In the FNPRM the Commission seeks comment on whether coverage requirements should be imposed for all narrowband PCS licensees. Any significant alternatives presented in the comments will be considered. Coverage requirements for narrowband PCS licensees, if adopted, would probably not affect small businesses.

With respect to partitioning, the Commission tentatively concludes that unjust enrichment provisions should apply when a licensee has benefitted from the small business provisions in the auction rules and partitions a portion of the geographic license area to another entity that would not qualify for such benefits. The alternative to applying the unjust enrichment provisions would be to allow an entity who had benefitted from the special bidding provisions for small businesses to become unjustly enriched by partitioning a portion of their license area to parties that do not qualify for such benefits. The Commission also seeks comment on whether spectrum disaggregation would be feasible for narrowband PCS, and how much spectrum a narrowband PCS licensee should be permitted to disaggregate.

The *FNPRM* proposes certain provisions for smaller entities designed to ensure that such entities have the opportunity to participate in the competitive bidding process and in the provision of narrowband PCS services. Any significant alternatives presented in the comments will be considered.

***IRFA Comments:*** We request written public comment on the foregoing Initial Regulatory Flexibility Analysis. Comments must have a separate and distinct heading designating them as responses to the IRFA and must be filed by the deadlines provided in paragraph 109 of this *Report and Order/Further Notice of Proposed Rulemaking*.

**APPENDIX E****FINAL REGULATORY FLEXIBILITY ANALYSIS**  
***Report and Order***

As required by the Regulatory Flexibility Act, *see* 5 U.S.C. . 604, the Commission has prepared a Final Regulatory Flexibility Analysis (FRFA) of the expected impact on small entities of the policies and rules proposed and adopted in the *Report and Order* section of this *Report and Order and Further Notice of Proposed Rulemaking (R&O)*. An Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Notice of Proposed Rule Making and Tentative Decision* in this proceeding, in GEN Docket No. 90-314 and ET Docket No. 92-100, as well as the *Third Memorandum Opinion and Order and Further Notice of Proposed Rule Making* in this proceeding. Additionally, Final Regulatory Flexibility Analyses were incorporated in the *First Report and Order*, the *Third Report and Order*, the *Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, and the *Second Memorandum Opinion and Order* in this proceeding. Written comments to the proposals, including the Initial Regulatory Flexibility Analysis, were requested. 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.

***A. Need for and Objective of Rules:***

This *R&O* was initiated to adopt rules and secure comment on proposals for revising rules for narrowband Personal Communications Services (PCS). Such changes to the rules for the narrowband PCS service would promote efficient licensing and enhance the service's competitive potential in the Commercial Mobile Radio Service marketplace. The adopted rules are based on the competitive bidding authority of Section 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. . 309(j), which authorizes the Commission to use auctions to select among mutually exclusive initial applications in certain services, including narrowband PCS. The Omnibus Budget Reconciliation Act of 1993 (Budget Act), Pub. L. No. 103-66, Title VI, . 6002, and the subsequent Commission actions to implement it are intended to establish a system of competitive bidding for choosing among certain applications for initial licenses, and carry out statutory mandates that certain designated entities, including small businesses, are afforded an opportunity to participate in the competitive bidding process and in the provision of narrowband PCS services.

***B. Issues Raised by the Public in Response to the Initial Analysis:***

No party suggested modifications specifically to the Initial Regulatory Flexibility Analysis. The following issues will apply to small businesses.

1. Power and Antenna Height Limits. The Commission clarifies that Section 24.132 of its rules applies to the regional service areas as well as Major Trading Area (MTA)<sup>245</sup> service areas. The Commission amends paragraphs (d) and (e) of Section 24.132 of its rules, 47 C.F.R. . 24.132, to reflect that these rules apply to regional areas. Regional base stations, in addition to MTA base stations, must operate at reduced heights and power limits near service area borders in order to protect adjacent licensees from interference. In addition, the Commission clarifies that a narrowband PCS licensee holding a license for the same channel in an adjacent region or MTA is not required to reduce height and power to protect itself.

2. Auction Rules. Based upon the comments and record before it, the Commission determines that it will not establish an entrepreneurs' block for narrowband PCS similar to its provisions in broadband PCS. The Commission agrees with those commenters who argue that the results of the previously-held narrowband regional auction demonstrate that bidding credits and installment payments can facilitate participation by designated entities in the competitive process, as well as securing licenses for the provision of narrowband PCS. Additionally, the Commission has the experience of other auctions, such as 900 MHz SMR, which did not have an entrepreneurs' block but, nonetheless, had many successful designated entity applicants.<sup>246</sup> Also, the Commission considers narrowband PCS to be less capital intensive than broadband PCS, thereby making it more likely that small businesses, for example, can acquire the financing to win these licenses, particularly for MTAs. Thus, the Commission concludes there is no need to insulate designated entities from other bidders and that bidding credits coupled with installment payments should satisfy its obligations under Section 309(j) of the Communications Act as they have in so many other auctions.

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<sup>245</sup> Rand McNally is the copyright owner of the MTA/BTA listings, which list the BTAs contained in each MTA and the counties within each BTA, as embodied in Rand McNally's Trading Areas System MTA/BTA Diskette, and geographically represented in the Rand McNally 1992 Commercial Atlas and Marketing Guide (the "MTA map"), 123rd Edition at pp. 38-39. The conditional use of Rand McNally's copyrighted material by interested persons is authorized under a blanket license agreement dated February 10, 1994, which covers certain services, including PCS. Rand McNally organizes the 50 states and the District of Columbia in 47 MTAs and 487 BTAs. For PCS licensing purposes, we adopted service areas that separated Alaska from the Seattle MTA and added five insular areas: Puerto Rico, U.S. Virgin Islands, Guam, Northern Mariana Islands and American Samoa. In 1994, the number of BTAs was changed to 493 because Puerto Rico was reconfigured into 2 BTA-like service areas. *See* Amendment of the Commission's Rules to Establish New Narrowband PCS, *Second Memorandum Opinion and Order*, GEN Docket 90-314, 9 FCC Rcd 4519, 4523, . 18 (1994) (*PCS Second MO&O*).

<sup>246</sup> *See Press Release, "Wireless Telecom Bureau Releases Progress Report"* (rel. March 5, 1997).



3. Definition of Minority Groups. In the *Competitive Bidding Fifth Memorandum Opinion and Order*, the Commission noted that it would make the same definitional correction made in the broadband PCS context to the definition of minority groups used in the narrowband PCS auction rules.<sup>247</sup> Thus, in an effort to maintain consistency throughout its auction rules for various services, the Commission revises its definition of "members of minority groups" in its narrowband PCS auction rules to include "Blacks, Hispanics, American Indians, Alaskan Native, Asians, and Pacific Islanders."

***C. Description and Number of Small Entities Involved:***

The rules adopted in this *Report and Order* will apply to current narrowband PCS operators and new entrants into the narrowband PCS market. Under these rules, mutually exclusive applications for narrowband PCS licenses will be resolved through competitive bidding procedures.

The Commission does not know how many narrowband PCS licenses will be granted or auctioned, as it has not yet determined the size or number of such licenses. Two auctions of narrowband PCS licenses have been conducted for a total of 41 licenses, out of which 11 were obtained by small businesses owned by members of minority groups and/or women. Small businesses were defined as those with averaged gross revenues for the prior three fiscal years of \$40 million or less.<sup>248</sup> For purposes of this Final Regulatory Flexibility Analysis, the Commission is utilizing the SBA definition applicable to radiotelephone companies, *i.e.*, an entity employing less than 1,500 persons.<sup>249</sup> Not all of the narrowband PCS licenses have yet been awarded. There is therefore no basis to determine the number of licenses that will be awarded to small entities in future auctions. Given the fact that nearly all radiotelephone companies have fewer than 1,000 employees,<sup>250</sup> and that no reliable estimate of the number of prospective narrowband PCS licensees can be made, the Commission assumes, for purposes of the evaluations and conclusions in this Final Regulatory Flexibility Analysis, that all the remaining narrowband PCS licenses will be awarded to small entities.

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<sup>247</sup> Implementation of Section 309(j) of the Communications Act - Competitive Bidding, *Fifth Memorandum Opinion and Order*, PP Docket No. 93-253, 10 FCC Rcd 403, 432, . 52, n.123 (1994).

<sup>248</sup> See Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, and Amendment of the Commission's Rules to Establish New Narrowband PCS, GEN Docket No. 90-314, *Competitive Bidding Third Memorandum Opinion and Order and Further Notice*, 10 FCC Rcd 175, 208 (1994).

<sup>249</sup> 13 C.F.R. . 121.201, Standard Industrial Classification Code 4812.

<sup>250</sup> The 1992 Census of Transportation, Communications, and Utilities, conducted by the Bureau of the Census, shows that only 12 radiotelephone firms out of a total of 1,178 such firms which operated during 1992 had 1,000 or more employees. U.S. Bureau of the Census, U.S. Department of Commerce, 1992 Census of Transportation, Communications, and Utilities, UC92-S-1, Subject Series, Establishment and Firm Size, Table 5, Employment Size of Firms: 1992, SIC Code 4812 (issued May 1995).

***D. Summary of Projected Reporting, Recordkeeping and Other Compliance Requirements:***

Narrowband PCS licensees may be required to report information concerning the location of their transmission sites under some circumstances,<sup>251</sup> although generally they will not be required to file applications on a site-by-site basis. Additionally, narrowband PCS license applicants will be subject to reporting and recordkeeping requirements to comply with the competitive bidding rules. Specifically, applicants will apply for narrowband PCS licenses by filing a short-form application (FCC Form 175), and will file a long-form application (FCC Form 600) at the conclusion of the auction. Additionally, entities seeking treatment as small businesses will need to submit information pertaining to the gross revenues of the small business applicant and its affiliates and certain investors in the applicant. Such entities will also need to maintain supporting documentation at their principal place of business.

***E. Steps Taken to Minimize Burdens on Small Entities:***

Section 309(j)(3)(B) of the Communications Act<sup>252</sup> provides that in establishing eligibility criteria and bidding methodologies the Commission shall, *inter alia*, promote economic opportunity and competition and ensure that new and innovative technologies are readily accessible by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women. Section 309(j)(4)(A) provides that in order to promote such objectives, the Commission shall consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, or other schedules or methods.<sup>253</sup> Therefore, the Commission finds that it is appropriate to establish special provisions in the narrowband PCS rules for competitive bidding by small businesses. The Commission believes that small businesses applying for narrowband PCS licenses should be entitled to some type of bidding credits and should be permitted to pay their bids in installments. In awarding narrowband PCS licenses, the Commission is committed to meeting the statutory objectives of promoting economic opportunity and competition, of avoiding excessive concentration of licenses, and of ensuring access to new and innovative technologies by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women.

In determining small business status, the Commission will consider the gross revenues of

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<sup>251</sup> See, e.g., 47 C.F.R. . 1.1301 *et seq.*

<sup>252</sup> 47 U.S.C. . 309(j)(3)(B).

<sup>253</sup> 47 U.S.C. . 309(j)(4)(A).

the small business applicant, its affiliates, and certain investors in the applicant. The Commission will attribute the gross revenues of all controlling principals in the small business applicant as well as the gross revenues of affiliates of the applicant. The Commission will require that in order for an applicant to qualify as a small business, qualifying small business principals must maintain control of the applicant.

***F. Significant Alternatives Considered and Rejected:***

The Commission considered and rejected a proposal to give additional relief to narrowband PCS licensees affected by an interim sharing arrangement with respect to use of narrowband PCS channels in border areas between the United States and Canada.<sup>254</sup> The Commission determined that such special relief is not necessary, as potential bidders to this spectrum had adequate notice of such interim arrangement and the interim arrangement also provides licensees with adequate spectrum protection.

The Commission also considered and rejected a proposal to establish an entrepreneur's block for narrowband PCS similar to the Commission's provisions for such a block of spectrum in broadband PCS.<sup>255</sup> The Commission agrees with those commenters who argue that the results of the previously-conducted narrowband regional auction demonstrate that bidding credits and installment payments can facilitate participation by designated entities in the competitive process as well as securing licenses for the provision of narrowband PCS. Additionally, the Commission has the experience of other auctions, such as 900 MHz Specialized Mobile Radio, where no entrepreneurs' block existed but, nonetheless, many successful designated entity applicants existed. The Commission also considers narrowband PCS to be less capital intensive than broadband PCS, thereby making it more likely that small businesses, for example, can acquire the financing to win these licenses, particularly for MTAs. Thus, the Commission concludes there is no need to insulate designated entities from other bidders and that bidding credits coupled with installment payments should satisfy its obligations under Section 309(j) of the Communications Act as they have in so many other auctions. Moreover, narrowband PCS licensees are free to transfer and assign licenses immediately (unlike broadband PCS), providing further flexibility to acquire licenses post-auction.<sup>256</sup>

The Commission also considered and rejected a proposal to maintain its definition of minority groups eligible for special provisions in the narrowband PCS auction.<sup>257</sup> The Commission instead decided to modify its definition in order to bring it into conformity with the

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<sup>254</sup> *Report and Order* at . 14.

<sup>255</sup> *Report and Order*, .. 19-20.

<sup>256</sup> *See* 47 C.F.R. . 24.839(d).

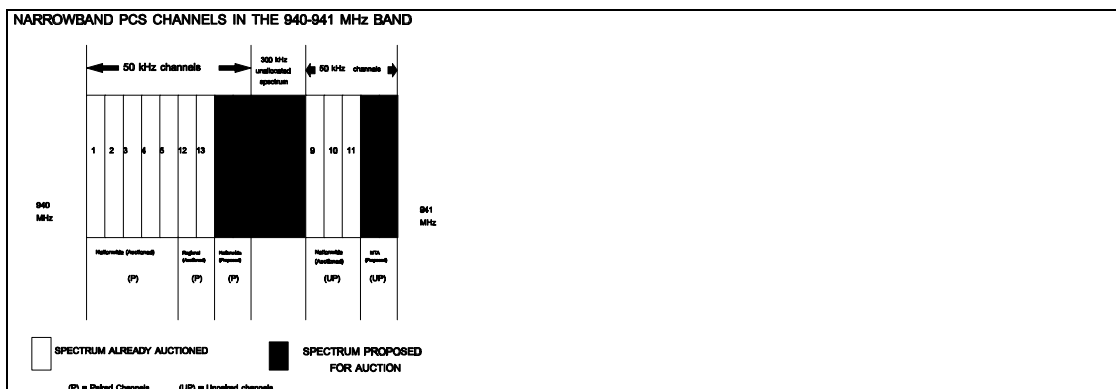
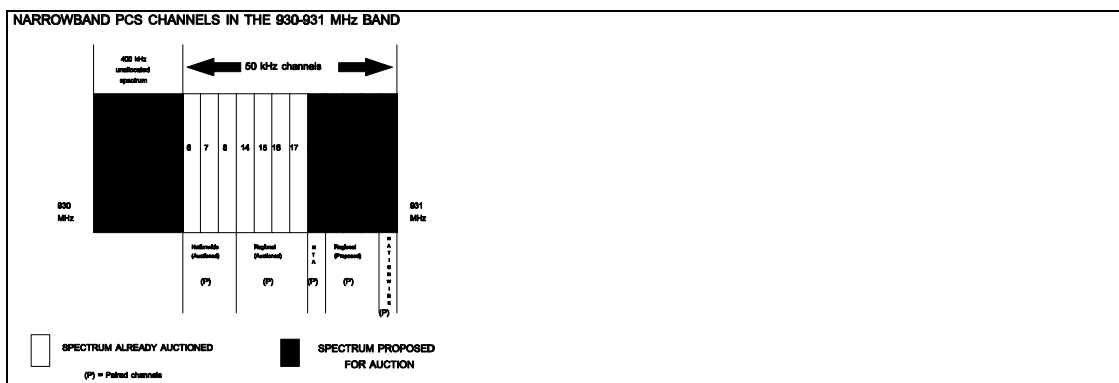
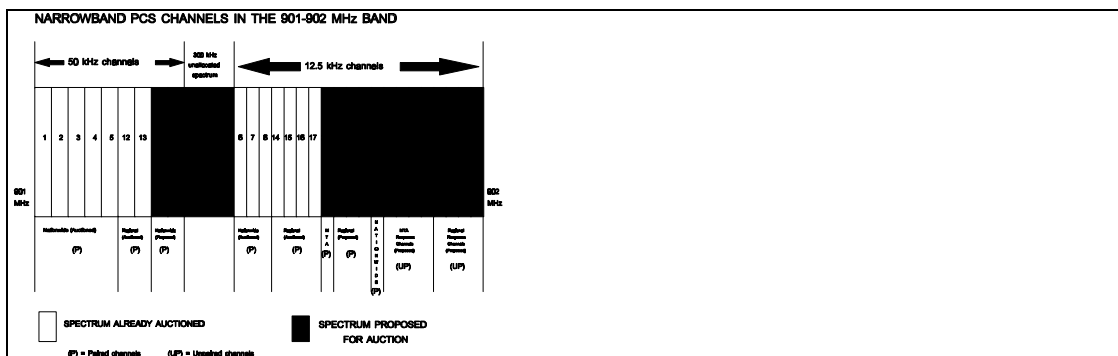
<sup>257</sup> *Report and Order*, . 22.

Commission's definition for broadband PCS, namely, "Blacks, Hispanics, American Indians, Alaskan Natives, Asians, and Pacific Islanders."

***G. Report to Congress:***

The Commission shall send a copy of this Final Regulatory Flexibility Analysis, along with this *Report and Order/Further Notice of Proposed Rulemaking*, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. . 801(a)(1)(A). A copy of this Final Regulatory Flexibility Analysis will also be published in the Federal Register.

APPENDIX F - NARROWBAND CHANNELIZATION PLANS



**ORIGINAL CHANNELIZATION PLAN:**

	50/50 kHz (paired)		50/12.5 kHz (paired)		50 kHz (unpaired)		12.5 kHz (unpaired)		Total channels		Overall Total # of licenses	
	Lic.	TBA	Lic.	TBA	Lic.	TBA	Lic.	TBA	Lic.	TBA	Lic.	TBA
Nationwide	5		3		3				11		11	
Regional (5)	2		4						6		30	
MTA (51)		2		3		2		4		11		561
BTA (493)				2				4		6		2958

Lic. = Already licensed.  
 TBA = To be auctioned.

**PROPOSED CHANNELIZATION PLAN:**

[shading reflects proposed changes:]

	50/50 kHz (paired)		50/12.5 kHz (paired)		50 kHz (unpaired)		12.5 kHz (unpaired)		Total channels		Overall Total # of licenses	
	Lic.	TBA	Lic.	TBA	Lic.	TBA	Lic.	TBA	Lic.	TBA	Lic.	TBA
Nationwide	5	2	3	1	3				11	3	11	3
Regional (5)	2		4	3				4	6	7	30	35
MTA (51)				1		2		4		7		357
BTA (493)										None		None

Lic. = Already licensed.  
 TBA = To be auctioned.