considered a claim under the Act if it constitutes a demand for compensation from the Department. A demand is not required to be for a specific sum of money.

(c) *Notification.* The determination upon the claim shall be provided to the claimant in writing by the deciding official.

§ 15.18 Computation of award and finality of settlement.

(a) The amount allowable for damage to or loss of any item of property may not exceed the lowest of

(1) The amount requested by the claimant for the item as a result of its loss, damage or the cost of its repair,

(2) The actual or estimated cost of its repair, or

(3) The actual value at the time of its loss, damage, or destruction. The actual value is determined by using the current replacement cost or the depreciated value of the item since its acquisition, whichever is lower, less any salvage value of the item in question.

(b) Depreciation in value is determined by considering the type of article involved, its cost, its condition when damaged or lost, and the time elapsed between the date of acquisition and the date of damage or loss.

(c) Current replacement cost and depreciated value are determined by use of publicly available adjustment rates or through use of other reasonable methods at the discretion of the official authorized to issue a determination upon the claim in question.

(d) Replacement of lost or damaged property may be made in kind wherever appropriate.

(e) At the discretion of the official authorized to issue the determination upon the claim in question, a claimant may be required to turn over an item alleged to have been damaged beyond economical repair to the United States, in which case no deduction for salvage value will be made in the calculation of actual value.

(f) Notwithstanding any other provisions of law, settlement of claims under the Act are final and conclusive.

§ 15.19 Attorney fees.

No more than 10 per centum of the amount paid in settlement of each individual claim submitted and settled under this subpart shall be paid or delivered to or received by any agent or attorney on account of services rendered in connection with that claim.

§ 15.20 Reconsideration.

(a) *Deciding official.* While there is no appeal from the decision of the deciding official in regard to claims under the Act, the deciding official may always reconsider his or her determination of a claim.

(b) *Claimant.* A claimant may request reconsideration from the deciding official by directing a written request for reconsideration to the deciding official within 180 days of the date of the original determination. The claimant must clearly state the factual or legal basis upon which he or she rests the request for a more favorable determination.

(c) *Notification.* The determination upon the reconsideration will be provided to the claimant in writing by the deciding official.

Subpart C—Claims Arising Out of the Operation of the Job Corps

§ 15.30 Scope and purpose.

(a) The purpose of this subpart is to set forth regulations relating to claims for damage to persons or property arising out of the operation of Job Corps which the Secretary of Labor finds to be a proper charge against the United States but which are not cognizable under the Federal Tort Claims Act.

(b) This subpart further amplifies the regulatory provisions set forth in 20 CFR 638.526(b) regarding such claims.

§ 15.31 Allowable claims.

(a)(1) A claim for damage to persons or property arising out of an act or omission of a student enrolled in the Job Corps may be considered pursuant to § 436(b) of the Job Training Partnership Act (29 U.S.C. 1706(b)):

(i) If the act or omission which gave rise to the claim took place at the center to which the student involved was assigned, or

(ii) If the student involved was not within the geographical limits of his hometown and was within 100 miles of the center to which he or she was assigned, or while he or she was on authorized travel to or from the center.

(2) The claim may be paid if the deciding official, in his or her discretion, finds the claim to be a proper charge against the United States resulting from an act or omission of a student enrolled in the Job Corps.

(b) A claim for damage to person or property hereunder may not be paid if the claim is cognizable under the Federal Tort Claims Act (28 U.S.C. 2677).

(c) A claim for damage to person or property may be adjusted and settled hereunder in an amount not exceeding $1500.

§ 15.32 Claim procedures.

(a) *Claim.* A claim under this subpart must be in writing and signed by the claimant or by an authorized representative. It must be received by the Office of the Solicitor within two years of the date upon which the claim accrued.

(b) *Award.* The Regional Solicitors and Associate Regional Solicitors are authorized to consider, ascertain, adjust, determine, compromise and settle claims filed under this subpart that arose within their respective jurisdictions.

(c) *Notification.* The determination upon the claim shall be provided to the claimant in writing by the deciding official.

(d) *Reconsideration.* Reconsideration of a determination under this subpart shall be available pursuant to the procedures and limitations set forth in § 15.20.

Signed at Washington, DC, this 14th day of July 1994.

Robert B. Reich,

Secretary of Labor.

[FR Doc. 94–17815 Filed 7–21–94; 8:45 am]

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July 22, 1994

Part III

Department of Transportation

Federal Highway Administration

23 CFR Parts 420 and 511
State Planning and Research Program Administration; Final Rule

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

23 CFR Parts 420 and 511

[FHWA Docket No. 93–18]

RIN 2125–AD21

State Planning and Research Program Administration

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Final rule.

SUMMARY: With the restructuring of the Federal-aid highway program due to enactment of the Intermodal Surface Transportation Efficiency Act (ISTEA) of 1991 (Pub. L. 102–240, 105 Stat. 1914), regulations for the administration and management of activities undertaken with FHWA planning and research funds are updated to reflect the revised sources of, and activities eligible for, such funds. In addition, the ISTEA allows the States more flexibility in managing and directing federally funded research, development, and technology transfer (RD&T) activities. This final rule includes the ISTEA revisions and grants States this greater responsibility and flexibility for the management and oversight of their RD&T initiatives funded with FHWA planning and research funds.

EFFECTIVE DATE: This rule is effective on August 22, 1994.

FOR FURTHER INFORMATION CONTACT: Mr. Tony Solury (202–366–5003), Office of Environment and Planning, Federal Highway Administration, 400 Seventh Street, SW., Washington, D.C. 20590, for 23 CFR part 420, subpart A; Mr. Charles W. Niessner (703–285–2100), Office of Research and Development, Federal Highway Administration, Turner-Fairbank Highway Research Center, 6300 Georgetown Pike, McLean, VA 22101–2296, for 23 CFR part 420, subpart B; or Mr. Wilbert Baccus (202–366–0780), Office of the Chief Counsel, Federal Highway Administration, 400 Seventh Street, SW., Washington, D.C. 20590. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION: On December 21, 1993, a notice of proposed rulemaking (NPRM) was published by the FHWA in the Federal Register (58 FR 67510) to obtain comments from interested persons on proposed revisions to regulations for program approval and authorization; conduct; and reporting of planning, research, development, and technology transfer activities undertaken by States and their subrecipients, including metropolitan planning organizations (MPOs), with FHWA planning and research funds. The proposed revisions were necessary to reflect changes to Title 23, United States Code, Highways, that resulted from enactment of the ISTEA. In addition, the FHWA proposed that States establish a process for management of RD&T activities undertaken with FHWA planning and research funds that would enable States to exercise greater authority over such activities.

With respect to administration of FHWA planning and research funded RD&T activities, the final rule reflects the FHWA's belief that its stewardship role should be one of concentrating more on the policies and procedures by which States implement such activities than on project-specific approvals and oversight. This philosophy parallels the administrative oversight procedures adopted for FHWA planning and research funded transportation planning activities in earlier revisions to 23 CFR part 420, subpart A in 1985 and 1990.

The ISTEA instituted a number of substantive changes pertinent to transportation planning and RD&T programs. In addition to retitling it from Highway Planning and Research to State Planning and Research (SPR), the ISTEA: (1) increased the set-aside of funds apportioned to States for SPR activities from 1.5 percent to 2 percent; (2) included planning and RD&T as eligible activities under the National Highway System (NHS) program and Surface Transportation Program (STP); (3) permitted the use of certain funds made available under title 23, U.S.C., for intermodal transportation planning and RD&T; and (4) required the expenditure of 25 percent of a State's annual SPR funds for RD&T activities, unless the State certifies that it will use more than 75 percent for planning and the Secretary of Transportation (the Secretary) accepts the certification. These legislative provisions are reflected in this rule.

Thirty-one sets of comments were submitted to the docket in response to the NPRM; 28 from State transportation departments/agencies, 1 from a regional planning agency, 1 from a professional association, and 1 from a Federal agency. The overwhelming majority of comments were in support of the proposed revisions and the increased flexibility for State management of RD&T activities. However, there were some concerns regarding some of the specific revisions and the short deadline for compliance. Many of these concerns were due to misunderstandings about existing requirements and not the proposed revisions. A summary of the comments, their disposition, and the changes made to the rule follow.

Subpart A—Administration of FHWA Planning and Research Funds

General Comments and Responses

Comment: One State, in which most research is conducted for the State by higher education institutions, stated that the proposed regulation does not pertain to universities as subrecipients and recommended citing Office of Management and Budget (OMB) Circular A–110, "Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations," November, 19, 1993, for universities as subrecipients.

Response: While the State is the recipient of FHWA planning and research funds, Part 420 also applies to subawards to all categories of subrecipients, including institutions of higher education. In accordance with standard OMB requirements, subawards are to be administered in accordance with the procedures in the OMB Circular and corresponding agency implementing regulations that apply to the type of agency receiving the subaward, whether or not specifically stated in the regulation. To clarify what applies to administration of subawards to institutions of higher education, a new paragraph (o) has been added to § 420.121 as discussed under the section-by-section analysis.

Comment: One commenter suggested that the term "State highway agency" be changed to "State transportation agency" to maintain consistent nomenclature and reflect reality.

Response: Since most of the State agencies to which Federal-aid highway program funds are apportioned are no longer single purpose highway agencies, the FHWA agrees that use of the term "State transportation agency" is more appropriate and has made this change. However, 23 U.S.C. 302 requires that a State desiring to avail itself of the provisions of title 23, U.S.C., have a suitably equipped and organized State *highway* department and has been interpreted by the FHWA to restrict reimbursement of a State *highway* department's indirect costs. Therefore, a definition of State transportation agency (STA) has been added to § 420.103, as discussed below under the section-by-section analysis, to distinguish a State *highway* department from other State transportation agencies in order to determine whether the agency's indirect costs are allowable under 23 U.S.C. 302.

Comment: One State commented that it is using a significant portion of its SPR funds for training, "since the ISTEA language which was supposed to have covered training was inadvertently left out of that Legislation."

Response: The ISTEA in fact continued the funding provisions (23 U.S.C. 321) for training of State personnel although at a reduced level of funding. With the exception of a specific type of training cited in 23 U.S.C. 307(c), FHWA planning and research funds may only be used for transportation planning or RD&T related training if the cost of the training is necessary, reasonable, and it benefits the purposes of the grant or subgrant. General training of employees who are not working on grant funded activities is not an allowable cost. This is consistent with OMB cost principles which are applicable to FHWA planning and research fund grants and subgrants.

Comment: One State questioned the estimate of 2,100 burden hours, shown under the heading Paperwork Reduction Act in the NPRM, for the 50 States to comply with the regulation and stated that it will take much more time to develop a procedures manual; procedures for tracking activities, schedules, accomplishment, and fiscal commitments; and procedures to determine the effectiveness of the implementation process, and the utilizations of the RD&T output. The commenter indicated that the State has many of the elements in place, but did not know if the FHWA Division office would accept them or require revisions in content or format.

Response: The estimate of 2,100 burden-hours (40 hours per respondent) is for the one-time preparation by each State, the District of Columbia, and the Commonwealth of Puerto Rico of the *new certification* required by subpart B of the regulation. Many of the other activities cited by the commenter are either required already (e.g., progress reports) and are covered by the cited existing OMB clearances or are standard management practices that the State should already have in place. An updated burden estimate has been prepared. It is estimated that the average one-time burden for preparation of RD&T management process documentation and certification statements is 480 burden-hours (12 weeks x 40 hours per week) per State.

Section-by-Section Analysis

The authority citation has been amended from the NPRM to include 23 U.S.C. 303(g) which allows the use of NHS, STP, and highway bridge replacement and rehabilitation (HBRR) funds for development and establishment of the management and monitoring systems required under 23 U.S.C. 303. In addition, section 149(b) has been deleted since this regulation does not apply to funds made available under this section of title 23, U.S.C.

Section 420.101 Purpose

This section states the purpose of this regulation. It indicates that the provisions of this part apply to subrecipients of States, including MPOs. Language has been added to indicate that it also applies to activities undertaken with NHS, STP, and Highway Bridge Replacement and Rehabilitation Program (HBRRP) funds for development, establishment, and implementation of the management and monitoring systems required by 23 U.S.C. 303 and 23 CFR part 500. Use of NHS and STP funds for such purposes was included in the NPRM definition of FHWA planning and research funds; the use of HBRRP funds is being added to the definition as discussed below. A reference to the additional requirements for RD&T programs and studies in subpart B of this part is included.

Section 420.103 Definitions

This section includes the terms defined in 23 U.S.C. 101(a) and contains additional definitions for terms used in this part.

The term "FHWA planning and research funds" includes SPR funds, metropolitan planning (PL) funds, and the optional use of NHS, STP, and Minimum Allocation (MA) funds for planning and RD&T purposes. It also includes the use of NHS, STP, and HBRRP funds for development, establishment, and implementation of the management and monitoring systems required by 23 U.S.C. 303. The definition has been amended from the NPRM to include funds apportioned under 23 U.S.C. 144 for the HBRRP when such funds are used for development, establishment, and implementation of the bridge management system required by 23 U.S.C. 303. This category was inadvertently not included in the NPRM.

Although this rulemaking does not change the definition of grant, one commenter believed that new readers may not be familiar with the difference between a contract and a grant and, therefore, suggested that a definition of grant be included to reduce confusion.

The FHWA agrees and has added definitions of "grant agreement" and "procurement contract." These mechanisms for agencies to make awards to recipients are adaptations of definitions in Chapter 63, Using Procurement Contracts and Grant and Cooperative Agreements, of title 31, CFR.

A "grant agreement" is defined as a legal instrument between an awarding agency and recipient where the principal purpose is to provide funds to the recipient to carry out a public purpose of support or stimulation authorized by law.

A "procurement contract" is defined as a legal instrument between an awarding agency and recipient where the principal purpose is to acquire (by purchase, lease, or barter) property or services for the direct benefit or use of the awarding agency.

For administrative purposes, it is important to note that the purpose of the award determines whether the award is a grant or a procurement action. The administrative procedures for grants are governed by OMB Circulars A–102 and A–110 and agency implementing regulations. The administrative procedures for procurement contracts are governed by the Federal Acquisition Regulations (48 CFR Part 31) or State procedures if the recipient is a State.

Since FHWA planning and research funds may be pooled for planning, as well as RD&T, studies or activities of national or regional significance, the definitions of national and regional pooled-fund studies have been moved from § 420.203 to § 420.103. In addition, both definitions have been modified to indicate: that MPOs, as well as States, may contribute to pooled-fund studies; that national studies are usually administered by the FHWA headquarters office; that regional studies are usually administered by an FHWA regional office in cooperation with a lead State or MPO; and that the funds may be pooled with or without matching. While any of the categories of funds included in the definition of "FHWA planning and research funds" may be pooled, the matching requirement can only be waived for SPR or PL funds. Such waiver must be approved by FHWA headquarters for both national and regional studies in accordance with the provisions of § 420.119(d).

As discussed under the general comments and responses, a definition of State transportation agency has been added. "State transportation agency (STA)" is defined as the State highway department, transportation department, or other State transportation agency to which Federal-aid highway funds are apportioned.

Section 420.105 Policy

This section continues the FHWA's previous policy of allowing States maximum possible flexibility in determining which eligible activities may be undertaken with FHWA planning and research funds, as long as planning activities of national significance, as identified in paragraph (b) of this section, are being adequately addressed. Under the provisions of this section, the FHWA may withhold or withdraw authorization of FHWA planning and research funds if planning activities of national significance are not being performed by a State. As discussed in the preamble to the NPRM, this policy also applies to State subrecipients. Paragraphs (a)(1) through (4) in the NPRM have been rewritten and consolidated for clarity into paragraphs (a)(1) and (2) in the rule without changing the substance of the policy.

One commenter expressed concern about the potential involvement in long range data reporting requirements that would make unexpected demands on its manpower in order to provide data that support FHWA responsibilities as specified in § 420.105(b). The commenter indicated that clarification was needed on this requirement. Another commenter indicated that States should have the right to question the need for particular data requests from the FHWA if the cost of providing such data becomes high.

This provision has been in the regulation since 1986. The major data bases that are referenced in § 420.105(b) are the FHWA's Highway Performance Monitoring System (HPMS) and statistical reports provided by the States for inclusion in the annual publication "Highway Statistics." Both of these data collection activities have been approved by the OMB and are resubmitted for approval every three years. Occasionally, information not included in these ongoing data bases is needed due to special circumstances and enactment of legislation, such as, designation of a National Highway System in accordance the provisions of the ISTEA. With each update of the HPMS and highway statistics reporting requirements and with each special request, the FHWA will continue to make every effort possible to limit the burden to the States while still receiving the information essential to guide the national transportation program.

Section 420.107 SPR Minimum Research, Development, and Technology Transfer Expenditure

This section reflects the requirement in 23 U.S.C. 307(c) that not less than 25 percent of a State's annual SPR funds be expended for RD&T activities unless the State certifies that it will expend more than 75 percent of such funds for transportation planning under 23 U.S.C. 134 and 135. It includes specific procedures and criteria for FHWA approval of a State's certification that were in the FHWA Executive Director's June 25, 1992, memorandum to the FHWA Regional Administrators. (This memorandum is available for review and copying in the file for FHWA docket number 93–18 at the address specified above under the caption FOR FURTHER INFORMATION CONTACT.) The certification must be submitted annually with the work program or with the request for authorization of funds for the second year of a biennial work program. Except for rephrasing of the considerations in paragraphs (c)(1) to (6) to change them from questions to statements, this section is unchanged from the NPRM.

Several commenters expressed concern over the criteria and procedures in § 420.107 for waiver of the requirement for use of 25 percent of a State's annual apportionment of SPR funds. One commenter stated that the proposed rules go far beyond what should be necessary to support such a certification and that it appears that the FHWA is unduly striving to discourage this option. This commenter recommended that the requirements be reduced to an assurance that the State's RD&T needs are being adequately addressed. Similarly, other commenters stated that the requirements for submitting an exception to the use of 25 percent of SPR fund for research are onerous and effectively prohibit exceptions as they are currently written or that the proposed rule indicates that the FHWA will be reluctant to grant exceptions.

While 23 U.S.C. 307(c)(2) requires that a State certify to the Secretary that its total expenditures for transportation planning under 23 U.S.C. 134 and 135 for the fiscal year will exceed 75 percent, it also requires that the certification be accepted by the Secretary. Based on the extensive provisions and emphasis on transportation RD&T in the ISTEA, the FHWA strongly believes that the Congress intended that the States have effective transportation RD&T programs. Therefore, the criteria for approving an exception are being retained.

Section 420.109 Distribution of PL Funds

This section reflects the requirements in 23 U.S.C. 104 that a State must make apportioned PL funds available to MPOs and that the funds must be distributed by the State to MPOs in the State based on a formula, approved by the Secretary (approval authority has been delegated to the FHWA), that considers population, status of planning, attainment of national ambient air quality standards, and other factors necessary to provide for an appropriate distribution of funds to carry out the requirements of 23 U.S.C. 134 and other applicable requirements of Federal law. The FHWA's longstanding interpretation, that the legislative requirement that States make PL funds available to MPOs precludes the use of such funds by the State for administration of PL grants or subgrants, is included in paragraph (a). It is FHWA policy to consult with the appropriate Federal Transit Administration (FTA) regional office prior to approval of a State's PL formula.

One State commented that the requirement in paragraph (a) that "the State shall not use any PL funds for grant or subgrant administration" is too restrictive and should be changed to permit a reasonable amount for administration. Another State commented that under the ISTEA, a State DOT's role in administering and participating in MPO planning activities funded with PL funds has increased significantly and that there should be a provision which permits the State DOT to retain a certain percentage of PL funds for its costs in administering and participating in PL funded programs. Another State commented: that the cost for grant administration historically has been included as part of the funding package of the MPO planning work program; that this new provision may unfairly restrict the use of PL funds to only direct program activity and not permit the State or MPO to use PL funds for organization administration costs; and that by not allowing the use of PL funds for grant or subgrant administration, the FHWA will be placing an unfair economic burden on the various parties concerned.

These comments imply a misunderstanding of both the legislation and regulation. Before responding to these comments, a distinction needs to be made between "grant or subgrant administration" and "general planning process administrative activities." "Grant or subgrant administration" includes activities such as processing or preparing PL grant agreements between

the FHWA and the State, subgrant agreements between the State and the MPOs, fiscal documents, progress reports, and audits. "General planning process administrative activities" may include conducting MPO meetings, preparation of planning work programs, and salaries of an MPO executive director and other administrative support staff.

The legislation has always specified that PL funds are to be made available *to the MPOs* by the State. The FHWA historically has interpreted this to mean that a State cannot unilaterally retain PL funds for any purpose; all PL funds must be made available to the MPOs. If an individual MPO chooses to include activities (e.g., development of a long range plan, traffic counting) to be performed with its PL funds by the State for the MPO in its work program, it may do so. If the required State PL fund distribution formula, developed in consultation with the MPOs, allows for State retainage of PL funds, it may be approved by the FHWA if the retained funds will be used by the State for *technical activities* in support of metropolitan planning or for making discretionary subgrants to MPOs for special studies.

In no instance may PL funds (either in an MPO's work program or retained under an approved formula) be used by a State for PL fund "grant or subgrant administration" as indicated in subparagraph (a). Such State grant or subgrant administrative activities are eligible for SPR funding. "General planning process administrative activities" performed by MPOs are eligible for PL funds. Such general administrative activities performed by a State for an MPO are eligible for SPR funds and would be eligible for PL funds if included in the MPO's work program.

One State commented that it would be concerned if the regulation is administratively construed to require a specific formula for distribution, or require reconsideration of its policy on PL funds.

The requirement that funds be distributed by a State by a formula that considers specific factors has existed since the enactment of the PL funding in 1973. The ISTEA added the additional factor of attainment of the national ambient air quality standards. In developing the formula, the State must consult with the MPOs and must consider the legislatively mandated factors, but all of the factors do not need to be included in the formula. In accordance with paragraph (f), any formula that does not meet these requirements must be brought into conformance as soon as possible, but not later than in time for distribution of PL funds apportioned to the State for the first Federal fiscal year beginning after the effective date of the regulation.

Section 420.111 Work Program

This section includes requirements for State and subrecipient work programs that serve as the application for FHWA planning and research funds. References to 23 CFR part 450 and subpart B of this part are cited for additional information on metropolitan area unified planning work programs and RD&T work programs, respectively. Except for correcting citations to 23 CFR part 450 and changing the first word in paragraph (a) from "expenditure" to "proposed use," this section is unchanged from the NPRM. The work program in essence is a statement of work that identifies the proposed use of the funds; expenditure of the funds is documented in the financial and progress reports.

One commenter stated that the requirement to submit work program documents creates duplicate paperwork for agencies. The commenter stated that the same information is available in work plans for individual studies, and, if FHWA review of individual study work plans is no longer required, submission of a work program is not appropriate.

A work program has always been required for both planning and RD&T activities. The work program is the "grant application" for FHWA planning and research funds and is necessary for the FHWA to determine if the proposed work is eligible. A work program may consist of a listing of proposed studies and activities and other appropriate information, such as cost of the activity and performing agency, with sufficient description for the FHWA to determine eligibility of the work. "Work plans" that included details on need, purpose, approach, etc., for individual RD&T studies are no longer required. Therefore, there is no duplication.

One State commented that while a biennial work program is allowed, it requires a projection of available Federal funds which may be difficult to make on a biennial basis.

Historically, the amount of FHWA planning and research funds available to a State is consistent from year to year over the period covered by authorizing legislation (e.g., the ISTEA). In any case, if a State's or subrecipient's transportation planning is a continuation of the same activities with minimal change in activities over an extended period, use of a 2-year work program should result in a significant reduction in paperwork since draft and final work programs would not need to be prepared and submitted for review and approval in the second year unless significant changes are necessary in the description of work. The initial work program would describe the activities anticipated to be accomplished over the 2-year period along with an estimate of funds for each year. The FHWA would approve the 2-year work program and authorize the first year's work subject to availability of funds. Prior to the beginning of the second year, when the actual amount of funds that will be available is known, the State would only need to submit a request to revise the budget to reflect the actual funds available (and if necessary any significant amendments in the description of work to be accomplished) for the second year and request the FHWA's authorization to proceed with the second year's work.

Section 420.113 Eligibility of Costs

This section includes general criteria and incorporates by reference other regulations and OMB Circulars for determining eligibility of transportation planning and RD&T activities and allowability of items of cost (e.g., salaries, travel) within such activities that are proposed for FHWA planning and research funds. Administrative procedures that must be followed for costs to be eligible for reimbursement are also included.

One commenter requested that a list of examples of transportation planning and RD&T activities that are eligible for FHWA planning and research funds be included in the final rule. Appropriate sections of title 23, U.S.C., that include information on broad categories of eligible activities are included by reference. The FHWA believes that any attempt to provide a more specific listing could be misinterpreted since all eligible activities could not possibly be listed. The longstanding practice of allowing the FHWA field offices to determine eligible activities, in consultation with the headquarters office if necessary, has worked well in the past and will be continued. In addition, the FHWA headquarters office will continue to issue appropriate guidance when necessary on the eligibility of specific types of activities. For example, in response to several inquiries since enactment of the ISTEA, guidance has been provided on the use of FHWA planning and research funds for transportation planning involving modes in addition to highway or transit. As discussed in the preamble to the NPRM, transportation planning studies involving modes in addition to highway

or transit are eligible for FHWA planning and research funds when performed as part of the statewide or metropolitan transportation planning processes.

In response to questions regarding eligibility of travel costs of team members conducting peer reviews of a State's RD&T management process, subpart B has been revised, as discussed below under the responses to comments on subpart B, to specify that such travel costs are eligible for FHWA planning and research funds. While not required by this regulation or 23 CFR part 450, similar peer reviews of statewide and metropolitan transportation planning processes would also be eligible if included in a State or MPO transportation planning work program and it is determined by the FHWA that the costs are necessary, reasonable, and benefit the FHWA planning and research funded transportation planning process.

Paragraph (b) of this section in the NPRM referenced the provisions of 23 CFR part 140, subpart G on the allowability of indirect costs of STA planning and research units. The allowability of such costs for any STA unit that performs work for development, establishment, and implementation of the management and monitoring systems required under 23 U.S.C. 303 was addressed in a May 3, 1994, memorandum to the FHWA and FTA Regional Administrators. (This memorandum is available for review and copying in the file for FHWA docket number 93–18 at the address specified above under the caption **FOR FURTHER INFORMATION CONTACT.**) To more clearly identify such allowable indirect costs, the reference to 23 CFR part 140, subpart G has been replaced with the specific provisions and information provided in the May 3 memorandum. In accordance with longstanding FHWA interpretation of 23 U.S.C. 302, except as specified in new paragraph (b)(2) of § 420.113, STA indirect costs are not eligible for reimbursement with FHWA planning and research funds. Paragraph (b)(2) specifies that salaries, but not other indirect costs, for services rendered by STA employees generally classified as administrative are eligible for reimbursement for a transportation planning unit, RD&T unit, or other unit performing eligible work with FHWA planning and research funds (including development, establishment, and implementation of the management and monitoring systems required by 23 U.S.C. 303 and 23 CFR part 500). Such STA administrative costs are allowable in the ratio of time spent on the FHWA planning and research funded work in the unit to the total unit's working hours. The FHWA is currently conducting a review of its longstanding policy on eligibility of STA indirect costs and, if necessary based on the results of this review, the provisions in this section will be amended.

Section 420.115 Approval and Authorization Procedures

This section includes procedures for approval of work programs or projects, and amendments thereto, and authorization for work to be performed with FHWA planning and research funds. The governmentwide common grant management provisions for prior awarding agency approval of certain budget and programmatic changes are referenced at 49 CFR 18.30. While executed project agreements are still necessary, the language in paragraph (c) was revised to eliminate reference to forms PR–2 and PR–2A since these forms are currently being revised and the form numbers may change.

Several commenters believe that the requirement for prior FHWA approval for budget and programmatic changes as specified in 49 CFR 18.30 is contrary to the intent of giving States more responsibility and authority. Some commenters also recommended that, after receiving initial FHWA approval of the work programs, additional FHWA approval should only be sought when a budget revision means additional Federal funds are required. One commenter suggested that FHWA approval be sought only when a budget revision exceeds the limits of $10,000 and 15 percent of a research study cost as specified in 23 CFR 511.3(e).

Most of these comments reflect a misunderstanding of the provisions of 49 CFR 18.30 which are governmentwide common grant management provisions that have been applicable to FHWA planning and research funded work programs since revision of OMB Circular A–102 in 1988 and issuance of 49 CFR part 18. These provisions were included in 23 CFR part 420 in the 1990 update and are unchanged in this final rule.

The limit of $10,000 and 15 percent under 23 CFR 511.3(e), applies to *individual* RD&T studies; for example, a cost increase of greater than $15,000 for a $100,000 study would require prior approval. Under the provisions of 49 CFR 18.30(c)(1)(ii), the State may make budget transfers among direct cost categories (e.g., individual RD&T studies) without FHWA prior approval unless the *total* of such transfers over the period of the work program will, or is expected to, exceed the larger of $100,000 or 10 percent of the total approved (i.e., work program) budget. For example, if an RD&T work program totals $2 million, the State may transfer $200,000 among direct cost line items included in the work program without prior FHWA approval. At the discretion of the FHWA, this prior approval requirement may be waived. Thus the use of the provisions of 49 CFR 18.30 provide more flexibility and authority to the State than the provisions that are being replaced.

On the other hand, a budget change that involves an increase in the total funds authorized for the work program still requires prior FHWA approval and authorization. Similarly, the programmatic changes (e.g., adding a line item, contracting out) specified in 49 CFR 18.30(d) require prior FHWA approval.

One commenter interpreted the provisions of paragraphs (b) and (c) of this section to imply that the State can impose obligation limitations on subrecipients of the PL funds and requested that it be clarified to indicate that such limits can indeed be applied.

The provisions of these paragraphs are not new and are not related to the issue of distribution of available obligation authority within a State. These provisions allow work to proceed and be reimbursed at a later date in situations where sufficient funds or obligation authority are not available at the time authorization is requested for all work in a statewide or metropolitan area work program. Obligation authority is distributed to the States for use by the States as determined in cooperation with the FHWA field offices. In general, neither legislation nor the FHWA specifies categories of funds for which the States must use the obligation authority. States may choose to request authorization of only a portion of the PL funds needed for a work program period, but would then need to ensure that additional funds are requested and authorized prior to the MPO proceeding with the remainder of the work program. Such partial funding necessitates processing of project amendments and additional paperwork. It also could result in an MPO performing work that would be ineligible for reimbursement if the work is performed prior to approval of the amendment. Such partial funding should be avoided if possible.

Section 420.117 Program Monitoring and Reporting

This section includes grant monitoring and reporting requirements. The frequency and content of progress and financial reports specified in paragraphs (a) through (d) are identical

to those contained in the governmentwide common grant management requirements and 49 CFR 18.40 which is referenced in paragraph (a). Paragraph (e) requires FHWA approval prior to publication of reports that document the results of work performed with FHWA planning and research funds. A State may request waiver of this prior approval requirement. The reference to the Federal-aid Project Agreement (Form PR–2) in the first sentence of paragraph (e) has been deleted since Form PR–2 is being revised and the contents of the cited provision for prior approval of reports are included in this paragraph.

Several commenters believe that these reporting requirements are contrary to the concept of delegation of program management responsibility to the State which should be allowed to determine how to monitor its research program; FHWA review and approval should be limited to assurance that an adequate monitoring process is in place and is being used to guide the State's program; and, if a State truly has responsibility for managing its own program, the State should determine the needed frequency of reporting for adequately monitoring projects. Another commenter recommended that an annual report should be adequate and that the reporting format should be kept simple.

These grant reporting requirements are not new and are standard governmentwide grant reporting requirements that replaced more comprehensive requirements that were in 23 CFR part 420 prior to 1990. These reports are necessary for the FHWA to perform its grant oversight responsibilities. Progress and financial reports that include the specified information must be submitted at least annually. The FHWA field offices may require more frequent reports, but not more than quarterly, unless the State is determined to be a high-risk grantee in accordance with the provisions of 49 CFR 18.12. The reporting requirements are for the work program (i.e., grant), not for individual "projects/studies." The progress reports previously required in 23 CFR part 511 for individual research studies are no longer required. Progress on individual studies would be addressed in the overall work program report. A State may establish additional reporting procedures that meet its needs for individual studies.

Similarly, another commenter stated that § 420.117 requires an increased level of reporting activity and that the interpretation and administration of this section could produce some very demanding requirements. This commenter also questioned who would establish and approve performance goals, and what level of detail would be required.

As indicated above, this section is unchanged from the existing regulation and does not require increased reporting. The level of reporting will only be greater for a State or subrecipient if the State or subrecipient was not in compliance with the existing requirements.

One commenter recommended that the reporting provisions be flexible enough to allow monthly reports if agreed to by the agency and the subrecipient.

As mentioned above, the FHWA may require more frequent reports, but may not require submission of reports more than quarterly unless a recipient or subrecipient is determined to be a high risk. A State may establish the frequency of progress and financial reports for its subgrantees, but is encouraged not to impose more burdensome requirements than those imposed upon the State by the FHWA.

One commenter stated that the requirement in § 420.117(c) that reports from subrecipients be submitted no more than 90 days after the end of the reporting period does not allow sufficient time to complete the audit of the work program, especially when the MPO has elected a 2-year cycle for the audit to be performed. It was suggested that the 90-day requirement be deleted and the timeframe be determined by the State with approval of the FHWA.

The commenter is confusing grant audit requirements with grant reporting requirements. In accordance with governmentwide common grant management requirements, final progress and financial reports for a grant (i.e., the annual/biennial work program) must be submitted within 90 days of the end of the grant period. If the later financial audit, which covers the MPO's fiscal year and typically is not completed until a year after the end of the grant period, necessitates adjustments, the grant may be reopened or adjustment may be made to a current grant, as appropriate. With regard to the statement that an MPO has been operating under a 2-year cycle for financial audits, in accordance with the OMB Circular A–128, Single Audits of State and Local Governments, audits must be performed annually unless a constitutional or statutory requirement for less frequent audit was in effect by January 1, 1987.

One commenter stated that the requirement that a State must request a waiver of prior approval of report publication is an unnecessary and demeaning retention of FHWA authority; the State should have sole responsibility and authority to publish reports that follow accepted editorial formatting for electronic data base management and retrieval purposes; and the use of a report as evidence of work performed and approval for publication are two separate issues and should not be combined. Another commenter stated that FHWA approval of reports prior to publication is inconsistent with the intent of allowing States flexibility in managing their own programs.

With respect to "editorial formatting," the FHWA does not review reports for this purpose. The FHWA agrees that the use of a report as evidence of work performed and approval for publication are two separate issues, but does not agree that they should not be combined. This comment implies that the report should be submitted to the FHWA *after* publication for acceptance as evidence of work performed. In addition to determining if the proposed work that was approved as part of the grant was performed, the FHWA should have an opportunity to determine if the contents of the report are supported by the work performed since the published report will include a credit reference to the FHWA. Also, submission prior to publication allows a State to use FHWA expertise, if desired, to identify any necessary technical corrections prior to publication and distribution. If, based on past performance, an FHWA field office is satisfied that prior review is unnecessary and a State requests a waiver of the prior review requirement, the field office may grant the waiver for all reports or for selected categories (e.g., State planning, MPO planning, all research, or bridge research). A waiver may be granted for an indefinite period of time, annually, or any other appropriate period. Whether or not a waiver is approved, appropriate reports that document work performed with FHWA planning and research funds must be prepared, the reports must include a credit reference and disclaimer statement, and copies must be provided to the FHWA as evidence of work performed.

Section 420.119 Fiscal Procedures

This section includes fiscal requirements for administration, matching, and payment for FHWA planning and research funds. Paragraph (c) specifies that the statewide and, if appropriate, metropolitan transportation improvement program provisions of 23 CFR Part 450 need to be met for the use of NHS, STP, MA, or HBRRP funds for planning or RD&T purposes. Paragraph (d) includes provisions for waiver of matching requirements for SPR and PL

funds (this option is not applicable for optional use of STP, NHS, MA, or HBRRP funds for planning or RD&T activities). If the FHWA determines that the interests of the Federal-aid program would be best served without matching, it may waive the matching requirement for individual activities or regional or national pooled-fund studies.

Two commenters stated that authority to approve 100 percent Federal funding should be delegated to the FHWA regional offices.

The approval authority for 100 percent Federal funding will remain with the Associate Administrator for Program Development (for planning activities) and the Associate Administrator for Research and Development (for RD&T activities) since these offices are in the best position to determine whether the interests of the Federal-aid highway program would be best served and whether the proposed work can be more effectively addressed if the matching requirement is waived.

Several commenters stated that limiting the cost to a minimum of $50,000 for cooperatively (pooled) funded projects and requiring an agency's contribution to be at least $10,000 were inappropriate.

Due to administrative costs and the time involved in coordinating pooled-fund studies, proposed national studies costing less than $50,000 will not be accepted. In response to the comments, the minimum agency contribution of $10,000 has been deleted. Agencies contributing less than $10,000 to a national pooled-fund study may participate in the technical committee meetings, but will not be reimbursed from the pooled funds for their expenses to attend the meetings. At the discretion of the FHWA regional offices and participating agencies, regional pooled-fund studies of less than $50,000 may be undertaken and travel costs may be reimbursed from the regional pooled funds for expenses for attendance at technical committee meetings of representatives of agencies that contribute less than $10,000.

Section 420.121 Other Requirements

This section contains, mostly by cross reference, other legislative or regulatory requirements applicable to FHWA planning and research fund grants. Except as noted below, this section is unchanged from the NPRM.

With respect to paragraph (d), one commenter stated that it appears that the regulation does not differ from present procedures with respect to the acquisition of research equipment. It was suggested that more latitude be given to the States for the purchase of research equipment with SPR funds when the equipment will clearly be devoted to research at a facility largely supported by SPR funds.

In accordance with governmentwide grant management procedures and cost principles, equipment is eligible if the cost is necessary, reasonable, and it benefits the grant. Individual items of equipment must be identified in the grant application (i.e., the work program) and will be reviewed for eligibility on a case-by-case basis. In general, if the equipment will be used only for FHWA funded work, all of the cost may be eligible. If the equipment will be used for work funded by other sources, the cost should be shared on an equitable basis or through the establishment of rental/use rates.

As noted above under the heading General Comments and Responses, paragraph (o) has been added to this section. This new paragraph specifies that subawards to institutions of higher education, hospitals, and other nonprofit organizations will be administered by the State in accordance with the provisions of OMB Circular A–110 (58 FR 62992) and the U.S. DOT's implementing regulations, 49 CFR part 19 (59 FR 15657). (Copies of OMB Circular A–110 and 49 CFR part 19 are available for review and copying in the file for FHWA docket number 93–18 at the address specified above under the caption FOR FURTHER INFORMATION CONTACT.)

A new paragraph (p) has been added to specify that reports and other documents prepared under FHWA planning and research funded grants or subgrants awarded after the effective date of this regulation must be in metric units.

Subpart B—Research, Development, and Technology Transfer Program Management

General Comments and Responses

Comment: Several commenters requested clarification concerning various aspects of the peer review process, including the purpose and use of the results of the reviews, funding of travel for review team members, and frequency of the reviews.

Response: It is the State's responsibility to initiate a peer review of its RD&T management process. An initial peer review should be undertaken sometime during the first three years after the State's management process has been approved by the FHWA Division Office.

The peer review is intended to review a State's management process, not the content of its RD&T program. It will not be used for compliance or certification. Peer reviews should help in identifying, reinforcing, and conveying effective program approaches across the country and enable a nationwide sharing of successful practices and policies. The purpose of providing the peer review report and a written response to the report findings to the FHWA Division Administrator is primarily to keep the Division Administrator informed of the status of the State's program and what efforts are being taken to improve the program.

The members of the peer review team will be selected by the State. The FHWA will establish criteria for team members and will develop and maintain a list of qualified individuals who will be available to serve on the teams. At least two members of the peer review team must be selected from this list.

A State may include a line item in its work program to pay for the peer review of its RD&T program with FHWA planning and research funds. The FHWA will consider establishing a national pooled-fund project if there is sufficient interest from the States and if it would expedite the peer review process.

The "periodic basis" for conducting peer reviews has been determined by the FHWA to be once every three years. After experience has been gained operating under the new procedures, consideration will be given to extending the time period between reviews.

Comment: Comments were mixed on whether the proposed rule should be mandatory for all States or whether a State could continue to submit individual RD&T studies for Federal approval.

Response: The option to submit individual studies for Federal approval (i.e., to continue operating under current procedures) has not been included in the final rule. The regulations are mandatory for all States. The final regulation provides a State with considerable latitude in developing and managing its RD&T activities and supports the intent of ISTEA to move the decisionmaking process to the State level.

The FHWA is available, at a State's request, to assist in reviewing any RD&T activities that are highly technical or require special expertise.

Comment: One commenter stated that the FHWA's intent concerning the degree of RD&T program interaction within State agencies should be more clearly stated. Specifically, expectations regarding the degree of management involvement at various organizational levels should be disclosed.

Response: Due to the different organizational structures of the States, it is not possible to be specific concerning the degree of management involvement. Each State should involve those management levels that are necessary to develop and implement an RD&T program that addresses high priority transportation issues.

Comment: One commenter stated that the NPRM implies that the FHWA is going to require a uniform format for State work programs since the information will be entered into a national data base.

Response: There is no intent to require a uniform work program format. The FHWA will encourage the States to include summary sheets listing all studies and costs followed by more detailed information on individual studies in their work programs. Also, as part of its management process, each State is required to use the Transportation Research Board's Transportation Research Information Services (TRIS) for reporting its active RD&T activities. It will be the State's responsibility to enter its new RD&T activities into the TRIS data base. Since uniform entries will be required for the data base, it could reasonably result in the States' work programs becoming more uniform to simplify data entry.

Comment: Several commenters expressed concern about the requirement that each State implement a program of RD&T activities for planning, design, construction, and maintenance of highways, public transportation, and intermodal transportation systems. The concerns were that the budgets for the smaller States are not sufficient to support activities in all of these areas; the FHWA is requiring the States to set up separate groups of funding for highway, transit, and intermodal research; and the term "program of RD&T activities" is not defined.

Response: The ISTEA *allows* the use of FHWA planning and research funds for RD&T activities noted in § 420.207. The regulation reflects the types of activities that may be conducted, but does not mandate that particular types be conducted. Each State is to develop a program that addresses its highest priority transportation research needs. The priorities will vary from State to State depending on such factors as the size of the State, its population, and the size and number of urban areas. This regulation does not establish separate groups of funds for highway, transit, or intermodal research.

Comment: One commenter stated that the conditions for grant approval appear to require more paperwork than currently required.

Response: Initially, for some States, it may require additional effort to document the State's RD&T management process. Once the management process has been documented and approved by the FHWA the amount of paperwork between the State and the FHWA should be reduced substantially. Paperwork on individual RD&T activities essentially will be eliminated.

Comment: One commenter was concerned that without additional explanation each FHWA Division Office would have a different interpretation of the requirement that a State have procedures to determine the effectiveness of its RD&T program.

Response: Guidelines for implementing subpart B are being developed. These guidelines will expand on the requirements in § 420.207. As a minimum, a State should develop a follow-up procedure to determine if the RD&T results have been incorporated into the State's standard plans, specifications, practices, or procedures. A more detailed process could involve benefit/cost ratios or other effectiveness measures.

Comment: One commenter stated that to list individual studies in the work program reduced the State's ability to be responsive to research needs as they arise during the year. According to the commenter this will cause a delay in the start of new research by having to wait for the next program approval or for approval of an amended program.

Response: A listing of individual studies in the work program is necessary for the FHWA Division Office to determine if the items are eligible for FHWA planning and research funds. Addition or deletion of individual studies is a programmatic change that requires prior FHWA approval. Such prior approval may be waived by the FHWA division office; however, the total FHWA planning and research funds authorized for the work program cannot be exceeded without FHWA prior authorization. It is anticipated that once a State has demonstrated that it has an adequate RD&T management process that meets the requirements of this rule, the FHWA Division Office would consider a request for waiver of prior approval of programmatic changes in the work program.

Section-by-Section Analysis

Section 420.201 Purpose and Applicability

This section states the purpose of subpart B. It indicates that the requirements are applicable to RD&T activities performed by the States and their subrecipients with FHWA planning and research funds. It references the provisions of subpart A. This section is unchanged from that proposed in the NPRM.

Section 420.203 Definitions

This section includes the definitions in 23 U.S.C. 101(a) and subpart A and provides additional definitions for terms used in this subpart.

Several commenters stated that the definition of "peer review" in the NPRM could be misinterpreted to require participation of representatives of specific organizations listed in the definition and that the definition should be revised to clearly state what is intended. The definition has been revised to indicate that a "peer review" is a review of a State's RD&T program conducted by persons who are knowledgeable in RD&T management and operation and to clarify that the peer review team *may* include, and is not limited to, representatives of another State, the FHWA, the American Association of State Highway and Transportation Officials, the Transportation Research Board, universities, or the private sector.

Commenters suggested that definitions of the terms "RD&T activity" and "intermodal RD&T" be included to provide an indication of individual or categories of activities that are included in these terms that are used in other sections of the rule.

The FHWA has added definitions of these two terms.

Section 420.205 Policy

This section explains the FHWA's intent to allow States maximum flexibility and discretion in managing and directing their FHWA planning and research funded RD&T activities while ensuring proper utilization of Federal funds and avoiding unnecessary duplication of effort.

Except for removal of paragraph (h), this section is unchanged from the NPRM. Paragraph (h) includes the nondiscrimination provisions of title VI of the Civil Rights Act of 1964 and DOT and FHWA implementing regulations. Most of this paragraph was redundant of § 420.121(m), which applies to RD&T as well as planning programs. The citation to 23 CFR part 200 that was in this paragraph has been moved to § 420.121(m).

Section 420.207 Conditions for Grant Approval

This section outlines the conditions that a State must meet for approval of

FHWA planning and research funds for its RD&T activities.

Paragraph (b) has been revised to indicate that a State's work program "may" include a line item for the costs associated with a peer review of its RD&T program.

The FHWA will establish criteria and develop and maintain a list of qualified individuals who will be available to serve on peer review teams. A requirement has been added to paragraph (b) providing that at least two members of the peer review team must be selected from the FHWA list.

The last sentence in paragraph (c) has been rewritten to eliminate the impression that the peer review team is under the direction of the FHWA.

Section 420.209 RD&T Work Program

This section outlines the items that must be included in a State's work program and incorporates by reference § 420.115 for approval and authorization procedures. The title of this section has been changed from "State work program" to "RD&T work program" since it includes provisions applicable to the RD&T program. A requirement to include a summary, listing the major items and estimated cost, has been added to this section. The summary will provide a quick overview of the content of a State's RD&T program.

Section 420.211 Eligibility of Costs

This section indicates eligible costs for FHWA participation in RD&T activities and references § 420.113 for other eligible costs. Paragraph (c) was revised to conform with § 420.113(b).

Section 420.213 Certification Requirements

This section provides the format for a State's certification indicating (1) State compliance with the requirements of this subpart; (2) the condition under which a new certification is required; and (3) the due date for the initial certification.

Several commenters noted that some States may not be able to comply with the proposed January 1, 1995, certification date. The date for certification has been changed to June 30, 1995. In addition, a provision has been added that allows the FHWA Division Administrator to grant conditional approval of a State's RD&T management process for a State unable to achieve full compliance by June 30, 1995. A conditional approval would cite those areas of the State's management process that are deficient and that all deficiencies would need to be corrected by January 1, 1996.

Questions were asked on how often a certification needs to be submitted and if a State could begin operating under the new procedures prior to proposed date of January 1, 1995. The certification is a one-time submittal, unless a State significantly changes its RD&T management process. A copy of the State's certification is to be submitted with its work program. A State may begin operating under these procedures as soon as its RD&T management process is approved by the FHWA.

Section 420.215 Procedure for Withdrawal of Approval

This section outlines the procedures used and penalties imposed if a State is not complying with the requirements of this subpart or is not performing in accordance with its RD&T management process.

Paragraph (d) in the NPRM proposed that, for any State not in compliance, the FHWA would withdraw the State's ability to approve RD&T activities and require the State to submit individual studies for FHWA approval. This approval requirement is similar to current procedures and would have provided little incentive for a State to correct deficiencies in its program. Therefore, paragraph (d) has been revised to indicate that an adverse decision shall result in the immediate withdrawal of FHWA planning and research funding for the State's RD&T activities until the State is in full compliance.

Rulemaking Analyses and Notices

Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures

The FHWA has determined that this rulemaking is not a significant regulatory action within the meaning of Executive Order 12866 or a significant regulation under the regulatory policies and procedures of the Department of Transportation. This action amends requirements for administration of FHWA planning and research funds to be consistent with legislative changes made by the ISTEA. Also, this rulemaking establishes a mandatory State certification process and a Federal and peer review process to determine annually whether each State complies with the standards for State RD&T management in subpart B. The economic costs of this rulemaking will be insignificant and will consist only of the costs associated with preparation of the grant applications and State development of procedures for RD&T management. The cost savings that will be realized by the States due to the reduction in time to initiate and conduct RD&T activities under the State RD&T management provisions will more than offset the one-time cost of development of the procedures.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (5 U.S.C. 601–612), the FHWA has evaluated the effects of this rule on small entities. This rule addresses the administrative procedures and requirements that States must comply with when using FHWA planning and research funds provided under title 23, U.S.C. This rule does not impose any direct requirement on small entities that would result in increased economic costs. Based on this evaluation, the FHWA certifies that this rule will not have a significant economic impact on a substantial number of small entities.

Executive Order 12612 (Federalism Assessment)

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 12612. Although this rule relates to requirements that States must meet to be eligible for FHWA planning and research funds, federalism implications, though unavoidable, would be minimized. Nothing in this rule preempts any State law or regulation. The rule provides States increased authority and flexibility to manage their federally assisted State planning and research programs. This increase in authority and flexibility is in concert with the principles and criteria contained in Executive Order 12612 for the implementation of express statutory provisions. Accordingly, the FHWA certifies that this rule does not have sufficient Federalism implications to warrant the preparation of a full Federalism Assessment under the principles and criteria contained in Executive Order 12612.

Executive Order 12372 (Intergovernmental Review)

Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation of Federal programs and activities apply to this program.

Paperwork Reduction Act

The information collection requirements referenced in § 420.105(b) have been approved by the OMB under the provisions of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501–

3520) and have been assigned OMB control numbers 2125–0028 and 2125–0032. The information collection requirements in §§ 420.111 (a), (b), and (c), and 420.117 (b) and (c) for metropolitan planning areas have been approved by the OMB and assigned control number 2132–0529. The information collection requirements in §§ 420.111 (a), (b), and (c), 420.117 (b) and (c), and 420.213 (a) and (b) for State planning and RD&T activities have been submitted to the OMB for approval.

National Environmental Policy Act

The agency has analyzed this action for the purpose of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and has determined that this action would not have any effect on the quality of the environment.

Regulation Identification Number

A regulation identification number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be used to cross reference this action with the Unified Agenda.

For the reasons set out in the preamble, and under the authority of 23 U.S.C. 315 and 49 CFR 1.48, title 23, Code of Federal Regulations, is revised as set forth below.

List of Subjects in 23 CFR Parts 420 and 511

Accounting, Grant programs—transportation, Highways and roads, Planning, Reporting and recordkeeping requirements, Research.

Issued on: July 18, 1994.

Rodney E. Slater,

Federal Highway Administrator.

In consideration of the foregoing, the FHWA amends Chapter I of title 23, Code of Federal Regulations, by revising the heading of subchapter E, by revising part 420, and by removing and reserving part 511 as set forth below.

SUBCHAPTER E—PLANNING AND RESEARCH

1. The heading of subchapter E is revised as set forth above.

2. Part 420 is revised to read as follows:

PART 420—PLANNING AND RESEARCH PROGRAM ADMINISTRATION

Subpart A—Administration of FHWA Planning and Research Funds

Sec.
420.101 Purpose and applicability.
420.103 Definitions.
420.105 Policy.
420.107 SPR minimum research, development, and technology transfer expenditure.
420.109 Distribution of PL funds.
420.111 Work program.
420.113 Eligibility of costs.
420.115 Approval and authorization procedures.
420.117 Program monitoring and reporting.
420.119 Fiscal procedures.
420.121 Other requirements.

Subpart B—Research, Development and Technology Transfer Program Management

Sec.
420.201 Purpose and applicability.
420.203 Definitions.
420.205 Policy.
420.207 Conditions for grant approval.
420.209 State work program.
420.211 Eligibility of costs.
420.213 Certification requirements.
420.215 Procedure for withdrawal of approval.

Authority: 23 U.S.C. 103(i), 104(f), 115, 120, 133(b), 134(n), 157(c), 303(g), 307, and 315; and 49 CFR 1.48(b).

Subpart A—Administration of FHWA Planning and Research

§ 420.101 Purpose and applicability.

This part prescribes the Federal Highway Administration (FHWA) policies and procedures for the administration of activities undertaken by States and their subrecipients, including Metropolitan Planning Organizations (MPOs), with FHWA planning and research funds. It applies to activities and studies funded as part of a recipient's or subrecipient's work program or as separate Federal-aid projects that are not included in a work program. This subpart also is applicable to the approval and authorization of research, development, and technology transfer (RD&T) work programs; additional policies and procedures regarding administration of RD&T programs are contained in subpart B of this part. The requirements in this part supplement those in 49 CFR Part 18 which are applicable to administration of these funds.

§ 420.103 Definitions.

Unless otherwise specified in this part, the definitions in 23 U.S.C. 101(a) are applicable to this part. As used in this part:

Grant agreement means a legal instrument between an awarding agency and recipient where the principal purpose is to provide funds to the recipient to carry out a public purpose of support or stimulation authorized by law.

FHWA planning and research funds means:

(1) State planning and research (SPR) funds (the 2 percent funds authorized under 23 U.S.C. 307(c)(1));

(2) Metropolitan planning (PL) funds (the 1 percent funds authorized under 23 U.S.C. 104(f) to carry out the provisions of 23 U.S.C. 134(a));

(3) National highway system (NHS) funds authorized under 23 U.S.C. 104(b)(1) used for transportation planning in accordance with 23 U.S.C. 134 and 135, highway research and planning in accordance with 23 U.S.C. 307, highway-related technology transfer activities, or development and establishment of management systems under 23 U.S.C. 303;

(4) Surface transportation program (STP) funds authorized under 23 U.S.C. 104(b)(3) used for highway and transit research and development and technology transfer programs, surface transportation planning programs, or development and establishment of management systems under 23 U.S.C. 303; and

(5) Minimum allocation funds authorized under 23 U.S.C. 157(c) used for carrying out, respectively, the provisions of 23 U.S.C. 307(c)(1) (up to 1½ percent) and 23 U.S.C. 134(a) (up to ½ percent).

Metropolitan planning area means the geographic area in which the metropolitan transportation planning process required by 23 U.S.C. 134 and section 8 of the Federal Transit Act (49 U.S.C. app. 1607) must be carried out.

Metropolitan planning organization (MPO) means the forum for cooperative transportation decisionmaking for a metropolitan planning area.

National pooled-fund study means a planning or RD&T study or activity expected to solve problems of national significance, usually administered by the FHWA headquarters office in cooperation with States and/or MPOs, that is funded by State and/or MPO contributions of FHWA planning and research funds, with or without matching funds.

Procurement contract means a legal instrument between an awarding agency and recipient where the principal purpose is to acquire (by purchase, lease, or barter) property or services for the direct benefit or use of the awarding agency.

Regional pooled-fund study means a planning or RD&T study expected to solve problems of regional significance,

usually administered by an FHWA region office in cooperation with a lead State and/or MPO, that is funded by State and/or MPO contributions of FHWA planning and research funds, with or without matching funds.

State transportation agency (STA) means the State highway department, transportation department, or other State transportation agency to which Federal-aid highway funds are apportioned.

Work program means a periodic statement of proposed work and estimated costs that document the eligible activities to be undertaken with FHWA planning and research funds during the next 1 or 2-year period by STAs and/or their subrecipients.

§ 420.105 Policy.

(a) Within the limitations of available funding and with the understanding that planning activities of national significance, identified in paragraph (b) of this section, and the requirements of 23 U.S.C. 134, 135, 303, and 307(c) are being adequately addressed, the FHWA will allow STAs and their subrecipients:

(1) Maximum possible flexibility in the use of FHWA planning and research funds to meet highway and multimodal transportation planning and RD&T needs at the national, State, and local levels while ensuring legal use of such funds and avoiding unnecessary duplication of efforts; and

(2) To determine which eligible planning and RD&T activities they desire to support with FHWA planning and research funds and at what funding level.

(b) The STAs shall provide data that support the FHWA's responsibilities to the Congress and to the public. These data include, but are not limited to, information required for: Preparing proposed legislation and reports to the Congress; evaluating the extent, performance, condition, and use of the Nation's transportation systems; analyzing existing and proposed Federal-aid funding methods and levels and the assignment of user cost responsibility; maintaining a critical information base on fuel availability, use, and revenues generated; and calculating apportionment factors.

(The information collection requirements in paragraph (b) of § 420.105 have been approved by the Office of Management and Budget (OMB) under control numbers 2125–0028 and 2125–0032.)

§ 420.107 SPR minimum research, development, and technology transfer expenditure.

(a) In accordance with the provisions of 23 U.S.C. 307(c), not less than 25 percent of the SPR funds apportioned to a State for a fiscal year shall be expended for RD&T activities relating to highway, public transportation, and intermodal transportation systems, unless the State certifies, and the FHWA accepts the State's certification, that total expenditures by the State during the fiscal year for transportation planning under 23 U.S.C. 134 and 135 will exceed 75 percent of the amount apportioned for the fiscal year.

(b) Prior to submitting a request for an exception to the 25 percent requirement, the State shall ensure that:

(1) The additional planning activities are essential and there are no other reasonable options available for funding these planning activities (including the use of National Highway System, Surface Transportation Program, or Federal Transit Administration Section 26(a)(2) funds or by deferment of lower priority planning activities);

(2) The planning activities have a higher priority than RD&T activities in overall needs of the State for a given year; and

(3) The total level of effort by the State in RD&T (using both Federal and State funds) is adequate.

(c) If the State chooses to pursue an exception, the request, along with supporting justification, shall be sent to the FHWA Division Administrator for action by the FHWA Associate Administrator for Research and Development. The Associate Administrator's decision shall be based upon the following considerations:

(1) Whether the State has a process for identifying RD&T needs and for implementing a viable RD&T program.

(2) Whether the State is contributing to cooperative RD&T programs or activities, such as the National Cooperative Highway Research Program, the Transportation Research Board, the implementation of products of the Strategic Highway Research Program, and pooled-fund studies.

(3) Whether the State is using SPR funds for technology transfer and for transit or intermodal research and development to help meet the 25 percent minimum requirement.

(4) The percentage or amount of the State's FHWA planning and research funds that were used for RD&T prior to enactment of the 25 percent requirement and whether the percentage or amount will increase if the exception is approved.

(5) If an exception is approved for the fiscal year, whether the State can demonstrate that it will meet the requirement or substantially increase its RD&T expenditures over a multi-year period.

(6) Whether the amount of Federal funds needed for planning for the program period exceeds the total of the 75 percent limit for the fiscal year and any unexpended (including unused funds that can be released from completed projects) funds for planning from previous apportionments.

(d) If the State's request for an exception is approved, the exception will be valid only for the fiscal year in which the exception is approved. A new request must be submitted in subsequent fiscal years.

§ 420.109 Distribution of PL funds.

(a) States shall make all PL funds authorized by 23 U.S.C. 104(f) available to the MPOs in accordance with a formula developed by the State, in consultation with the MPOs, and approved by the FHWA. The State shall not use any PL funds for grant or subgrant administration.

(b) In developing the formula for distributing PL funds, the State shall consider population, status of planning, attainment of air quality standards, metropolitan area transportation needs, and other factors necessary to provide for an appropriate distribution of funds to carry out the requirements of 23 U.S.C. 134 and other applicable requirements of Federal law.

(c) As soon as practicable after PL funds have been apportioned by the FHWA to the States, the STAs shall inform the MPOs and the FHWA of the amounts allocated to each MPO.

(d) If the STA, in a State receiving the minimum apportionment of PL funds under the provisions of 23 U.S.C. 104(f)(2), determines that the share of funds to be allocated to any MPO results in the MPO receiving more funds than necessary to carry out the provisions of 23 U.S.C. 134(a), the STA may, after considering the views of the affected MPOs and with the approval of the FHWA, use these funds to finance transportation planning outside of metropolitan planning areas.

(e) In accordance with the provisions of 23 U.S.C. 134(n), any PL funds not needed for carrying out the metropolitan planning provisions of 23 U.S.C. 134 may be made available by the MPOs to the State for funding statewide planning activities under 23 U.S.C. 135, subject to approval by the FHWA.

(f) Any State PL fund distribution formula that does not meet the requirements of paragraphs (a) or (b) of this section shall be brought into conformance with such requirements as soon as possible, but no later than in time for distribution of PL funds apportioned to the State for the first

Federal fiscal year beginning after August 22, 1994.

§ 420.111 Work program.

(a) Proposed use of FHWA planning and research funds shall be documented by the STAs and subrecipients in a work program(s) acceptable to the FHWA. Statewide, metropolitan, other transportation planning activities, and transportation RD&T activities may be administered as separate programs, paired in various combinations, or brought together as a single work program. Similarly, these transportation planning and RD&T activities may be authorized for fiscal purposes as one combined Federal-aid project or as separate Federal-aid projects. The expenditure of PL funds for transportation planning outside of metropolitan planning areas under § 420.109(d) may be included in the work program for statewide transportation planning activities or in a separate work program submitted by the STA.

(b) Work program(s) that document transportation planning activities shall include a description of work to be accomplished and cost estimates for each activity. Additional information on metropolitan planning area work programs is contained in 23 CFR 450.314. Additional information on research, development, and technology transfer work program content and format is contained in subpart B of this part.

(c) The STAs that use separate Federal-aid projects in accordance with § 420.111(a) shall submit, in addition to the financial information specified below for each program, one overall summary showing the funding for the entire FHWA funded planning, research, development, and technology transfer effort. Each work program shall include a financial summary that shows:

(1) Federal share by type of fund;

(2) Matching rate by type of fund;

(3) State and/or local matching share; and

(4) Other State or local funds.

(d) The STAs and MPOs also are encouraged to include cost estimates for transportation planning, research, development, and technology transfer related activities funded with other Federal or State and/or local funds; particularly for producing the FHWA-required data specified in paragraph (b) of § 420.105, for planning for other transportation modes, and for air quality planning activities in areas designated as nonattainment for transportation-related pollutants in their work programs. The MPOs in Transportation Management Areas shall include such information in their work programs in accordance with the provisions of 23 CFR part 450.

(The information collection requirements in §§ 420.111(a), (b), and (c), and 420.117(b) and (c) for metropolitan planning areas have been approved by the OMB and assigned control number 2132–0529.)

§ 420.113 Eligibility of costs.

(a) Costs will be eligible for FHWA participation provided that the costs:

(1) Are for work performed for activities eligible under the section of title 23, U.S.C., applicable to the class of funds used for the activities;

(2) Are verifiable from the STA's or the subrecipient's records;

(3) Are necessary and reasonable for proper and efficient accomplishment of project objectives and meet the other criteria for allowable costs in the applicable cost principles cited in 49 CFR 18.22;

(4) Are included in the approved budget, or amendment thereto; and

(5) Were not incurred prior to FHWA authorization.

(b)(1) Except as specified in paragraph (b)(2) of this section, indirect costs of an STA are not eligible for reimbursement with FHWA planning and research funds.

(2) Salaries for services rendered by STA employees who are generally classified as administrative are eligible for reimbursement for a transportation planning unit, RD&T unit, or other unit performing eligible work with FHWA planning and research funds (including development, establishment, and implementation of the management and monitoring systems required by 23 U.S.C. 303 and 23 CFR part 500) in the ratio of time spent on the participating portion of work in the unit to the total unit's working hours.

(c) Indirect costs of MPOs and local governments are allowable if supported by a cost allocation plan and indirect cost proposal approved in accordance with the provisions of OMB Circular A–87. An initial plan and proposal must be submitted to the Federal cognizant or oversight agency for negotiation and approval prior to recovering any indirect costs. The cost allocation plan and indirect cost proposal shall be updated annually and retained by the MPO or local government, unless requested to be resubmitted by the Federal cognizant or oversight agency, for review at the time of the audit required in accordance with 49 CFR Part 90. If the MPO or local government's indirect cost rate varies significantly from the rate approved for the previous year, or if the MPO or local government changes its accounting system and affects the previously approved indirect cost allocation plan and proposal or rate and its basis of application, the indirect cost allocation plan and proposal shall be resubmitted for negotiation and approval. In either case, a rate shall be negotiated and approved for billing purposes until a new plan and proposal are approved.

(d) Indirect costs of other STA subrecipients, including other State agencies, are allowable if supported by a cost allocation plan and indirect cost proposal prepared, submitted, and approved by the cognizant or oversight agency in accordance with the OMB requirements applicable to the subrecipient.

§ 420.115 Approval and authorization procedures.

(a) The STA and its subrecipients shall obtain work program approval and authorization to proceed prior to beginning work on activities in the work program. Such approvals and authorizations should be based on final work program documents. The STA and its subrecipients also shall obtain prior approval for budget and programmatic changes as specified in 49 CFR 18.30 and for those items of allowable costs which require prior approval in accordance with the applicable cost principles specified in 49 CFR 18.22.

(b) Except for advance construction, authorization to proceed with the work program(s) in whole or in part shall be deemed a contractual obligation of the Federal Government pursuant to 23 U.S.C. 106 and shall require that appropriate funds be available for the full Federal share of the cost of work authorized. Those STAs that do not have sufficient FHWA planning and research funds or obligation authority available to obligate the full Federal share of the entire work program(s) may utilize the advance construction provisions of 23 U.S.C. 115(a) in accordance with the requirements of 23 CFR Part 630, subpart G. The STAs that do not meet the advance construction provisions, or do not wish to utilize them, may request authorization to proceed with that portion of the work program(s) for which FHWA planning and research funds are available. In the latter case, authorization to proceed may be given for either selected work activities or for a portion of the program period, but such authorization shall not constitute a commitment by the FHWA to fund the remaining portion of the work program(s) should additional funds become available.

(c) A project agreement shall be executed by the STA and FHWA Division Office for each statewide

transportation planning, metropolitan planning area transportation planning, or RD&T work program, individual activity or study, or any combination administered as a single Federal-aid project. The project agreement shall be executed after the authorization has been given by the FHWA to proceed with the work in whole or in part. In the event that the project agreement is executed for only part of the work program, the project agreement shall be amended when authorization is given to proceed with additional work.

§ 420.117 Program monitoring and reporting.

(a) In accordance with 49 CFR 18.40, the STA shall monitor all activities, including those of its subrecipients, supported by FHWA planning and research funds to assure that the work is being managed and performed satisfactorily and that time schedules are being met.

(b)(1) The STA shall submit performance and expenditure reports, including a report from each subrecipient, that contain as a minimum:

(i) Comparison of actual performance with established goals;

(ii) Progress in meeting schedules;

(iii) Status of expenditures in a format compatible with the work program, including a comparison of budgeted (approved) amounts and actual costs incurred;

(iv) Cost overruns or underruns;

(v) Approved work program revisions; and

(vi) Other pertinent supporting data.

(2) Additional information on reporting requirements for individual RD&T studies is contained in subpart B of this part.

(c) The frequency of reports required by paragraph (b) of this section shall be annual unless more frequent reporting is determined to be necessary by the FHWA; but in no case will reports be required more frequently than quarterly. These reports are due 90 days after the end of the reporting period for annual and final reports and no later than 30 days after the end of the reporting period for other reports.

(d) Events that have significant impact on the work program(s) shall be reported as soon as they become known. The type of events or conditions that require reporting include: problems, delays, or adverse conditions that will materially affect the ability to attain program objectives. This disclosure shall be accompanied by a statement of the action taken, or contemplated, and any Federal assistance needed to resolve the situation.

(e) A provision of the Federal-Aid Project Agreement requires both the preparation of suitable reports to document the results of activities performed with FHWA planning and research funds and FHWA approval prior to publishing such reports. The STA may request a waiver of the requirement for prior approval. The FHWA's approval constitutes acceptance of such reports as evidence of work performed but does not imply endorsement of a report's findings or recommendations. Reports prepared for FHWA funded work shall include appropriate credit references and disclaimer statements.

(The information collection requirements in §§ 420.117(b) and (c) for metropolitan planning areas have been approved by the OMB and assigned control number 2132–0529.)

§ 420.119 Fiscal procedures.

(a) SPR funds shall be administered and accounted for as a single fund regardless of the category of Federal-aid highway funds from which they are derived.

(b) PL funds shall be administered and accounted for as a single fund.

(c) Optional funds authorized under 23 U.S.C. 104(b)(1), 104(b)(3), and 157(c) used for eligible planning and RD&T purposes shall be identified separately in the work program(s) and shall be administered and accounted for separately for fiscal purposes. The statewide and, if appropriate, metropolitan transportation improvement program provisions of 23 CFR Part 450 must be met for the use of NHS, STP, or minimum allocation funds for planning or RD&T purposes.

(d) The maximum rate of Federal participation with funds identified in paragraphs (a) through (c) of this section shall be as prescribed in title 23, U.S.C., for the specific class of funds; unless, for funds identified under paragraph (a) or (b) of this section, the FHWA determines that the interests of the Federal-aid highway program would be best served without such match in accordance with 23 U.S.C. 307(c)(3) or 23 U.S.C. 104(f)(3). The FHWA also may waive the requirement for matching funds if national or regional high priority planning or RD&T problems can be more effectively addressed if several States and/or MPOs pool their funds. Requests for 100 percent Federal funding must be submitted to the FHWA Division Office for approval by the Associate Administrator for Program Development (for planning activities) or the Associate Administrator Research and Development (for RD&T activities).

(e) The provisions of 49 CFR 18.24 are applicable to any necessary matching of FHWA planning and research funds.

(f) Payment shall be made in accordance with the provisions of 49 CFR 18.21.

§ 420.121 Other requirements.

(a) The financial management systems of the STAs and their subrecipients shall be in accordance with the provisions of 49 CFR 18.20(a).

(b) Program income, as defined in 49 CFR 18.25(b), shall be shown and deducted to determine the net costs on which the FHWA share will be based, unless an alternative method for using program income is specified in the Federal-Aid Project Agreement.

(c) Audits shall be performed in accordance with 49 CFR 18.26 and 49 CFR Part 90.

(d) Acquisition, use, and disposition of equipment purchased by the STAs and their subrecipients with FHWA planning and research funds shall be in accordance with 49 CFR 18.32(b).

(e) Acquisition and disposition of supplies acquired by the STAs and their subrecipients with FHWA planning and research funds shall be in accordance with 49 CFR 18.33.

(f) In accordance with 49 CFR 18.34, STAs and their subrecipients may copyright any books, publications, or other copyrightable materials developed in the course of the FHWA planning and research funded project. The FHWA reserves a royalty-free, nonexclusive and irrevocable right to reproduce, publish, or otherwise use, and to authorize others to use, the work for Government purposes.

(g) Procedures for the procurement of property and services with FHWA planning and research funds by the STAs and their subrecipients shall be in accordance with 49 CFR 18.36(a) and, if applicable, 18.36(t). The STAs and their subrecipients shall not use FHWA funds for procurements from persons (as defined in 49 CFR 29.105) who have been debarred or suspended in accordance with the provisions of 49 CFR Part 29, subparts A through E.

(h) The STAs shall follow State laws and procedures when awarding and administering subgrants to MPOs and local governments and shall ensure that the requirements of 49 CFR 18.37(a) have been satisfied. STAs shall have primary responsibility for administering FHWA planning and research funds passed through to subrecipients, for ensuring that such funds are expended for eligible activities, and for ensuring that the funds are administered in accordance with this part, 49 CFR Part 18, and applicable cost principles.

(i) Recordkeeping and retention requirements shall be in accordance with 49 CFR 18.42.

(j) The STAs and their subrecipients are subject to the provisions of 37 CFR Part 401 governing patents and inventions and shall include, or incorporate by reference, the standard patent rights clause at 37 CFR 401.14, except for § 401.14(g), in all subgrants or contracts. In addition, STAs and their subrecipients shall include the following clause, suitably modified to identify the parties, in all subgrants or contracts, regardless of tier, for experimental, developmental or research work: "The subgrantee or contractor will retain all rights provided for the State in this clause, and the State will not, as part of the consideration for awarding the subgrant or contract, obtain rights in the subgrantee's or contractor's subject inventions."

(k) In accordance with the provisions of 49 CFR Part 29, subpart F, STAs shall certify to the FHWA that they will provide a drug free workplace. This requirement can be satisfied through the annual certification for the Federal-aid highway program.

(l) The provisions of 49 CFR Part 20 regarding restrictions on influencing certain Federal activities are applicable to all tiers of recipients of FHWA planning and research funds.

(m) The nondiscrimination provisions of 23 CFR Parts 200 and 230 and 49 CFR Part 21, with respect to Title VI of the Civil Rights Act of 1964 and the Civil Rights Restoration Act of 1987, apply to all programs and activities of recipients, subrecipients, and contractors receiving FHWA planning and research funds whether or not those programs or activities are federally funded.

(n) The STAs shall administer the transportation planning and RD&T program(s) consistent with their overall efforts to implement section 1003(b) of the Intermodal Surface Transportation Efficiency Act of 1991 (Pub. L. 102-240, 105 Stat. 1914) and 49 CFR Part 23 regarding disadvantaged business enterprises.

(o) States and their subrecipients shall administer subgrants to universities, hospitals, and other non-profit organizations in accordance with the administrative requirements of OMB Circular A-110 as implemented by the U.S. DOT in 49 CFR Part 19, Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations.

(p) Reports and other documents prepared under FHWA planning and research funded grants or subgrants awarded after August 22, 1994, must be in metric units.

Subpart B—Research, Development and Technology Transfer Program Management

§ 420.201 Purpose and applicability.

The purpose of this subpart is to implement the provisions of 23 U.S.C. 307 and to prescribe Federal assistance requirements for research, development, and technology transfer (RD&T) activities, programs, and studies undertaken by States with FHWA planning and research funds. The requirements of this subpart and subpart A of this part are applicable to work performed by the States and their subrecipients with FHWA planning and research funds.

§ 420.203 Definitions.

Unless otherwise specified in this part, the definitions in 23 U.S.C. 101(a) and Part 420, subpart A, are applicable to this subpart. As used in this subpart:

Applied research means the study of phenomena relating to a specific known need in connection with the functional characteristics of a system; the primary purpose of this kind of research is to answer a question or solve a problem.

Basic research means the study of phenomena whose specific application has not been identified; the primary purpose of this kind of research is to increase knowledge.

Cooperatively funded study means an RD&T study or activity, administered by the FHWA, a lead State, or other agency, that is funded by some combination of a State's contribution of FHWA planning and research funds, FHWA administrative contract funds, 100 percent State funds, or funds from other Federal agencies.

Development means the translation of basic or applied research results into prototype materials, devices, techniques, or procedures for the practical solution of a specific problem in transportation.

Final report means a report documenting a completed RD&T study or activity.

Intermodal RD&T means research, development, and technology transfer activities involving more than one mode of transportation including transfer facilities between modes.

National Cooperative Highway Research Program (NCHRP) means the cooperative RD&T program directed toward solving problems of national or regional significance identified by States and the FHWA, and administered by the Transportation Research Board, National Academy of Sciences.

Peer review means a review conducted by persons who are knowledgeable of the management and operation of RD&T programs. This may include but is not limited to representatives of another State, the FHWA, American Association of State Highway and Transportation Officials, Transportation Research Board (TRB), universities or the private sector.

RD&T activity means a basic or applied research, development, or technology transfer project or study.

Research means a systematic controlled inquiry involving analytical and experimental activities which primarily seek to increase the understanding of underlying phenomena. Research can be basic or applied.

Technology transfer means those activities that lead to the adoption of a new technique or product by users and involves dissemination, demonstration, training, and other activities that lead to eventual innovation.

Transportation Research Information Services (TRIS) means the TRB-maintained computerized storage and retrieval system for abstracts of ongoing and completed RD&T activities, including abstracts of RD&T reports and articles.

§ 420.205 Policy.

(a) It is the FHWA's policy to administer the RD&T program activities utilizing FHWA planning and research funds consistent with the policy specified in § 420.105 and the following general principles in paragraphs (b) through (g) of this section.

(b) State transportation agencies shall provide information necessary for peer reviews.

(c) States are encouraged to develop, establish, and implement an RD&T program, funded with Federal and State resources, that anticipates and addresses transportation concerns before they become critical problems. To promote effective utilization of available resources, States are encouraged to cooperate with other States, the FHWA, and other appropriate agencies to achieve RD&T objectives established at the national level and to develop a technology transfer program to promote and use those results.

(d) States will be allowed the authority and flexibility to manage and direct their RD&T activities as presented in their work programs, and to initiate RD&T activities supported by FHWA planning and research funds, subject to the limitation of Federal funds and to compliance with program conditions set forth in subpart A of this part and § 420.207.

(e) States will have primary responsibility for managing RD&T activities supported with FHWA planning and research funds carried out by other State agencies and organizations and for ensuring that such funds are expended for purposes consistent with this subpart.

(f) Each State shall develop, establish, and implement a management process that ensures effective use of available FHWA planning and research funds for RD&T activities on a statewide basis. Each State is permitted to tailor its management process to meet State or local needs; however, the process must comply with the minimum requirements and conditions of this subpart.

(g) States are encouraged to make effective use of the FHWA Division, Regional, and Headquarters office expertise in developing and carrying out their RD&T activities. Participation of the FHWA on advisory panels and in program review meetings is encouraged.

§ 420.207 Conditions for grant approval.

(a) As a condition for approval of FHWA planning and research funds for RD&T activities, a State shall implement a program of RD&T activities for planning, design, construction, and maintenance of highways, public transportation, and intermodal transportation systems. Not less than 25 percent of the State's apportioned SPR funds shall be spent on such activities, unless waived by the FHWA, in accordance with the provisions of § 420.107. In addition the State shall develop, establish, and implement a management process that identifies and implements RD&T activities expected to address highest priority transportation issues, and includes:

(1) An interactive process for identification and prioritization of RD&T activities for inclusion in an RD&T work program;

(2) Utilization, to the maximum extent possible, of all FHWA planning and research funds set aside for RD&T activities either internally or for participation in national, regional pooled, or cooperatively funded studies;

(3) Procedures for tracking program activities, schedules, accomplishments, and fiscal commitments;

(4) Support and use of the TRIS database for program development, reporting of active RD&T activities, and input of the final report information;

(5) Procedures to determine the effectiveness of the State's management process in implementing the RD&T program, to determine the utilization of the State's RD&T outputs, and to facilitate peer reviews of its RD&T Program on a periodic basis and;

(6) Procedures for documenting RD&T activities through the preparation of final reports. As a minimum, the documentation shall include the data collected, analyses performed, conclusions, and recommendations. The State shall actively implement appropriate research findings and should document benefits.

(b) Each State shall conduct peer reviews of its RD&T program and should participate in the review of other States' programs on a periodic basis. To assist peer reviewers in completing a quality and performance effectiveness review, the State shall disclose to them information and documentation required to be collected and maintained under this subpart. Travel and other costs associated with peer reviews of the State's program may be identified as a line item in the State work program and will be eligible for 100 percent Federal funding. At least two members of the peer review team shall be selected from the FHWA list of qualified peer reviewers. The peer review team shall provide a written report of its findings to the State. The State shall forward a copy of the report to the FHWA Division Administrator with a written response to the peer review findings.

(c) Documentation that describes the management process and the procedures for selecting and implementing RD&T activities shall be developed and maintained by the State. The documentation shall be submitted by the State to the FHWA Division office for FHWA approval. Significant changes in the management process also shall be submitted by the State for FHWA approval. The State shall make the documentation available, as necessary, to facilitate peer reviews.

§ 420.209 RD&T work program.

(a) The State's RD&T work program shall, as a minimum, consist of an annual or biennial description of activities and individual RD&T activities to be accomplished during the program period, estimated costs for each eligible activity, and a description of any cooperatively funded activities that are part of a national or regional pooled study including the NCHRP contribution. The State's work program should include a list of the major items with a cost estimate for each item.

(b) The State's RD&T work program shall include financial summaries showing the funding levels and share (Federal, State, and other sources) for RD&T activities for the program year. States are encouraged to include any activity funded 100 percent with State or other funds.

(c) Approval and authorization procedures in § 420.115 are applicable to the State's RD&T work program.

§ 420.211 Eligibility of costs.

(a) Unless otherwise specified in this section, the eligible costs for Federal participation in § 420.113 are applicable to this part.

(b) Costs for implementation of RD&T activities in conformity with the requirements and conditions set forth in this subpart are eligible for Federal participation.

(c) Indirect costs of a State transportation agency RD&T unit are allowable to the extent specified in § 420.113(b).

(d) Indirect costs of other State agencies and organizations are allowable if supported by a cost allocation plan and indirect cost proposal in accordance with OMB requirements.

§ 420.213 Certification requirements.

(a) Each State shall certify to the FHWA Division Administrator before June 30, 1995, that it is complying with the requirements of this subpart. For those States unable to meet full compliance by June 30, 1995, the FHWA Division Administrator may grant conditional approval of the State's RD&T management process. A conditional approval shall cite those areas of the State's management process that are deficient. All deficiencies must be corrected by January 1, 1996. A copy of the certification shall be submitted with each work program. A new certification will be required if the State significantly revises its management process for the RD&T program.

(b) The certification shall consist of a statement signed by the Administrator, or an official designated by the Administrator, of the State transportation agency certifying as follows: I (name of certifying official), (position title), of the State (Commonwealth) of _____, do hereby certify that the State (Commonwealth) is in compliance with all requirements of 23 U.S.C. 307 and its implementing regulations with respect to the research, development and technology transfer program, and contemplate no changes in statutes, regulations, or administrative procedures which would affect such compliance.

(c) The FHWA Division Administrator shall determine if the State is in compliance with the requirements of this subpart.

§ 420.215 Procedure for withdrawal of approval.

(a) If a State is not complying with the requirements of this subpart, or is not performing in accordance with its RD&T management process, the FHWA Division Administrator shall issue a written notice of proposed determination of noncompliance to the State. The notice shall set forth the reasons for the proposed determination and inform the State that it may reply in writing within 30 calendar days from the date of the notice. The State's reply should address the deficiencies cited in the notice and provide documentation as necessary.

(b) If the State and Division Administrator cannot resolve the differences set forth in the determination of nonconformity, the State may appeal to the Federal Highway Administrator.

(c) The Federal Highway Administrator's action shall constitute the final decision of the FHWA.

(d) An adverse decision shall result in immediate withdrawal of approval of FHWA planning and research funds for the State's RD&T activities until the State is in full compliance.

PART 511—RESEARCH AND DEVELOPMENT (R&D) STUDIES AND PROGRAMS; GENERAL [REMOVED]

3. Chapter I of title 23, CFR, is amended by removing and reserving part 511.

[FR Doc. 94–17908 Filed 7–21–94; 8:45 am]
BILLING CODE 4910–22–P

Federal Register

Friday
July 22, 1994

Part IV

Federal Communications Commission

47 CFR Part 24
Competitive Bidding; Final Rule

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 24

[PP Docket No. 93-253, FCC 94-178]

Implementation of Section 309(j) of the Communications Act—Competitive Bidding

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this *Fifth Report and Order*, the Commission adopts rules governing competitive bidding to award initial licenses in the Personal Communications Services in the 2 GHz band (broadband PCS"). This action is taken to implement Section 309(j) of the Communications Act of 1934, as amended. The new rules will promote the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas. These rules also will promote economic opportunity and competition, and disseminate licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women. This action will result in recovery for the public of a portion of the value of the public spectrum made available for commercial use.

EFFECTIVE DATE: August 22, 1994.

FOR FURTHER INFORMATION CONTACT: Sara Seidman, Office of General Counsel, (202) 418–1700, or Jonathan Cohen, Office of Plans and Policy, (202) 418–2030.

SUPPLEMENTARY INFORMATION: This *Fifth Report and Order* in PP Docket No. 93–253, adopted June 29, 1994, and released July 15, 1994, is available for inspection and copying during normal business hours in the FCC Dockets Branch, Room 230, 1919 M Street NW., Washington, DC. The complete text may be purchased from the Commission's copy contractor, International Transcription Service, Inc., 2100 M Street, NW., Suite 140, Washington, DC 20037, telephone (202) 857–3800.

Paperwork Reduction Act

In the *Fifth Report and Order* in PP Docket No. 93–253, the Commission has amended 47 CFR Part 24 to add new Subparts H and I which contain rules and requirements governing the award of broadband PCS licenses through a system of competitive bidding. Applicants are required to file certain information so that the Commission can determine whether the applicants are legally, technically, and financially qualified to be licensed. Affected public are any member of the public who wants to become a licensee. Implementation of the rules contained in the *Fifth Report and Order* will impose reporting and recordkeeping requirements on the public. The Federal Communications Commission will submit an information collection request to OMB for review and clearance under the Paperwork Reduction Act of 1980, 44 U.S.C. Section 3507. Persons wishing to comment on this information collection should contact Timothy Fain, Office of Management and Budget, Room 3225, New Executive Office Building, Washington, DC 20503, (202) 395–3561. For further information, contact Judy Boley, Federal Communications Commission, (202) 418–0210.

Fifth Report and Order

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By the Commission: Commissioners Quello, Barrett, Ness and Chong issuing separate statements.

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I. Introduction

1. In this *Fifth Report and Order*, we adopt rules to conduct auctions for the award of more than 2,000 licenses to provide personal communications services in the 2 GHz band, which we call "broadband PCS." These broadband PCS auctions will constitute the largest auction of public assets in American history and are expected to recover billions of dollars for the United States Treasury. More importantly, the auctions will lead to the introduction of an array of new telecommunications products and services that are expected to fuel our nation's economic growth and revolutionize the way in which Americans communicate.

2. We also adopt in this Order provisions to fulfill Congress's mandate that we ensure that small businesses, rural telephone companies and businesses owned by minorities and women are given the opportunity to participate in the provision of broadband PCS. These rules will provide unprecedented opportunities for these designated entities to become meaningfully involved in the provision of a new telecommunications service. This action seeks to ensure that licenses for broadband PCS are disseminated to a wide variety of applicants and to remedy the serious underrepresentation of minorities and women in the provision of telecommunications services. Further, by the actions we take today we seek to ensure that PCS is provided to all communities in this country, including rural areas.

3. Broadband PCS will provide a variety of mobile services that will

compete with existing cellular services. In addition, broadband PCS is expected to provide new mobile communications capabilities that are not currently available. These services will be provided by means of a new generation of communications devices that will include small, lightweight, multi-function portable phones, portable facsimile and other imaging devices, new types of multi-channel cordless phones, and advanced paging devices with two-way data capabilities.[1] The introduction of broadband PCS should benefit consumers by raising the overall level of competition in many already competitive segments of the telecommunications industry and by providing competition in other segments for the first time. The broadband PCS industry should also generate thousands of jobs in this country and improve the international competitiveness of the American economy.

4. Auctions for broadband PCS licenses will be conducted pursuant to Section 309(j) of the Communications Act, 47 U.S.C. § 309(j), which was enacted in August 1993. Section 309(j) granted the Commission express authority to employ competitive bidding procedures to award licenses to use the electromagnetic spectrum.[2] Section 309(j)(1) permits auctions only where mutually exclusive applications for initial licenses are accepted for filing by the Commission and where the principal use of the spectrum is reasonably likely to involve the receipt by the licensee of compensation from subscribers in return for enabling those subscribers to receive or transmit communications signals. In the *Second Report and Order* in his proceeding, we concluded that PCS as a class of service satisfies the Section 309(j)(1) criteria. *See Second Report and Order* in PP Docket No. 93–253, 9 FCC Rcd 2348, 59 FR 22980, May 4, 1994 (*Second Report and Order*), at ¶¶ 54–58. Accordingly, if mutually exclusive applications for a broadband PCS license are accepted for filing, we will award that license through competitive bidding.

5. We also concluded in the *Second Report and Order* that we could design auction procedures to govern the award of broadband PCS licenses that would promote the objectives listed in Section 309(j)(3). More specifically, in the *Second Report and Order*, we determined that the use of competitive bidding to award broadband PCS licenses, as compared with other licensing methods, would speed the development and deployment of new services to the public and would encourage efficient use of the spectrum, as required by Section 309(j)(3) (A) and (D). In this regard, we noted that auctions would generally award licenses quickly to those parties who value them most highly and who are therefore most likely to introduce service rapidly to the public. *Id.* at ¶ 57. We also concluded that competitive bidding would recover for the public a portion of the value of the spectrum, as envisioned in Section 309(j)(3)(C). *Id.* We considered a variety of methods to implement Congress's remaining objectives, set forth in Section 309(j)(3)(B), of "promoting economic opportunity" and "avoiding excessive concentration of licenses" by disseminating licenses "among a wide variety of applicants." In the *Second Report and Order*, we adopted rules which provide the Commission with a menu of options to choose from to promote these objectives with respect to particular spectrum services to be auctioned, such as broadband PCS, in service-specific rules.

6. In our *Broadband PCS Reconsideration Order*, we established bandwidth assignments and area designations for broadband PCS. *See Memorandum Opinion and Order* in GEN Docket No. 90–314, FCC 94–144, 59 FR 32830, June 24, 1994 (*"Broadband PCS Reconsideration Order"); see also Second Report and Order* in GEN Docket No. 90–314, FCC 93–451, 8 FCC Rcd 7700, 58 FR 59174, Nov. 8, 1993. In that Order, we allocated 120 MHz of spectrum for licensed broadband PCS. We divided the licensed broadband PCS spectrum into three 30 MHz blocks (blocks A, B and C) and three 10 MHz blocks (blocks D, E and F). We also designated two different service areas: 493 Basic Trading Areas ("BTAs") and 51 Major Trading Areas ("MTAs").[3] The licenses in frequency blocks A and B will be awarded on an MTA basis, and the licenses on frequency blocks C, D, E and F will be awarded on a BTA basis. A total of 2,074 broadband PCS licenses will therefore be issued.[4] The *Broadband PCS Reconsideration Order* sets forth eligibility rules for obtaining broadband PCS licenses, and establishes construction requirements to facilitate the provision of PCS services. *See Broadband PCS Reconsideration Order* at ¶¶ 102–132, 147–158. By these rules, we intend to promote competition in the wireless telecommunications market by as many different qualified providers as the spectrum can reasonably accommodate and to promote the rapid deployment of the infrastructure required to provide broadband PCS.

II. Executive Summary

7. In this *Fifth Report and Order*, we set forth the specific auction procedures for broadband PCS licenses. We have decided to conduct three auctions: the first for the 99 available PCS licenses in MTA blocks A and B, the second for the 986 PCS licenses in BTA blocks C and F, and the third for the remaining 986 PCS licenses in BTA blocks D and E. That is, the first auction will award licenses for the 30 MHz blocks for large geographic areas. The second auction will award licenses for smaller geographic areas for the two blocks that, as explained below, we have reserved for bidding by relatively small companies. In these "entrepreneurs' blocks," we have designed procedures to ensure that small businesses, rural telephone companies and businesses owned by women and minorities, which we collectively refer to as designated entities, have "the opportunity to participate in the provision" of PCS, as Congress directed in Section 309(j)(4)(D). In the third auction we will award licenses for the remaining 10 MHz blocks.

8. We intend to conduct each auction through simultaneous multiple round bidding with simultaneous stopping rules. Under that approach, no license awarded until the bidding closes on all licenses in the auction. We have determined that simultaneous multiple

[1] We already have adopted rules for competitive bidding on licenses to be awarded to provide personal communications services in the 900 MHz band (narrowband PCS), which will be used primarily to provide advanced paging services, and for licenses to provide Interactive Video and Data Service (IVDS), which will be used to provide services such as home shopping and pay-per-view programming. *See* Third Report and Order in PP Docket No. 99–253, FCC 94–98, 59 FR 26741, May 24, 1994 (narrowband PCS); and Fourth Report and Order in PP Docket No. 93–253, FCC 94–99, 59 FR 24947, May 13, 1994 (IVDS).

[2] We adopted a Notice of Proposed Rule Making to implement Section 309(j) on September 23, 1993. Notice of Proposed Rule Making in PP Docket No. 93–253, 8 FCC Rcd 7635, 58 FR 53488, Oct. 15, 1993 (hereinafter "NPRM" or "Notice"). The Commission received 222 comments, 169 reply comments and numerous *ex parte* presentations relating to this proceeding. Commenters may be referred to herein by abbreviations.

[3] The 493 BTAs and 51 MTAs used in our broadband PCS licensing rules have been adapted from the Rand McNally 1992 Commercial Atlas and Marketing Guide, 123rd Edition, at 38–39.

[4] The Commission has granted pioneer's preference to three broadband PCS applicants, and stated that the parties awarded pioneer's preferences may apply for a 30 MHz MTA broadband PCS license without facing competing applications. *See* Third Report and Order in GEN Docket No. 90–314, 9 FCC Rcd 1337, 59 FR 9419, Feb. 28, 1994. If the Commission grants licenses to the three pioneer's preference grantees, three fewer licenses will be awarded through competitive bidding.

round bidding is appropriate where the value of the licenses is high compared to the cost of conducting the auction and the values of licenses are interdependent. *See Second Report and Order* at ¶106–111. We believe the former condition is met here because other government agencies project that the boardband PMS licenses will be auctioned for as much as $10.6 billion. *See id.* at ¶177. The latter condition is also satisfied because the record demonstrates, for example, that a license for the Philadelphia MTA or the Richmond MTA will likely be valued more highly if it is held in conjunction with the license for the Washington-Baltimore MTA. We are adopting a variety of rules governing bid increments and bidding activity to move the auctions toward completion in a reasonable period of time. We are also retaining the ability to use other approaches, including sequential auctions for the licenses, and to make other adjustments to the auction process as necessary.

9. As mentioned above, we establish by this Order a number of rules to implement Congress's mandate in Section 309(j)(4)(D) that we ensure that designated entities are "given the opportunity to participate in the provision of spectrum-based services" such as broadband PCS. To accomplish this objective, Congress directed us to "consider the use of tax certificates, bidding preferences, and other procedures." 47 U.S.C. § 309(j)(4)(D). We construe this congressional directive as a mandate that we take the steps that are necessary to ensure that designated entities have a realistic opportunity to obtain broadband PCS licenses. We apply that mandate in light of *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 564–565 (1990), which held that "benign race-conscious measures mandated by Congress * * * are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives." The rules we adopt also further Congress's objectives, set forth in Section 309(j)(3)(B), of "promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small business, rural telephone companies, and businesses owned by members of minority groups and women." Each of the steps adopted here is directly related to carrying out Congress's stated objective of promoting economic opportunity by disseminating broadband PCS licenses to a wide variety of applicants, including designated entities.

10. The record clearly demonstrates that the primary impediment to participation by designated entities is lack of access to capital. This impediment arises for small businesses from the higher costs they face in raising capital and for businesses owned by minorities and women from lending discrimination as well. In this regard, it should be noted that although auctions have many beneficial aspects, they threaten to erect another barrier to participation by small businesses and businesses owned by minorities and women by raising the cost of entry into spectrum-based services.

11. Congress has recognized that "small business concerns, which represent higher degrees of risk in financial markets than do large businesses, are experiencing increased difficulties in obtaining credit."[5] Congress further found that women and minorities face particularly severe problems in raising capital.[6] A study of mortgage lending conducted by the Federal Reserve Bank of Boston in 1992 illustrates how problems arise. That study showed that in cases in which lenders exercised discretion in deciding whether to make a loan to a borrower who presented some problems (which includes most mortgage applicants), that discretion tended to be exercised in favor of whites. As a result, a minority applicant for a mortgage who was identical in all pertinent respects to a white applicant nevertheless was 60 percent more likely to be denied a mortgage loan.[7] At the same time, discrimination was difficult to show in any particular case, although it emerged clearly when data concerning hundreds of mortgage applications were reviewed.

12. The first measure we adopt to fulfill Congress's mandate that we ensure that designated entities have the opportunity to participate in providing broadband PCS is to reserve the 30 MHz licenses on block C and the 10 MHz licenses on block F, both of which are to be licensed in each of the 493 BTAs, for bidding by entities with annual gross revenues of less than $125 million and total assets of less than $500 million. These limits will exclude many large telecommunications companies from bidding on these two blocks. We will not allow one entity to obtain more than 10 percent (*i.e.*, 98) of the licenses on these two blocks. By excluding large companies from bidding in these two blocks and by limiting the total number of licenses that one entity can obtain in these blocks we create numerous opportunities for small entities to become PCS providers and thereby ensure that broadband PMS licenses will be disseminated "among a wide variety of applicants," as required by Section 309(j)(3)(B).

13. Reserving blocks C and F for bidding by relatively small companies will not, by itself, be sufficient to ensure that small businesses and businesses owned by members of minority groups and women have the opportunity to obtain broadband PCS licenses. Under the definition we apply or purposes of this Order, "small businesses" are those with gross revenues not exceeding $40 million, and those businesses will be at a disadvantage in competing against companies with gross revenues of as much as $125 million. In addition, businesses owned by members of minority groups and women face discrimination that poses additional obstacles for these firms. Accordingly, we take five related steps within the entrepreneurs' blocks to assist designated entities in attracting the capital necessary to obtain a broadband PCS license.

14. First, we will structure our attribution rules to allow those extremely large companies that may not bid on blocks C and F to invest in entities that bid on those blocks. More specifically, we will allow the relatively small companies eligible to bid in these blocks to obtain investment representing up to 75 percent of their passive equity from larger companies so long as each investor holds no more than a 25 percent passive equity interest. In addition, eligible businesses owned by minorities and women may choose to have a single investor, no matter how large, hold a passive equity interest up to 49.9 percent. These rules, and others that we establish in this Order, are designed to enhance access to capital by businesses owned by minorities and women.

15. Second, to encourage large companies to invest in designated entities and to assist designated entities without large investors to overcome the additional hurdle presented by auctions, we will make bidding credits available to designated entities. More specifically, small businesses will receive a 10 percent bidding credit (or a 10 percent discount on their winning bids).

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[5] Small Business Credit and Business Opportunity Enhancement Act of 1992, Section 331(a)(3), Pub. L. 102–366, Sept. 4, 1992.

[6] *Id.* Sections 112(4) and 331(a)(4).

[7] Mortgage Lending in Boston: Interpreting HMDA Data, Federal Reserve Bank of Boston, Working Paper 92–7 (October 1992).

Businesses owned by minorities and women will receive a 15 percent bidding credit to compensate for the substantial problems they face in attracting capital. The credits will be cumulative, so that a business owned by minorities or women that also qualifies as a small business will receive a 25 percent bidding credit. Under these rules, it still will be more expensive for designated entities to participate in the provision of spectrum-based services than it was before Congress granted us authority to hold auctions, because they will have to purchase licenses. But by adopting bidding credits, which are explicitly authorized by Section 309(j)(4)(D), the Commission seeks to promote economic opportunity and to counterbalance the tendency of auctions to concentrate license ownership in the hands of several very large companies.

16. Third, we will allow most successful bidders within the entrepreneurs' blocks to pay for their licenses in installments for generally the same reasons—encouraging large companies to invest in designated entities, promoting economic opportunity by assisting designated entities in overcoming the additional hurdle presented by auctions, and ensuring that licenses are disseminated widely. In general, successful bidders will be permitted to defer payments of principal on their debt to the government for some period. Small businesses and businesses owned by minorities and women will be permitted to defer payments of principal for a longer period than other successful bidders in these blocks. Finally, businesses owned by minorities and women will be charged a lower interest rate.

17. Fourth, we will extend our tax certificate policies to promote participation by minorities and women in the provision of broadband PCS. The holder of a tax certificate is permitted to defer payment of the capital gains tax that would otherwise be recognized upon the sale of an investment. Our extension of the tax certificate policy to broadband PCS will promote involvement by minorities and women in spectrum-based services in three ways. First, initial investors in such businesses will be eligible for tax certificates upon the sale of their investments. We expect that the availability of such favorable tax treatment will enable minority- and women-owned businesses to attract investors more easily. Second, holders of broadband PCS licenses will be able to obtain tax certificates upon the sale of the business to a company controlled by minorities and women. Third, a cellular operator that sells its interest in an overlapping cellular system to a minority- or woman-owned business to come into compliance with our PCS/cellular cross-ownership rule will be eligible for a tax certificate. Both the second and third policy will further Congress' objective of ensuring that spectrum licenses are disseminated widely and, in particular, to designated entities.

18. Finally, we will reduce the upfront payment for all bidders in the entrepreneurs' block. Bidders in the other blocks will pay $0.02 per MHz per pop while winners in the entrepreneurs' blocks will receive a 25 percent discount and pay only $0.015 per MHz per pop as a pre-auction payment.

19. Congress was also concerned that rural areas not go unserved by PCS, and therefore directed us to ensure participation in auctions for spectrum-based services by rural telephone companies who have a history of service to rural areas and an established infrastructure on which to build a PCS business effectively. Thus, we establish partitioning rules in this Order that will allow them to use their existing wireline network to efficiently and expeditiously provide PCS in rural areas. In addition, most rural telephone companies will qualify to bid on the entrepreneurs' blocks, and hence will be eligible for installment payments. Those rural telephone companies that qualify as small or minority- or women-owned businesses will also be able to take advantage of the applicable bidding credits.

20. The rules that we adopt today are designed to ensure that only *bona fide* designated entities qualify for the special provisions established to ensure their participation in broadband PCS. The rules are designed to enable designated entities to attract passive equity from non-designated entities, provided that designated entities maintain control and a substantial entity stake in the ventures at all times. The Commission will not tolerate "fronts" that are controlled by supposedly passive investors, and we will be vigilant in preventing abuse of the designated entity provisions. Our rules are also designed to prevent designated entities from assigning licenses obtained through the use of these special measures or who otherwise lose their designated entity status before the end of a required five-year holding period.

21. The following sections of this *Fifth Report and Order* discuss in detail the actions we have outlined above.

III. Auctionability of Broadband PCS

22. Section 309(j)(1) of the Communications Act, as amended, 47 U.S.C. § 309(j)(1), permits auctions only where mutually exclusive applications for initial licenses or construction permits are accepted for filing by the Commission and where the principal use of the spectrum will involve or is reasonably likely to involve the receipt by the licensee of compensation from subscribers in return for enabling those subscribers to receive or transmit communications signals. In the *Second Report and Order*, we concluded that PCS as a class of service would satisfy the section 309(j)(1) criteria for auctionability. *See Second Report and Order* at ¶¶ 54–58. Specifically, based on the record in this proceeding and in GEN Docket No. 90–314, we concluded that the principal use of broadband PCS spectrum satisfied these auction criteria. *Id.* at ¶ 56. Thus, if mutually exclusive applications for a broadband PCS license are accepted for filing, we will award that license through competitive bidding.[8]

23. As noted above, we concluded in the *Second Report and Order* that the criteria in Section 309(j)(3) will be satisfied by competitive bidding for broadband PCS licenses, and thus that broadband PCS should be subject to our competitive bidding procedures. We determined that the use of competitive bidding to award broadband PCS licenses, as compared with other licensing methods, will speed the development and deployment of new services to the public with minimal administrative or judicial delay, and will encourage efficient use of the spectrum as required by Section 309(j)(3) (A) and (D). We also concluded that competitive bidding would recover for the public a portion of the value of the spectrum, as envisioned in Section 309(j)(3)(C). *Id.* Finally, in accordance with Section 309(j)(3)(B), we adopted a set of open competitive bidding procedures and a menu of special

[8] In the Second Report and Order, we addressed the only commenter who argued that the Commission should not find that the principal use of PCS is likely to be for the provision of service to subscribers for compensation. *See* Second Report and Order at ¶¶ 55–56. The Commission rejected the argument of Millin Publications, a publisher of specialized information services that intends to utilize PCS frequencies on a non-subscription basis, that the Commission should refrain from making the principal use finding because PCS does not yet exist. We concluded that the overwhelming weight of the comments in this proceeding, as well as our experience with the PCS experiments that we have licensed, reflect that licensed PCS spectrum is likely to be used principally for the provision of service to subscribers for compensation. *See id.* at ¶ 56. We find no basis in the record to depart from this conclusion.

provisions designed to increase opportunities for designated entities who might otherwise face entry barriers. Our views on this matter remain unchanged since adoption of the *Second Report and Order*. We therefore affirm in this Order the use of competitive bidding procedures to award broadband PCS licenses.

IV. Competitive Bidding Design

A. General Competitive Bidding Rules

24. The *Second Report and Order* established the criteria to be used in selecting which auction design method to use for each particular auctionable service. Generally, we concluded that awarding licenses to those parties who value them most highly will foster Congress' policy objectives. In this regard, we noted that since a bidder's ability to introduce valuable new services and to deploy them quickly, intensively, and efficiently increases the value of a license to that bidder, an auction design that awards licenses to those bidders with the highest willingness to pay tends to promote the development and rapid deployment of new services and the efficient and intensive use of the spectrum. In articulating our auction design principles we further stated that: (1) Licenses with strong value interdependencies should be auctioned simultaneously; (2) multiple round auctions, by providing bidders with information regarding other bidders' valuations of licenses, generally will yield more efficient allocations of licenses and higher revenues, especially where there is substantial uncertainty as to value; and (3) because they are relatively expensive to implement and time-consuming, simultaneous and/or multiple round auctions become less cost-effective as the value of licenses decreases. *See Second Report and Order* at ¶ 69.

25. Based on the foregoing, we concluded that where the licenses to be auctioned are interdependent and their value is expected to be high, simultaneous multiple round auctions would best achieve the Commission's goals for competitive bidding. *See Second Report and Order* at ¶¶ 109–111. We indicated that compared with other bidding mechanisms, simultaneous multiple round bidding will generate the most information about license values during the course of the auction and provide bidders with the most flexibility to pursue back-up strategies. Thus, we concluded that simultaneous multiple round bidding is most likely to award interdependent licenses to the bidders who value them the most. We also indicated that this method will facilitate efficient aggregation of licenses across spectrum bands, thereby resulting in vigorous competition among several strong service providers who will be able rapidly to introduce a wide variety of services highly valued by end users. *Second Report and Order* at ¶ 106. In addition, we concluded that because of the superior information and flexibility it provides, this method is likely to yield greater revenues than other auction designs. Thus, we found that the use of simultaneous multiple round auctions would generally be preferred. *Id.*

26. However, because simultaneous multiple round bidding is likely to be more administratively complex and costly both for bidders and for the FCC than sequential or single round bidding, we indicated that we would use this auction design only where license values are interdependent and the expected value of the licenses to be auctioned is high relative to the costs of conducting a simultaneous multiple round auction. *See Second Report and Order* at ¶¶ 110–111.

B. Competitive Bidding Design for Broadband PCS Licenses

27. In the *Second Report and Order* we considered several auction methods including simultaneous multiple round bidding, sequential bidding, and combinatorial bidding. We discuss each of these below. We have chosen to adopt simultaneous multiple round auctions as our auction methodology for broadband PCS licenses. We believe that for broadband licenses this method will best meet Congress' goals in authorizing competitive bidding in section 309(j) of the Communications Act.

1. Simultaneous Multiple Round Auctions

28. There is considerable support in the record for the use of simultaneous multiple round auctions, in which two or more licenses are put up for bid at the same time, and there are multiple bidding rounds in which bidders have the opportunity to top the high bids from the previous round. Several comments and studies in the record by academic auction experts advocate simultaneous multiple round bidding for broadband PCS. *See* comments of PacTel Corporation, Attachment of R. Preston McAfee; comments of Pacific Bell and Nevada Bell, Attachment of Paul R. Milgrom and Robert B. Wilson; comments of NYNEX, Attachment by Robert G. Harris and Michael L. Katz. NTIA also recommends simultaneous multiple round bidding.[9] Comments of NTIA at 14–16. Other experts recommend using some combination of sequential and simultaneous bidding. *See* comments of Bell Atlantic Personal Communications, Inc., Attachment by Barry Nalebuff and Jeremy Bulow; and comments of Telephone and Data Systems, Attachment by Robert J. Weber. Some commenters who originally expressed no opinion on the issue or supported other methods in their comments supported proposals for simultaneous bidding in their reply comments. *See* reply comments of AT&T, GTE Service Corp. and Community Service Telephone Co.

29. The analysis in the *Second Report and Order* also supports simultaneous multiple round bidding for broadband PCS auctions. We concluded that multiple round bidding is generally superior to single round bidding, and that when licenses are interdependent, simultaneous bidding is generally superior to sequential bidding. As we noted in the *Second Report and Order*, multiple-round auctions have the advantage over single-round auctions insofar as they provide more information to bidders about the value that other bidders place on licenses, increasing the likelihood that the licenses are acquired by those who value them most highly and increasing the revenue likely to be gained from the auction. Multiple-round auctions are also more likely to be perceived as open and fair. The disadvantage of multiple round auctions is that they have higher administrative costs than single round auctions. *Second Report and Order* at ¶¶ 82–85.

30. As noted in the *Second Report and Order*, simultaneous auctions are more likely than sequential auctions to award interdependent licenses efficiently because they provide more information about the value of interdependent licenses and allow the use of that information because all licenses remain available throughout the bidding process. Simultaneous auctions are also likely to raise more revenue than sequential auctions for two reasons. First, they increase the value of the licenses by facilitating efficient aggregation. Second, because they provide more information about the value of interdependent licenses they reduce the propensity of sophisticated bidders to bid cautiously in order to avoid the "winner's curse"—the tendency for the winner to be the bidder

[9] NTIA also supports all-or-nothing bids on groups of licenses, *i.e.*, combinatorial bidding, in conjunction with simultaneous multiple round bidding.

who most overestimates the value of the item up for bid. Simultaneous auctions also eliminate the need to choose the order in which licenses will be auctioned. The advantage offered by simultaneous auctions depends on how much interdependence exists among licenses. *Second Report and Order* at ¶¶ 89–94. The disadvantages of simultaneous multiple round auctions appear to be that they may be difficult to implement and there is little experience in their use. *Second Report and Order* at ¶ 95.

31. We agree with commenters who support simultaneous multiple round bidding for awarding broadband PCS licenses. Estimates of total PCS revenues by the Office of Management and Budget and the Congressional Budget Office indicate that the value of broadband PCS licenses will likely be sufficiently high to warrant the use of simultaneous auctions.[10] We further believe that the values of most broadband PCS licenses will be significantly interdependent because of the desirability of aggregation across spectrum blocks and geographic regions and because there is a high degree of substitutability among licenses with the same amount of spectrum and covering the same geographic area. *See Second Report and Order* at ¶¶ 90–91. Compared with other bidding mechanisms, simultaneous multiple round bidding generates the most information about license values during the course of the auction and provides bidders with the most flexibility to pursue back-up strategies, and is therefore most likely to award licenses to the bidders who value them the most. Simultaneous multiple round auctions will also facilitate efficient aggregation across spectrum bands, where permitted, thereby enhancing competition among wireless products and services.

32. We recognize, however, that simultaneous multiple round bidding may involve a greater degree of complexity than other competitive bidding methods, and that it may present greater operational difficulties both for the FCC and for bidders, especially where many bidders are expected to participate. Therefore, we will use a sequence of simultaneous auctions. Licenses that are highly interdependent will be grouped together and auctioned simultaneously.

2. Sequential Auctions

33. In a pure sequential auction, whether oral or electronic, licenses are put up for bid one at a time, so that bidding ends on one item before it begins on the next item. Sequential multiple round oral or electronic auctions generate valuable information about earlier auctioned licenses, which can assist bidders in valuing later auctioned licenses. If license values are interdependent, however, sequential oral or electronic auctions are less likely than simultaneous auctions to award interdependent licenses to the parties who value them most highly and to result in the efficient aggregation of licenses, because bidders for licenses that are auctioned early must bid with less information about the value of licenses to be auctioned later, and they will have less opportunity to pursue backup bidding strategies. For these reasons, we conclude that sequential multiple round auctions are less preferred in the award of broadband PCS licenses than simultaneous multiple round auctions. Nevertheless, if, as a result of our auction experience, we determine that the operational costs or complexities associated with simultaneous multiple round auctions outweigh their benefits, we may decide instead to employ pure sequential oral or electronic (multiple round) auctions or a sequence of single combined oral auctions in which bidding is combined for all licenses in a given band with the same bandwidth and the same geographic service area. If such a change becomes necessary, the auction method will be announced by Public Notice before each auction.

34. If we should decide in the future to use sequential oral or sequential electronic bidding for relatively homogeneous licenses, we will employ a single combined auction design. Under this approach, the Commission will combine bidding for all licenses in the same band with the same amount of spectrum and same geographic service area.[11] Licenses will be awarded market by market to the highest bidders until all the available licenses are exhausted, *e.g.*, two relatively homogeneous licenses would be awarded to the two highest bidders. Because broadband PCS licenses may not be perfectly homogeneous (*i.e.*, bidders may prefer one frequency over another within the same geographic region for purposes of efficient aggregation), winning bidders will be given the opportunity to choose among licenses for which bidding is combined in descending order of their bid amounts (*i.e.*, the highest bidder will pick first).

3. Combinatorial Bidding

35. In general terms, combinatorial bidding allows bidders to bid for multiple licenses as all-or-nothing packages.[12] Combinatorial bidding can be implemented with either simultaneous or sequential auction designs. Although we recognized in the *Second Report and Order* that there may be significant benefits associated with combinatorial bidding, especially in terms of efficient aggregation of licenses, we concluded that simultaneous multiple round auctions offer many of the same advantages without the same degree of administrative and operational complexity and without biasing auction outcomes in favor of combination bids. *See Second Report and Order* at ¶¶ 101–105. On balance, we believe that the advantages of combinatorial bidding appear unlikely to outweigh the disadvantages. While broadband PCS licenses are likely to be worth more to some bidders as a part of a package, we believe that simultaneous multiple round bidding will provide these bidders with ample opportunity to express the value of interdependent licenses. Moreover, we conclude that there will not be any extreme discontinuity in value if some licenses in a package are not obtained. We believe that the opportunity to acquire licenses in post-auction transactions and the ability to withdraw bids (upon payment of the bid withdrawal penalty) will limit the risks associated with failing to acquire all of the licenses in a desired package. Nevertheless, if, based on our experience with the initial simultaneous multiple round auctions and auction experiments, we determine that such auctions do not result in efficient aggregation of licenses, and if there are significant advances in the development of combinatorial auctions,

[10] A study by the Congressional Budget Office estimated that an auction for PCS licenses on two 25 MHz nationwide blocks of spectrum could raise $1.3 billion to $5.7 billion in revenues. Congressional Budget Office, *Auctioning Radio Spectrum Licenses*, at 23 (March 1992). The Office of Management and Budget estimated that auctioning broadband PCS licenses would generate $12.6 billion in revenues. *Budget of the United States Government, Analytical Perspective, Fiscal Year 1995*, at 220 (February 1994).

[11] This approach was proposed by Bell Atlantic. *See* comments of Bell Atlantic Personal Communications Inc., Attachment by Barry Nalebuff and Jeremy Bulow at 4–5. Single combined auctions are used by the U.S. Department of the Treasury to sell U.S. securities.

[12] In combinatorial bidding, if a bid for a group of licenses exceeds the sum of the highest bids for the individual licenses that comprise the package, then the package bid would win. In the Second Report and Order we also indicated that if we were to utilize combinatorial bidding we might institute a premium so that the combinatorial bid would win only if it exceeded the sum of the bids for individual licenses by a set amount. *See* Second Report and Order at ¶ 114. NTIA is the main advocate of combinatorial bidding. *See* comments of NTIA, and *ex parte* submission of NTIA in PP Docket No. 93–253, February 28, 1994.

we may, by public notice prior to a specific auction, choose to use combinatorial bidding techniques in conjunction with simultaneous multiple round auctions.

C. Bidding Procedures

1. Grouping of Licenses

36. In the *Second Report and Order*, the Commission concluded that highly interdependent licenses should be grouped together and put up for bid at the same time in a multiple round auction. *See Second Report and Order* at ¶¶ 106–107. This will facilitate awarding licenses to the bidders who value them most highly because it will provide bidders information about the prices of complementary and substitutable licenses while such licenses are still up for bid. The magnitude of the benefit of auctioning a group of licenses together in a simultaneous multiple round auction increases with the degree of interdependence among the licenses. On the other hand, the *Second Report and Order* also noted that the cost and complexity, both for the FCC and for bidders, of auctioning a very large number of interdependent licenses simultaneously may outweigh the informational and bidding flexibility advantages. *See Second Report and Order* at ¶ 107. Accordingly, although we believe that all broadband PCS licenses are interdependent, we will not auction them all simultaneously. Instead, we will divide the licenses into three groups by combining those licenses that are most closely related so that there will be limited interdependence across groups. Then we will sequentially conduct a separate simultaneous multiple round auction for each group. We formed the three groups in two conceptual steps. First, we separated the "entrepreneurs'" blocks (C and F) from all other blocks.[13] Then, we separated the large unrestricted blocks (A and B, with 30 MHz of spectrum and MTA geographic scope) from the small ones (D and E, with 10 MHz of spectrum and BTA geographic scope).

37. In the first auction, the 99 available MTA licenses in blocks A and B will be put up for bid. In the second auction, the 986 BTA licenses in blocks C and F will be put up for bid. And in the last auction, the 986 BTA licenses in blocks D and E will be put up for bid. As explained below, we believe that this grouping strikes a proper balance among the competing concerns of awarding licenses to the parties who value them most highly, keeping the auction process simple and manageable, minimizing administrative delay, and fostering designated entity participation.

38. Separating the entrepreneurs' blocks (C and F) from all other blocks entails little loss of efficiency because most firms are likely to be interested in licenses in either the entrepreneurs' blocks or the non-restricted blocks, but not both. Large firms cannot bid on entrepreneurs' licenses, although they may partner with firms that can. Small firms can bid on all blocks, but are likely to be most interested in the entrepreneurs' blocks because on these blocks they would not be placed in the position of bidding against large firms.

39. In addition to reducing the complexity of the auctions, auctioning block C licenses after the block A and B licenses is likely to further another objective of auction design—fostering designated entity participation—by enabling designated entities to more easily attract partners. Many potential partners may be unwilling to commit themselves to a partnership arrangement with designated entities prior to the auction of licenses on the A and B blocks. So, designated entities that are unable to raise independent financing for at least the required upfront and down payments may have difficulty participating in an auction in which block C is put up for bid simultaneously with blocks A and B. If, however, block C is auctioned after blocks A and B, we expect that non-designated entities who are unsuccessful in acquiring MTA licenses on blocks A and B will want to become partners with or make investments in designated entities so as to gain an interest in 30 MHz licenses on block C. In addition, the auction on blocks A and B will produce price information that would be valuable to designated entities in their business planning.

40. The efficiency loss associated with separating the large unrestricted blocks (A and B) from the small ones (D and E) depends on the degree of substitutability and complementarity between licenses in these two groups. Auctioning licenses on the D and E blocks separately from those on the A and B blocks may make it more difficult for bidders to pursue a back-up strategy of combining two 10 MHz licenses in the same geographic areas as an alternative to acquiring 30 MHz licenses in the A or B blocks. We believe, however, that this is not likely to be a widely used strategy, because the licenses are defined on a BTA basis while the licenses on the A and B blocks are defined on a MTA basis. It is also possible that some bidders may wish to combine a 10 MHz license with a 30 MHz license in the same geographic area. Although this approach would be easier to pursue if blocks A, B, D and E were auctioned together, we believe that in most cases the amount bidders would be willing to pay for a block A or B license would not be strongly affected by whether they were able to acquire a complementary block D or E license. So auctioning blocks D and E after blocks A and B would not significantly hinder combining 30 MHz and 10 MHz licenses. We conclude that the benefits of administrative simplicity from auctioning license on blocks A and B separately from those on blocks D and E are likely to outweigh the possible loss of efficiency.

2. Bid Increments

41. In using simultaneous multiple round auctions to award broadband PCS licenses, it is important to specify minimum bid increments.[14] The bid increment is the amount or percentage by which the bid must be raised above the previous round's high bid in order to be accepted as a valid bid in the current bidding round. The application of a minimum bid increment speeds the progress of the auction and, along with activity and stopping rules, helps to ensure that the auction comes to closure within a reasonable period of time. Establishing an appropriate minimum bid increment is especially important in a simultaneous auction with a simultaneous closing rule. In that case, all markets remain open until there is no bidding on any license, and a delay in closing one market will delay the closing of all markets.

42. Because we plan to use simultaneous multiple round auctions to award broadband PCS licenses, we believe that it is necessary to impose a minimum bid increment to ensure that the broadband PCS auctions conclude within a reasonable period of time. Commenters addressing the issue generally supported a minimum bid increment of 5 percent. PacTel, for example, argues that this amount will provide a reasonable compromise

[13] As explained in more detail below, we establish economic eligibility criteria for bidders in blocks C and F.

[14] *See* Second Report and Order at ¶¶ 124–126. Commenters who addressed the issue supported minimum bid increments. *See* comments of Telephone and Data Systems, Inc. at 24; comments of PacTel Corporation, Attachment of R. Preston McAfee at 16, 18; comments of Pacific Bell and Nevada Bell, Attachment of Paul R. Milgrom and Robert B. Wilson at 19; reply comments of Telephone and Data Systems, Inc., Attachment of Robert J. Weber at 11; reply comments of PacTel Corporation, Attachment of R. Preston McAfee at 10; reply comments of Pacific Bell and Nevada Bell, Attachment of Paul Milgrom and Robert Wilson, Appendix at 8, 9.

between the goal of completing the auction quickly and that of revealing information about the distribution of valuations among bidders.[15] As we recognized in the *Second Report and Order*, it is important in establishing the amount of the minimum bid increment to express such increment as the greater of a percentage and fixed dollar amount. *See Second Report and Order* at ¶ 126. This will ensure a timely completion of the auction even if bidding begins at a very low dollar amount. Accordingly, we will impose a minimum bid increment of some percentage of the high bid from the previous round or a dollar amount per MHz per pop, whichever is greater, in broadband PCS auctions where multiple round bidding is used.[16]

43. PacTel also suggests, in the context of simultaneous auctions, that the Commission should vary the bid increment, reducing it as the number of active bidders declines.[17] Similarly, PacBell suggests that the bid increment depend on the stage of the auction, with a 5 percent increment in stage I, 2 percent in stage II, and 1 percent in stage III.[18] This would move the auction quickly at the beginning, when prices have limited informational content and there is little benefit to either bidders or the Commission of refined price movements, while allowing bidders to express small differences in valuations as the auction nears a close, increasing both efficiency and auction revenues. Small bid increments also reduce the chances of ties. Where a tie does occur, the high bidder will be determined by the order in which the bids were received by the Commission.[19]

44. Accordingly, we will start the auction with large bid increments, and reduce the increments as bidding activity falls. The minimum bid increment in stage I of the auction will be 5 percent of the high bid in the previous round or $.02 per MHz per pop, whichever is greater.[20] We will reduce the minimum bid increment as we move through the auction stages, with a minimum bid increment of the greater of 2 percent or $.01 per MHz per pop in stage II, and the greater of 1 percent or $.005 per MHz per pop in stage III.[21] The Commission, however, retains the discretion in broadband PCS auctions to set and, by announcement before or during the auction, vary the minimum bid increments for individual licenses or groups of licenses over the course of an auction if the auction is not moving at an appropriate pace.

45. In addition, the Commission will establish a suggested minimum bid on each license. Bids below the suggested minimum bid will count as activity under the activity rule (see *infra*) only if no bids at or above the suggested minimum bid are received. Initial bids must be above the minimum bid increment of $.02 per MHz per pop, but may be below the suggested minimum bid. Once a bid has been received on a license, the suggested minimum bid is no longer applicable in subsequent rounds. The amount of the suggested minimum bid may vary by market size, with a larger minimum bid in larger markets, and will be announced by public notice prior to each auction. We will establish suggested minimum bids at no less than $.05 per MHz per pop and not more than $.20 per MHz per pop. The suggested minimum bid provides bidders an incentive to start bidding at a substantial fraction of the final prices of licenses, thus ensuring a rapid conclusion of the auction, while still allowing for bidding on licenses whose market values are below the suggested minimum bids.[22]

3. Stopping Rules for Multiple Round Auctions

46. We also noted in the *Second Report and Order* that with multiple round auctions a stopping rule must be established for determining when the auction is over.[23] In simultaneous multiple round auctions, bidding may close separately on individual licenses, simultaneously on all licenses, or a hybrid approach may be used. Under an individual, license-by-license approach, bidding closes on each license after one round passes in which no new acceptable bids are submitted for that particular license. With a simultaneous stopping rule, bidding remains open on all licenses until there is no new acceptable bid on any license. This approach has the advantage of providing bidders full flexibility to bid for any license as more information becomes available during the course of the auction, but it may lead to very long auctions, unless an activity rule (*see* discussion *infra*) is imposed. A hybrid approach combines the first two stopping rules. For example, we may use a simultaneous stopping rule (along with an activity rule designed to expedite closure for licenses subject to the simultaneous stopping rule) for the higher value licenses. For lower value licenses, where the loss from eliminating some back-up strategies is less, we may use simpler license-by-license closings. In the *Second Report and Order* we recognize that such a hybrid approach might simplify and speed up the auction process without significantly sacrificing efficiency or expected revenue. *Id.*

47. For broadband PCS we believe that a simultaneous stopping rule is preferable for all MTA licenses. MTA licenses are expected to have relatively

[15] *See* comments of PacTel, Exhibit by R. Preston McAfee, Auction Design for Personal Communications Services at 16. Milgrom and Wilson also recommend a minimum bid increment of 5 percent (subject to a dollar minimum and maximum) for stage I of the auction, and smaller percentages for stages II and III. Reply comments of PacBell, Attachment of Paul Milgrom and Robert Wilson, Appendix at 8, 9.

[16] "Pop" refers to each member of the population of the license service area and "MHz" refers to the amount of spectrum, in megahertz, that the licensee is permitted to use. For example, for a 30 MHz license with a population of 10 million, if the minimum bid increment were the greater of 5 percent or $0.02 per MHz per pop, the minimum bid increment would be $6 million ($0.02×30 MHz×10,000,000) when the high bid from the previous round is less than $120 million. If the high bid from the previous round exceeds $120 million, the minimum bid would be 5 percent of the value of that bid (since 5 percent of a bid over $120 million is greater than $6 million).

[17] *See* comments of PacTel, Exhibit by R. Preston McAfee, *Auction Design for Personal Communications Services*, at 18.

[18] *See* reply comments of PacBell, Appendix to Exhibit by Paul Milgrom and Robert Wilson, *auction Rules and Procedures*, at 8–9. For a discussion of auction stages in simultaneous multiple round auctions see the section on activity rules *infra*.

[19] *See* Second Report and Order at ¶ 125.

[20] $0.02 per MHz per pop would represent almost 6 percent of the value of a license based on an extrapolation from the $10.6 billion estimated value of the 120 MHz of broadband PCS spectrum to be licensed. *See* Second Report and Order at ¶ 177.

[21] In oral or electronic sequential auctions the auctioneer may within his or her sole discretion establish and vary the amount of the minimum bid increment in each round of bidding.

[22] If the Commission were to preclude bidding below a starting minimum bid, a bidder who is interested in only a single license for which the minimum bid is set above the market value would be forced to use an activity rule waiver or drop out of the auction under the activity rules adopted *infra*.

[23] *See* Second Report and Order at ¶ 127. Commenters agreed on the importance of the appropriate stopping rule. PacTel proposes that bidding on an individual license close if there are no new bids on that license within a given round, or if there are fewer than two bids greater than a "suggested minimum bid." Comments of PacTel, Attachment of R. Preston McAfee at 16–18. Pacific Bell recommends simultaneous closing of bidding on all licenses when there are no new acceptable bids on any license. Comments of PacBell, Attachment of Paul Milgrom and Robert Wilson at 19; reply comments of PacBell, Attachment of Paul Milgrom and Robert Wilson, Appendix at 5. Bell Atlantic Personal Communications, on the other hand, asserts that in simultaneous auctions, no stopping rule can prevent strategic delays. They provide no evidence for this, however, and do not discuss any closing rule in detail. In discussing the Milgrom-Wilson closing rule they fail to account for the Milgrom-Wilson activity rule, which will reduce the likelihood of delay, and the fail-safe closing mechanism proposed by Milgrom and Wilson. Reply comments of Bell Atlantic Personal Communications, Inc., Attachment of Barry J. Nalebuff and Jeremy I. Bulow at 12.

high values and are fewer in number than BTA licenses, which will reduce the complexity of implementing a simultaneous stopping rule. Since we intend to impose an activity rule (as discussed below), we believe that allowing simultaneous closing for all licenses will afford bidders flexibility to pursue back-up strategies without running the risk that bidders will hold back their bidding until the final rounds. We also intend to use a simultaneous stopping rule for BTA licenses. However, because of the large number of BTA licenses, we retain the discretion either to use a hybrid stopping rule or to allow bidding to close individually for these licenses if as we gain experience with auctions we determine that simultaneous stopping rules are too complex to implement for very large numbers of licenses. The specific stopping rule for ending bidding on BTA licenses will be announced by Public Notice prior to auction.

48. In addition, we will retain the discretion to declare at any point after 40 rounds in a simultaneous multiple round auction that the auction will end after some specified number of additional rounds.[24] This gives the Commission a means to prevent bidders from continuing to bid on a few low value licenses solely to delay the closing for all licenses in an auction with a simultaneous closing rule. This will also ensure that the Commission can end the auction if it determines that the benefits from ending the auction, and hence issuing licenses more rapidly, exceeds the possible efficiency loss from cutting off bidding on a few low value licenses. If we exercise this option, we favor the use of three final rounds. Allowing more than one additional round provides some opportunity for counter-offers, thus reducing the risk that a license will not be awarded to the party that values it most highly.

49. Moreover, if this fail-safe mechanism is used, we will accept bids in the final round(s) only for licenses on which the highest bid increased in at least one of the preceding three rounds. No new bids will be accepted for other licenses.[25] There are two reasons not to take bids on licenses on which there has been no recent bidding. First, the fact that bidding on an individual license may close will provide an additional incentive to bid actively and thus speed the conclusion of the auction. If bids are accepted on all licenses in the final round(s) there is less cost to a bidder in holding back. Second, closing bidding on licenses for which activity has ceased ensures high bidders for those licenses that they will not lose a license without having an opportunity to make a counter-offer.[26] This reduces the uncertainty associated with aggregating licenses that are worth more as a package than individually. If final bids are accepted on all licenses, a high bidder on an aggregation of licenses may unexpectedly lose a critical part of the aggregation and have no chance to regain it except in the post-auction market, where bargaining or other transaction costs may be high.

4. Duration of Bidding Rounds

50. In simultaneous multiple round auctions for large numbers of interdependent high-value licenses, bidders may need a significant amount of time to evaluate back-up strategies and consult with their principals. For this reason, PacBell proposes one bidding round per day and PacTel proposes three business days per bidding round for broadband PCS.[27] We will provide bidders with a single business day to submit bids, and conduct one round of bidding each business day.[28] However, we reserve the discretion to vary, by public notice or announcement, the duration of bidding rounds or the interval at which bids are accepted (*e.g.*, run two or more rounds per day rather than one), in order to move the auction toward closure more quickly. We are more likely to conduct more than one round per day early in an auction than towards the end of an auction. At early stages of an auction prices will be low and contain relatively little information, so bidders will need less time to deliberate. It is in the final stages of an auction, when the consequences of bidding decisions are greatest, that bidders need the most time to deliberate. We will indicate either by Public Notice prior to an auction, or by announcement during an auction any changes to the duration of and intervals between bidding rounds.

5. Activity Rules

51. As discussed above, in order to ensure that simultaneous auctions with simultaneous stopping rules close within a reasonable period of time and to increase the information conveyed by bid prices during the auction, we believe that it is necessary to impose an activity rule to prevent bidders from waiting until the end of the auction before participating. Because simultaneous stopping rules generally keep all licenses open for bidding as long as anyone wishes to bid, they also create an incentive for bidders to hold back until prices approach equilibrium before making a bid. As noted above, this could lead to very long auctions. Delaying serious bidding until late in the auction also reduces the information content of prices during the course of an auction. Without an activity rule, bidders cannot know whether a low level of bidding on a license means that the license price is near its final level or if instead many serious bidders are holding back and may bid up the price later in the auction.[29] An activity rule is less important when licenses close one-by-one because failure to participate in any given round may result in losing the opportunity to bid at all, if that round turns out to be the last.

52. In the *Second Report and Order* we adopted the Milgrom-Wilson activity rule as our preferred activity rule where a simultaneous stopping rule is used. *See Second Report and Order* at ¶¶ 144–145. The Milgrom-Wilson approach encourages bidders 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-pop.[30] (*See* discussion of upfront payments *infra*.) That is, in each round bidders will be limited to bidding on licenses encompassing no more than the number of MHz-pops covered by their upfront payment. Licenses on which a bidder is the high bidder from the previous round count against this

[24] PacBell proposed that in case of inordinate delays in the auction the Commission should have the ability to conclude the auction at any time after 40 rounds by issuing a call for final bids on the following business day for each of those licenses for which the highest bid increased in at least 1 of the preceding 3 rounds. *See* reply comments of PacBell, Attachment of Paul Milgrom and Robert Wilson, Appendix at 5.

[25] *See* reply comments of PacBell, Appendix to attachment by Milgrom and Wilson at 5. *See also* Second Report and Order at ¶ 130, n. 106.

[26] Either the auction will close only when bidding ceases on all licenses, so the high bidder will have an opportunity to respond to any new bids, or the Commission will call for final bids but not accept new bids on licenses on which there have been no new bids in the previous three rounds, so no other bidder will have the opportunity to outbid the high bidder in a final round.

[27] Comments of PacBell, Attachment by Milgrom and Wilson at 19; comments of PacTel, Attachment by McAfee at 16.

[28] With one round per day, the auction may take weeks to complete. This should not impose an excessive burden on bidders, however, because bids may be submitted by telephone or by a computer connected to a telephone line, so bidders need not have a representative in Washington throughout the auction.

[29] *See ex parte* presentation by Paul Milgrom on behalf of PacBell, June 21, 1994.

[30] The number of "MHz-pops" is calculated by multiplying the population of the license service area by the amount of spectrum authorized by the license. We use the terms "per MHz-pop" and "per MHz per pop" interchangeably.

bidding limit. Under this approach, bidders will have the flexibility to shift their bids among any licenses for which they have applied so long as, within each round, the total MHz-pops encompassed by those licenses does not exceed the total number of MHz-pops on which they are eligible to bid. Bidders will be able to secure the option to participate at whatever maximum level they deem appropriate by making a sufficient upfront payment. To preserve their maximum eligibility, however, bidders will be required to maintain activity during each round of the auction. A bidder is considered active on a license in the current round if the bidder has submitted an acceptable bid for that license in the current round, or has the high bid for that license from the previous round, in which case, the bidder does not need to bid on that license in the current round to be considered active on that license.

53. Under the Milgrom-Wilson proposal, the minimum activity level, measured as a fraction of the bidder's eligibility in the current round, will increase during the course of the auction.[31] Milgrom and Wilson divide the auction into three stages. During the first stage of the auction, a bidder is required to be active on licenses encompassing one-third of the MHz-pops for which it is eligible. The "penalty" for falling below that activity level is a reduction in eligibility. At this stage, bidders will lose three MHz-pops in eligibility for each MHz-pop below the minimum required activity level.[32] In the second stage, bidders are required to be active on two-thirds of the MHz-pops for which they are eligible. The penalty for falling below that activity level is a loss of 1.5 MHz-pops in eligibility for each MHz-pop below the minimum required activity level. In the third stage, bidders are required to be active on licenses encompassing all of the MHz-pops for which they are eligible. The penalty for falling below that activity level is a loss of one MHz-pop in eligibility for each MHz-pop below the minimum required activity level. Thus in the final stage, each bidder retains eligibility (for the next round) equal to the MHz-pops for which it is an active bidder in the current round.

54. The auction will start in stage I and move from stage I to stage II when, in each of three consecutive rounds of bidding, the high bid has increased on 10 percent or less of the spectrum (measured in terms of MHz-pops) being auctioned.[33] The auction will move from stage II to stage III when the high bid has increased on 5 percent or less of the spectrum being auctioned (measured in terms of MHz-pops), in each of three consecutive rounds of bidding in stage II.[34] In order to speed up an auction, the Commission may also announce, at any time after the initial 15 rounds, that the next stage of the auction (with a higher minimum participation level) will begin in the next bidding round.[35] Moreover, if as the Commission gains experience with auctions that use activity rules it determines that such auctions tend to move too slowly, it may, by public notice prior to a specific auction, increase the activity levels at which that auction moves between stages. Conversely, if the Commission determines that auctions tend to move too quickly, depriving bidders of sufficient time to deliberate and pursue back-up strategies, it may decrease the activity levels at which an auction moves between stages.

55. Finally, to avoid the consequences of clerical errors and to compensate for unusual circumstances that might delay a bidder's bid preparation or submission on a particular day, Milgrom and Wilson recommend permitting each bidder to request and automatically receive a waiver of the activity rule once every three rounds. We believe that some waiver procedure is a critical element of the Milgrom-Wilson activity rule, since the Commission would not wish to reduce a bidder's eligibility due to an accidental act or circumstances not under the bidder's control.

56. We believe that the Milgrom-Wilson approach will best achieve the Commission's goals of affording bidders flexibility to pursue backup strategies, while at the same time ensuring that simultaneous auctions are concluded within a reasonable period of time. Accordingly, we plan to impose such an activity rule in conjunction with a simultaneous stopping rule to award higher value broadband PCS licenses. We intend, however, to use a simpler waiver procedure than that proposed by Milgrom and Wilson. We will permit bidders one automatic waiver from the activity rule during each stage of an auction. A waiver will permit a bidder to maintain its eligibility at the same level as in the round for which the waiver is submitted.[36] A waiver may be submitted either in the round in which bidding falls below the minimum required level to maintain (for the next round) the same eligibility as in that round, or prior to submitting a bid in the next round. If an activity rule waiver is entered in a round in which no other bidding activity occurs, the auction will remain open.[37] However, an activity rule waiver entered after a round in which no other bidding activity occurs will not reopen the auction. If, as we gain both experimental and actual auction experience, we determine that permitting one automatic waiver per auction stage is insufficient to prevent the inadvertent reduction in eligibility of serious bidders, we may, by public notice prior to a specific broadband auction, increase the number of automatic activity rule waivers, or instead allow one automatic waiver

[31] Absent waivers (discussed *infra*), a bidder's eligibility (in terms of MHz-pops) in the current round is determined by the bidder's activity level and eligibility in the previous round. In the first round, however, eligibility is determined by the bidder's upfront payment and is equal to the upfront payment divided by $.02 per MHz-pop.

[32] An alternative way to state the rule for determining eligibility in stage I of an auction is that each bidder will be eligible to bid in the next round on three times the MHz-pops for which it is an active bidder in the current round, or the MHz-pops for which it is eligible in the current round, whichever is less.

[33] The transition rule may also be defined in terms of the "auction activity level"—the sum of the MHz-pops of those licenses whose highest bid increased in the current round, as a percentage of the total MHz-pops of all licenses in that auction. (Note that this definition differs slightly from that used by Milgrom and Wilson. *See* reply comments by PacBell, Appendix to attachment by Milgrom and Wilson at 1.) The auction moves from stage I to stage II when the auction activity level is less than or equal to 10 percent for three consecutive rounds in stage I. The auction moves from stage II to stage III when the auction activity level is less than or equal to 5 percent for three consecutive rounds in stage II. For example, if two nationwide 30 MHz blocks of spectrum are put up for bid and the national population is approximately 250 million, a total of approximately 15,000 million MHz-pops would be available in the auction. If in stage I of the auction, the high bid increases on licenses encompassing less than 1,500 million MHz-pops for three consecutive rounds, the auction moves to stage II. This would be the case, for example, if in three consecutive rounds new bids were received on only a license for the New York MTA (26 million pops) and a license for the Los Angeles MTA (19 million pops), since the two licenses encompass a total of 1,350 million MHz-pops. Once in stage II, if in each of three consecutive rounds new acceptable bids are received on licenses encompassing less than 750 million MHz-pops, the auction would move to stage III.

[34] Once an auction is in stage II, it cannot revert to stage I. Once an auction is in stage III, it remains there.

[35] Moving to stage II prematurely might result in an auction moving too quickly to allow adequate time for consideration and may excessively limit the ability of bidders to pursue alternative backup strategies. *See Second Report and Order* at ¶ 142.

[36] An activity rule waiver cannot be used to correct an error in the amount bid.

[37] If, however, we determine, based on evidence from experimental and actual auctions, that this is likely to excessively delay the close of an auction or result in other adverse strategic manipulation of an auction, we any announce by public notice prior to a specific broadband auction that submission of a waiver will not keep an auction open under any circumstances.

during a specified number of bidding rounds.

57. Furthermore, if, as we gain experience with auctions, we determine that the Milgrom-Wilson three stage activity rule is too complicated or costly to administer, we may alternatively impose a less complex activity rule. *See Second Report and Order* at ¶ 144. We will announce by Public Notice before each auction the activity rule that will be employed in that particular auction.

V. Procedural, Payment, and Penalty Issues

A. Pre-Auction Application Procedures

58. In the *Second Report and Order*, the Commission established general competitive bidding rules and procedures which we noted may be modified on a service-specific basis. *See* 47 CFR Part 1, subpart Q. As discussed below, we will generally follow the procedural, payment and penalty rules established in the *Second Report and Order* with certain minor modifications designed to address the particular characteristics of the broadband PCS service. These rules are structured to ensure that bidders and licensees are qualified and will be able to construct systems quickly and other service to the public. By ensuring that bidders and license winners are serious, qualified applicants, these rules will minimize the need to re-auction licenses and prevent delays in the provision of broadband PCS service to the public. In addition, as we proposed in the Notice at ¶ 129, we adopt general procedural and processing rules based on Part 22 of the Commission's Rules.

59. Section 309(j)(5) provides that no party may participate in an auction "unless such bidder submits such information and assurances as the Commission may require to demonstrate that such bidder's application is acceptable for filing." 47 U.S.C. § 309(j)(5). Moreover, "[n]o license shall be granted to an applicant selected pursuant to this subsection unless the Commission determines that the applicant is qualified pursuant to [Section 309(a)] and Sections 308(b) and 310" of the Communications Act. *id.* As the legislative history of Section 309(j) makes clear, the Commission may require that bidders' applications contain all information and documentation sufficient to demonstrate that the application is not in violation of Commission rules, and applications not meeting those requirements may be dismissed prior to the competitive bidding. *See* H.R. Rep. No. 111, 103d Cong., 1st Sess. 258 (1993) (H.R. Rep. No. 103–111).

60. In the MPRM, we proposed that all parties interested in participating in an auction for spectrum licenses would be required to file a short-form application (modeled on the Commission's "Transmittal Sheet for Cellular Applications"), and asked whether applicants should also be required to submit a long-form application prior to the auction, or whether the long-form application should be submitted subsequent to the auction. NPRM at ¶ 97. The comments generally agreed that we should require only a short-form application prior to competitive bidding, and that only winning bidders should be required to submit a long-form license application after the auction. Because we believed that such a procedure would fulfill the statutory requirements and objectives and adequately protect the public interest, we incorporated these requirements into the rules adopted in the *Second Report and Order*. *See* 47 CFR §§ 1.2105 and 1.2107. We will extend the application of these rules to the competitive bidding process for broadband PCS.

61. We will be guided by the following procedures in conducting broadband PCS auctions. The Commission will release an initial Public Notice announcing that it will accept applications for specific broadband PCS licenses. This initial Public Notice will specify the licenses and identify the time and place of an auction in the event that mutually exclusive applications are filed. The Public Notice also will specify the method of competitive bidding to be used, including applicable bid submission procedures, stopping rules and activity rules, as well as the deadline by which short-form applications must be filed, and the amounts and deadlines for submitting the upfront payment. *See Second Report and Order* at ¶ 164. We will not accept applications filed before or after the dates specified in Public Notices. Applications submitted before release of a Public Notice announcing the availability of particular license(s), or before the opening date of the filing window specified therein, will be returned as premature. Applications submitted after the deadline specified by Public Notice will be dismissed, with prejudice, as untimely. Soon after release of the initial Public Notice, an auction information package will be made available to prospective bidders.

62. Bidders will be required to submit short-form applications on FCC Form 175 (and FCC Form 175–S, if applicable), together with any applicable filing fee[38] by the date specified in the initial Public Notice.[39] The short-form applications will require applicants to provide the information required by Section 1.2105(a)(2) of the Commission's Rules, 47 CFR § 1.2105(a)(2). Specifically, each applicant will be required to specify on its Form 175 applications certain identifying information, including its status as a designated entity (if applicable), its classification (*i.e.*, individual, corporation, partnership, trust or other), the markets and frequently blocks for which it is applying, and assuming that the licenses will be auctioned, the names of persons authorized to place or withdraw a bid on its behalf. In addition, applicants will be required to provide detailed ownership information (*see* Section 24.813(a) of the Commission's Rules) and identify all parties with whom they have entered into any consortium arrangements, joint ventures, partnerships or other agreements or understandings which relate to the competitive bidding process. Applicants will also be required to certify that they have not entered and will not enter into any explicit or implicit agreements, arrangements or understandings with any parties, other than those identified, regarding the amount of their bid, bidding strategies or the particular properties on which they will or will not bid. In addition, applicants for licenses in the entrepreneurs' blocks will be required, as part of their short-form applications, to certify that they are eligible to bid on and win licenses in those blocks. Among other things, this means that they are in compliance with our PCS-cellular and PCS–PCS cross-ownership limitations. As we indicated in the *Second Report and Order*, if the Commission receives only one application that is acceptable for filing for a particular license, and thus there is no mutual exclusivity, the Commission by Public Notice will

[38] Because Section 8 of the Communications Act, 47 U.S.C. § 158, does not currently afford the Commission authority to charge an application fee in connection with PCS applications, broadband PCS applicants will not be required to submit a fee with their short-form application. However, the Commission has requested that Congress amend Section 8 of the Communications Act to provide a specific application fee for PCS services. If the Commission receives application fee authority, the general rules governing submission of fees will apply. *See* 47 CFR § 1.1101 *et seq.* These rules currently provide for dismissal of an application if the application fee is not paid, is insufficient, is in improper form, is returned for insufficient funds or is otherwise not in compliance with our fee rules. Whenever funds are remitted to the Commission, applicants also must file FCC Form 159.

[39] Applicants should submit one paper original and one microfiche original of their application, as well as two microfiche copies.

cancel the auction for this license and establish a date for the filing of a long-form application, the acceptance of which will trigger the procedures permitting petitions to deny. *See Second Report and Order* at ¶ 165.

63. A number of commenters in this proceeding objected to our original tentative conclusion that short-form applications should be judged by a letter-perfect standard. *See* NPRM at ¶ 100. Parties proposed that the Commission allow a brief period for correcting errors in short-form applications. *See, e.g.*, comments of AT&T at 30–31, BellSouth at 36–37. As we stated in the *Second Report and Order*, we believe that the public interest would be better served by encouraging maximum bidder participation in auctions. *See Second Report and Order* at ¶ 167. Therefore, we will provide applicants with an opportunity to correct minor defects in their short-form applications (*e.g.*, typographical errors, incorrect license designations, etc.) prior to the auction. Applicants will not be permitted until after the auction, however, to make any major modifications to their applications, including cognizable ownership changes or changes in the identification of parties to bidding consortia. In addition, applications that are not signed will be dismissed as unacceptable.

64. After reviewing the short-form applications, the Commission will issue a second Public Notice listing all defective applications, and applicants whose applications contain minor defects will be given an opportunity to cure defective applications and resubmit a correction version.[40] After reviewing the corrected applications, the Commission will release a third Public Notice announcing the names of all applicants whose applications have been accepted for filing. These applicants will be required to submit an upfront payment to the Commission, as discussed below.

B. Upfront Payment

65. The comments in this proceeding generally supported the Commission's proposal to require prospective bidders to make substantial upfront payments prior to auction. *See, e.g.*, comments of Comcast at 18, PacBell at 28, Nextel at 16, and AWCC at 31–32. Consistent with the weight of the comments, we concluded in the *Second Report and Order* that a substantial upfront payment prior to the beginning of an auction is necessary to ensure that only serious and qualified bidders participate. *See Second Report and Order* at ¶ 171. By requiring such a payment we also help to ensure that any bid withdrawal or default penalties are paid. These considerations apply to broadband PCS auctions. We will therefore require all broadband PCS auction participants to tender in advance to the Commission a substantial upfront payment as a condition of bidding.

66. In the Notice, we proposed to require upfront payments based on a $0.02 per MHz per pop formula. Though some commenters favor a fixed upfront payment set by the Commission prior to the auction,[41] most support the Commission's proposed $0.02 per MHz per pop formula, which would enable prospective bidders to tailor their upfront payment to their bidding strategies.[42] Commenters suggest that there should be some fixed minimum on the amount of upfront payment made prior to auction (suggestions range from $2,500 to $100,000 for different services).[43] Some commenters also favor setting a maximum upfront payment, pointing out that our proposed formula yields very high payments in the broadband PCS context.[44]

67. We believe that the standard upfront payment formula of $0.02 per pop per MHz for the largest combination of MHz-pops a bidder anticipates bidding on in any single round of bidding is appropriate for broadband PCS services.[45] Using this formula will provide bidders with the flexibility to change their strategy during an auction and to bid on a larger number of smaller licenses or a smaller number of larger licenses, so long as the total MHz-pops combination does not exceed that amount covered by the upfront payment. For example, when we auction licenses covering the nation simultaneously, a bidder would not be required to file an upfront payment representing national coverage unless it intended to bid on licenses covering the entire nation in a single bidding round. The $0.02 per MHz per pop formula also works well with the Milgrom-Wilson activity rule that we plan to employ in broadband PCS auctions, as described in Section III above. In the initial Public Notice issued prior to each auction, we will announce population information corresponding to each license to enable bidders to calculate their upfront payments.

68. As we indicated in the *Second Report and Order*, we will not set a maximum on upfront payments.[46] We decline to do so because we wish to ensure that those bidding on large numbers of valuable broadband PCS licenses are bidding in good faith and are financially capable of constructing those systems quickly. We recognize that upfront payments for broadband PCS licenses may amount to millions of dollars, but we do not believe that it is unreasonable to expect prospective bidders to tender such sums given the expected overall value of some of these licenses and the expected financial requirements to construct the systems. Indeed, such a requirement is necessary to ensure the seriousness of bidders for these valuable licenses.

69. In the *Second Report and Order*, we accepted commenters' suggestions and established a general minimum upfront payment of $2,500 to ensure that the use of our preferred formula would result in a substantial enough payment that bidders would be deterred from making frivolous bids.[47] Such a minimum upfront payment is needed in connection with auctions where the $0.02 per MHz per pop formula would yield a comparatively small upfront payment (such as those for narrowband PCS licenses in BTAs). Because of the wider bandwidth of broadband PCS licenses, however, this minimum upfront payment will not be relevant in auctions for this service.[48]

70. For broadband PCS auctions, we will follow the procedures for submission of upfront payments outlined in the *Second Report and Order*. Applicants whose short-form applications have been accepted for filing will be required to submit the full amount of their upfront payment to the Commission's lock-box bank by a date

[40] On the date set for submission of corrected applications that on their won discover minor errors in their applications also will be permitted to file corrected applications.

[41] *See, e.g.*, comments of Edward M. Johnson at 2; and LuxCel Group, Inc. at 8.

[42] *See, e.g.*, comments of PacBell at 28; Telocator (now PCIA) at 13; CTIA at 30; and Rochester Telephone Corporation at 13.

[43] *See, e.g.*, comments of Telocator at 20–21; Cellular Communications, Inc. at 15; AT&T at 34; and BellSouth at 41.

[44] *See, e.g.*, comments of Southwestern Bell at 38–40 (arguing generally for a maximum deposit of $50 million for all markets) and AT&T at 34 (supporting a maximum upfront payment of $5 million, with a down payment following the auction).

[45] As discussed in Section VII, *infra*, designated entities will be subject to a lesser upfront payment requirement of $0.015 per MHz per pop. Further, we retain the flexibility to consider using a simpler payment requirement if circumstances warrant.

[46] *See Second Report and Order* at ¶ 179.

[47] *Id.* at ¶ 180.

[48] The smallest bandwidth that a broadband PCS licensee will be authorized to use is 10 MHz, so a $2,500 upfront payment would result for a license area with a population of only 12,500 persons. The least populous BTA in the United States (Williston, North Dakota) has a population of approximately 27,500, and the upfront payment for a 10 MHz license in that BTA would be approximately $5,500.

certain, which will be announced in a Public Notice and generally will be no later than 14 days before the scheduled auction.[49] After the Commission receives from its lock-box bank the names of all applicants who have submitted timely upfront payments, the Commission will issue a Public Notice announcing the names of all applicants that have been determined to be qualified to bid. An applicant who fails to submit a sufficient upfront payment to qualify it to bid on any license being auctioned will not be identified on this Public Notice as a qualified bidder, and it will be prohibited from bidding in the auction. That is, we will require that applicants for broadband PCS licenses submit a sufficient upfront payment to reflect the MHz-pops of the smallest license being put up for bid in a particular auction.[50]

71. Although it would be simpler to require the submission of upfront payments at the same time short-form applications are filed, we agree with those commenters that argued that they should not be required to commit the large sums that will likely be involved in broadband PCS upfront payment for longer than is necessary. Accordingly, applicants will not be required to tender upfront payments with their short-form applications. Instead, as noted above, upfront payments will be due by a date specified by Public Notice, but generally no later than 14 days before a scheduled auction. This period should be sufficient to allow the Commission adequate time to process upfront payment data and release a Public Notice listing all qualified bidders, but not so long as to impose undue burdens upon bidders. The rules set forth in Section 1.2106 of the Commission's Rules concerning upfront payments will be applicable in broadband PCS auctions. Each qualified bidder will be issued a bidder identification number and further information and instructions regarding the auction procedures. During an auction, bidders will be required to provide their bidder identification numbers when submitting bids.

C. Payment and Procedures for Licenses Awarded by Competitive Bidding

1. Down Payment

72. The *Second Report and Order* established a 20 percent down payment by winning bidders to discourage default between the auction and licensing and to ensure payment of the penalty if such default occurs. We concluded that a 20 percent down payment was appropriate to ensure that auction winners have the necessary financial capabilities to complete payment for the license and to pay for the costs of constructing a system, while at the same time not being so onerous as to hinder growth or diminish access. Most of the commenters addressing this issue generally support our proposal that winning bidders increase their deposits with the Commission up to an amount equalling 20 percent of their winning bid or bids. *See, e.g.*, comments of BellSouth at 43–44, PageNet at 35–36, and Telocator at 13. Some commenters feel that a 20 percent down payment requirement would be too high. *See* comments of Sprint at 18 (prefers a 10 percent down payment).

73. We believe that the reasoning that led us to conclude that 20 percent is the appropriate down payment applies to broadband PCS auctions. We therefore will require that, with the exception of bidders eligible for installment payments in the entrepreneurs' blocks (*see* Section VII, *infra*), winning bidders in broadband PCS auctions supplement their upfront payments with a down payment sufficient to bring their total deposits up to 20 percent of their winning bid(s).[51] Winning bidders will be required to submit the required down payment by cashier's check or wire transfer to our lock-box bank by a date to be specified by Public Notice, generally within five (5) business days following the close of bidding. All auction winners will generally be required to make full payment of the balance of their winning bids within five (5) business days following award of the license. Grant of the license will be conditioned on this payment.

74. An auction winner that is eligible to make payments through an installment plan (*see* Section VII, *infra*) will be subject to different payment requirements. Such an entity will be required to bring its deposits with the Commission up to only 5 percent of its winning bid after the bidding closes, and will pay an additional 5 percent of its winning bid to the Commission after a license is granted.

2. Bid Withdrawal and Default Penalties

75. As we discussed in the *Second Report and Order*, it is critically important to the success of our system of competitive bidding that potential bidders understand that there will be a substantial penalty assessed if they withdraw a high bid, are found not to be qualified to hold licenses or default on payment of a balance due. There was substantial support in the comments for the notion that the Commission is authorized to and should order forfeiture of upfront and down payments if the auction winner later defaults or is disqualified. *See, e.g.*, comments of CTIA at 29–30, AT&T at 35, n.43, PageNet at 35–36, Cook Inlet at 47, and BellSouth at 42–44. We concluded, however, that forfeiture of all amounts that a bidder may have on deposit with the Commission may, in some circumstances, be too severe a penalty and would not necessarily be rationally related to the harm caused by withdrawal, default or disqualification. *See Second Report and Order* at ¶ 197.

76. This logic applies to broadband PCS auctions, so for these auctions we will employ the bid withdrawal, default and disqualification penalties adopted in the *Second Report and Order*, which are reflected in Sections 1.2104(g) and 1.2109 of the Commission's Rules. Any bidder who withdraws a high bid during an auction before the Commission declares bidding closed will be required to reimburse the Commission in the amount of the difference between its high bid and the amount of the winning bid the next time the license is offered by the Commission, if this subsequent winning bid is lower than the withdrawn bid.[52] No withdrawal

[49] Upfront payments must be made by wire transfer or by cashier's check drawn in U.S. dollars from a financial institution whose deposits are insured by the Federal Deposit Insurance Corporation and must be made payable to the Federal Communications Commission.

[50] For example, in our first broadband PCS auction (the 30 MHz MTA licenses on blocks A and B), the smallest upfront payment that may be submitted to qualify an applicant to bid will be calculated by multiplying the population of the least populous MTA (American Samoa: population 47,000) times 30 times two cents, or $28,200. It should be noted, however, that this minimal upfront payment will entitle the bidder to bid only on a license to serve American Samoa.

[51] If the upfront payment already tendered by a winning bidder, after deducting any bid withdrawal and default penalties due, amounts to 20 percent or more of its winning bids, no additional deposit will be required. If the upfront payment amount on deposit is greater than 20 percent of the winning bid amount after deducting any bid withdrawal and default penalties due, the additional monies will be refunded. If a bidder has withdrawn a bid or defaulted but the amount of the penalty cannot yet be determined, the bidder will be required to make a deposit of 20 percent of the amount bid on such licenses. When it becomes possible to calculate and assess the penalty, any excess deposit will be refunded. Upfront payments will be applied to such deposits and to bid withdrawal and default penalties due before being applied toward the bidder's down payment on licenses the bidder has won and seeks to acquire.

[52] If a license is re-offered by auction, the "winning bid" refers to the high bid in the auction in which the license is re-offered. If a license is re-offered in the same auction, the winning bid refers to the high bid amount, made subsequent to the withdrawal, in that auction. If the subsequent high bidder also withdraws its bid, that bidder will be required to pay a penalty equal to the difference between its withdrawn bid and the amount of the subsequent winning bid the next time the license is offered by the Commission. If a license which is

penalty will be assessed if the subsequent winning bid exceeds the withdrawn bid. After bidding closes, a defaulting auction winner (*i.e.*, a winner who fails to remit the required down payment within the prescribed time, fails to pay for a license, or is otherwise disqualified) will be assessed an additional penalty of three percent of the subsequent winning bid or three percent of the amount of the defaulting bid, whichever is less. *See* 47 CFR §§ 1.2104(g) and 1.2109. The additional three percent penalty is designed to encourage bidders who wish to withdraw their bids to do so before bidding ceases. We will hold deposits made by defaulting or disqualified auction winners until full payment of the penalty.[53] We believe that these penalties will adequately discourage default and ensure that bidders have adequate financing and that they meet all eligibility and qualification requirements. As we explained in the *Second Report and Order*, we further believe that this approach is well within our authority under both Section 309(j)(4)(B) and Section 4(i) of the Communications Act, 47 U.S.C. § 154(i), as it is clearly necessary to carry out the rapid deployment of new technologies through the use of auctions.[54]

77. In addition, if a default or disqualification involves gross misconduct, misrepresentation or bad faith by an applicant, the Commission may declare the applicant and its principals ineligible to bid in future auctions, and may take any other action that it deems necessary, including institution of proceedings to revoke any existing licenses held by the applicant. *See Second Report and Order* at ¶ 198.

3. Re-Offering Licenses When Auction Winners Default

78. In the event that an auction winner defaults or is otherwise disqualified, the Commission must determine whether to hold a new auction or simply offer the license to the second-highest bidder. Parties commenting on this issue generally favored re-auctioning the license, pointing out that changing market and even technological developments since the initial auction may change the amounts that bidders are willing to pay for a license, especially if the intervening period is relatively long. They urge that any re-auction be open to new bidders, arguing that such a procedure would reduce the incentive of losing bidders to file unmeritorious petitions to deny against the auction winner. *See, e.g.*, comments of BellSouth at 37, Utilities Telecommunications Council at 21.

79. As we stated in the *Second Report and Order*, we believe that, as a general rule, when an auction winner defaults or is otherwise disqualified after having made the required down payment, the best course of action is to re-auction the license. *See Second Report and Order* at ¶ 204. Although we recognize that this may cause a brief delay in the initiation of service to the public, during the time between the original auction and the disqualification circumstances may have changed so significantly as to alter the value of the license to auction participants as well as to parties who did not participate. In this situation, awarding licenses to the parties that value them most highly can best be assured through a re-auction. However, if the default occurs within five (5) business days after the bidding has closed, the Commission retains the discretion to offer the license to the second highest bidder at its final bid level, or if that bidder declines the offer, to offer the license to other bidders (in descending order of their bid amounts) at the final bid levels.[55]

80. If a new auction becomes necessary because of default or disqualification more than five (5) business days after bidding has ended, the Commission will afford new parties an opportunity to file applications. One of our primary goals in conducting auctions is to assure that all serious interested bidders are in the pool of qualified bidders at any re-auction. We believe that allowing new applications will promote achievement of this goal, which outweighs the short delay that we recognize may result from allowing new applications in a re-auction. Indeed, if we were not to allow new applicants in a re-auction, interested parties might be forced into an after-market transaction to obtain the license, which would itself delay service to the public and may prevent the public from recovering a reasonable portion of the value of the spectrum resource.

4. Long-Form Application

81. If the winning bidder makes the down payment in a timely manner, a long-form application filed on FCC Form 401 (as modified), or such other form as may be adopted for Commercial Mobile Radio Service use in GEN Docket No. 93–252, will be required to be filed by a date specified by Public Notice, generally within ten (10) business days after the close of bidding.[56] After the Commission receives the winning bidder's down payment and the long-form application, we will review the long-form application to determine if it is acceptable for filing. In addition to the information required in the long-form application of all winning bidders, each winning bidder on licenses in frequency blocks C and F will be required to submit evidence of its eligibility to bid on licenses in these blocks, as well as evidence to support its claim to any special provisions made available to designated entities. This information may be included in an exhibit to FCC Form 401, and must include the gross revenues and total assets of the applicant and all attributable investors in the applicant, and a certification that the personal net worth of each individual investor does not exceed the eligibility limitation. This information will enable the Commission, and other interested parties, to ensure the validity of the applicant's certification of eligibility to bid in blocks C and F (submitted as part of its FCC Form 175) and its eligibility for any bidding credits, installment payment options, or other special provision. Upon acceptance for filing of the long-form application, the Commission will issue a Public Notice announcing this fact, triggering the filing window for petitions to deny. If the Commission denies all petitions to deny, and is otherwise satisfied that the applicant is

the subject of withdrawal or default is not re-auctioned, but is instead offered to the highest losing bidders in the initial auction, the "winning bid" refers to the bid of the highest bidder who accepts the offer. Losing bidders would not be required to accept the offer, *i.e.*, they may decline without penalty. We wish to encourage losing bidders in simultaneous multiple round auctions to bid on other licenses, and therefore we will not hold them to their losing bids on a license for which a bidder has withdrawn a bid or on which a bidder has defaulted.

[53] In rare cases in which it would be inequitable to retain a down payment, we will entertain requests for waiver of this provision.

[54] *See* Second Report and Order at ¶ 198.

[55] If only a small number of relatively low-value licenses are to be re-auctioned and only a short time has passed since the initial auction, the Commission may choose to offer the license to the highest losing bidders because the cost of running another auction may exceed the benefits.

[56] Schedule B to FCC Form 401 will not be required to be submitted by broadband PCS applicants. However, applicants for broadband PCS licenses proposing to use any portion of broadband PCS spectrum to offer service on a private mobile radio service basis must overcome the presumption that PCS is a commercial mobile radio service. *Regulatory Treatment of Mobile Services*, Second Report and Order in GEN Docket No. 93–252, 9 FCC Rcd 1411, 1460–63, 59 FR 18493, Apr. 19, 1994; 47 CFR § 20.9(a)(11), (b). Applicants (or licensees) seeking to dedicate a portion of the spectrum for private mobile radio service will be required to attach as an exhibit to the Form 401 application a certification that it will offer PCS service on a private mobile radio basis. The certification must include a description of the proposed service sufficient to demonstrate that it is not within the definition of commercial mobile radio service in Section 20.3 of the Commission's Rules. *Id.*

qualified, the license(s) will be granted to the auction winner.

5. Processing and Procedural Rules

82. In the Notice, we proposed to adopt general processing and procedural rules for broadband PCS based on Part 22 of the Commission's Rules. One commenter, AIDE, argues that the Commission's reference to proposed PCS rules is vague and legally insufficient for a Notice of Proposed Rule Making. Comments of AIDE at 16–17. AIDE also asserts that the adoption of PCS processing and procedural rules is beyond the scope of the Notice in this rule making proceeding. *Id.* We disagree. The Notice sought comment on specific rule sections contained in Part 22 of our Rules and asked commenters to indicate what modifications should be made to those rules to adapt them for PCS services. *See* Notice at ¶ 128. In addition, the Notice specifically requested comment on the general procedural, processing and petition to deny procedures that should be used for auctionable services. The Notice's proposal to adopt processing rules based on Part 22 of the Commission's Rules, with any appropriate modifications for PCS services, clearly indicated to commenters the terms of the proposed rules, as is required by 5 U.S.C. § 553 and 47 CFR § 1.413(c). Accordingly, we believe that the Notice's description of the proposed rules was sufficiently specific to alert interested parties to the substance of our proposal and to provide an adequate opportunity for comment on those proposals. Moreover, we conclude that these issues are well within the scope of the Notice.

83. As we proposed, we adopt for broadband PCS a modified version of the application processing rules contained in Part 22 of the Commission's Rules. These rules, which will comprise Subpart I of Part 24 of our Rules, will govern application filing and content requirements, waiver procedures for return of defective applications, regulations regarding modification of applications, and general application processing rules. We also adopt petition to deny procedures based on Section 22.30 of the Commission's Rules. In addition, as we proposed in the Notice, we adopt rules similar to Sections 22.927, 22.928 and 22.929 of our existing rules (47 CFR §§ 22.927, 22.928, 22.929) to prevent the filing of speculative applications and pleadings (or threats of the same) designed to extract money from sincere broadband PCS applicants. In this regard, we limit the consideration that an applicant or petitioner is permitted to receive for agreeing to withdraw an application or a petition to deny to the legitimate and prudent expenses of the withdrawing applicant or petitioner.

84. With regard to petitions to deny, we adopt expedited procedures consistent with the provisions of Section 309(i)(2) of the Communications Act to resolve substantial and material issues of fact concerning qualifications.[57] This provision requires us to entertain petitions to deny the application of the auction winner if petitions to deny are otherwise provided for under the Communications Act or our Rules.

85. As we indicated in the *Second Report and Order*, the Commission need not conduct a hearing before denying an application if it determines that an applicant is not qualified and no substantial issue of fact exists concerning that determination. *See Second Report and Order* at ¶ 202. In the event that the Commission identifies substantial and material issues of fact in need of resolution, Section 309(i)(2) of the Communications Act permits in any hearing the submission of all or part of evidence in written form and allows employees other than administrative law judges to preside over the taking of written evidence. We will incorporate these principles into our broadband PCS procedural rules.

D. Procedures in Alternative Auction Design

86. If we decide to employ a sequential auction design (using either oral or electronic bid submission), the same general rules and procedures described above will be used with certain modifications to fit the oral or electronic auction format. In the case of oral auctions, bidders would be required to follow the procedures described above, including the submission of the standard upfront payment of $0.02 per MHz-pop prior to the auction. Applicants would submit a sufficient upfront payment to cover the total number of MHz-pops they desire to win. Once a bidder has won the maximum number of MHz-pops covered by its upfront payment, that bidder will be precluded from further bidding in the auction.[58] Immediately after bidding closes on a license, the winning bidder (*i.e.*, the high bidder on a license on which bidding has closed) will be asked to sign a bid confirmation form. No other license will be put up for bid until a bid confirmation form is signed by a high bidder on the previous license.[59] Because we recognize that in an oral auction the chances of a bidder accidentally placing a high bid are greater than in other auction methods, and because the harm will be limited if the license is immediately re-offered, we will not impose a penalty on a high bidder who withdraws a high bid by refusing to sign the bid confirmation form. Thus, in an sequential oral auction in which a high bidder declines to sign the bid confirmation form, the license will be immediately put up for bid again. If, however, a high bidder signs a bid confirmation form but subsequently fails to submit the 20 percent down payment or otherwise defaults, the standard default penalties (described *supra*) will apply.[60]

87. If we decide to use sequential electronic bidding, bidders would again follow the general procedures described above including the submission of the standard upfront payment amount of $0.02 per MHz per pop prior to the auction. Applicants would submit a sufficient upfront payment to cover the total number of MHz-pops they desire to win. An applicant will not be eligible to bid on a license for which it has not applied or which contains more MHz-pops than the total MHz-pops covered by the bidder's upfront payment less any MHz-pops already won by that bidder. Once a bidder has won licenses representing the maximum number of MHz-pops reflected in its upfront payment, that bidder will be precluded from further bidding in the auction. Each bidder's eligibility will be computed and tracked by the auction software and bids placed by ineligible bidders will not be accepted. After the auctioneer declares bidding on a license closed and the high bidder has been notified, that bidder will be asked to confirm its high bid. If the high bidder in a sequential electronic auction declines to confirm its high bid, the license will be immediately re-auctioned and no penalty will be imposed. No other licenses will be put up for bid until a bid confirmation form is signed by a high bidder on the previous license.[61] As with sequential oral auctions, if a high bidder signs a bid confirmation form but subsequently

[57] The adoption of such procedures is necessary because Section 309(j)(5) of the Communications Act forbids the granting of licenses through competitive bidding unless the Commission determines that the applicant is qualified.

[58] This is similar to the procedure adopted in the Fourth Report and Order for the oral auctioning of IVDS licenses. *See* Fourth Report and Order in PP Docket No. 93–253, 9 FCC Rcd 2330, 59 FR 24947, May 13, 1994.

[59] If we use single combined bidding, described *supra*, no other licenses will be put up for bid until a bid confirmation form is signed for each license put up for bid together in a combined auction.

[60] *See* 47 CFR §§ 1.2104 and 1.2109.

[61] *See also* n. 59, *supra*.

fails to submit the 20 percent down payment or otherwise defaults, the standard default penalties (described *supra*) will apply.

VI. Regulatory Safeguards

A. Transfer Disclosure Requirements

88. In Section 309(j), Congress directed the Commission to "require such transfer disclosures and anti-trafficking restrictions and payment schedules as may be necessary to prevent unjust enrichment as a result of the methods employed to issue licenses and permits." 47 U.S.C. § 309(j)(4)(E). In the *Second Report and Order*, the Commission adopted safeguards designed to ensure that the requirements of Section 309(j)(4)(E) are satisfied. *See Second Report and Order* at ¶¶ 210–226 and 258–265.

89. In the *Second Report and Order* (at ¶ 214), we stated our belief that it is important to monitor transfers of licenses awarded by competitive bidding in order to accumulate the data necessary to evaluate our auction designs and to judge whether "licenses [have been] issued for bids that fall short of the true market value of the license." H.R. Rep. No. 103–111 at 257. Therefore, we imposed a transfer disclosure requirement on licenses obtained through the competitive bidding process, whether by a designated entity or not. *See* 47 CFR § 1.2111(a). We believe that the transfer disclosure requirements contained in Section 1.2111(a) of the Commission's Rules should apply to all broadband PCS licenses obtained through the competitive bidding process. Generally, licensees transferring their licenses within three years after the initial license grant will be required to file, together with their transfer applications, the associated contracts for sale, option agreements, management agreements, and all other documents disclosing the total consideration received in return for the transfer of its license. As we indicated in the *Second Report and Order*, we will give particular scrutiny to auction winners who have not yet begun commercial service and who seek approval for a transfer of control or assignment of their licenses within three years after the initial license grant, in order to determine if any unforeseen problems relating to unjust enrichment have arisen outside the designated entity context. *See Second Report and Order* at ¶ 214.[62]

[62] We note that these transfer disclosure provisions are in addition to the limitations on transfers that we have adopted in the Broadband PCS Reconsideration Order (with respect to spectrum disaggregation) or elsewhere in this Order (with respect to transfers of licenses in the entrepreneurs' block).

B. Performance Requirements

90. The Budget Act requires the Commission to "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."[63] In the *Second Report and Order* we decided that it was unnecessary and undesirable to impose additional performance requirements, beyond those already provided in the service rules, for all auctionable services. The broadband PCS service rules already contain specific performance requirements, such as the requirement to construct within a specified period of time. *See, e.g.*, 47 CFR § 24.203. Failure to satisfy these construction requirements will result in forfeiture of the license. Accordingly, we do not see the need to adopt any additional performance requirements in this Report and Order.

C. Rules Prohibiting Collusion

91. In the *Second Report and Order*, we adopted a special rule prohibiting collusive conduct in the context of competitive bidding. *See* 47 CFR § 1.2105(c). We referred to the Notice, wherein we indicated our belief that such a rule would serve the objectives of the Budget Act by preventing parties, especially the largest firms, from agreeing in advance to bidding strategies that divide the market according to their strategic interests and disadvantage other bidders. *See Second Report and Order* at ¶ 221. We believe that this rule is nowhere more necessary than with respect to broadband PCS auctions, where we expect bidder interest to be high and the incentives to collude to be great. Thus, Section 1.2105(c) will apply to broadband PCS auctions. This rule provides that from the time the short-form applications are filed until the winning bidder has made its required down payment, all bidders will be prohibited from cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies with other bidders, unless such bidders are members of a bidding consortium or other joint bidding arrangement identified on the bidder's short-form application. In addition, as discussed in Section IV, *supra*, bidders will be required by Section 1.2105(a)(2) of the Commission's Rules to identify on their Form 175 applications all parties with whom they have entered into any consortium arrangements, joint ventures, partnerships or other agreements or understandings which relate to the competitive bidding process. Bidders will also be required to certify that they have not entered and will not enter into any explicit or implicit agreements, arrangements or understandings with any parties, other than those identified, regarding the amount of their bid, bidding strategies or the particular properties on which they will or will not bid.

92. Winning bidders in broadband PCS auctions will also be subject to Section 1.2107 of the Commission's Rules, which among other things requires each winning bidder to attach as an exhibit to the Form 401 long-form application a detailed explanation of the terms and conditions and parties involved in any bidding consortium, joint venture, partnership, or other agreement or arrangement they had entered into relating to the competitive bidding process prior to the close of bidding. All such arrangements must have been entered into prior to the filing of short-form applications. In addition, where specific instances of collusion in the competitive bidding process are alleged during the petition to deny process, the Commission may conduct an investigation or refer such complaints to the United States Department of Justice for investigation. Bidders who are found to have violated the antitrust laws or the Commission's rules in connection with participation in the auction process may be subject to forfeiture of their down payment or their full bid amount and revocation of their license(s), and they may be prohibited from participating in future auctions.

VII. Treatment of Designated Entities

A. Overview and Objectives

93. 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 the provision of spectrum-based services." 47 U.S.C. § 309(j)(4)(D). To achieve this goal, the statute requires the Commission to "consider the use of tax certificates, bidding preferences, and other procedures." Thus, while providing that we charge for licenses, Congress has ordered that the Commission design its auction procedures to ensure that designated

[63] *See* Section 309(j)(4)(B) of the Communications Act, as amended.

entities have opportunities to obtain licenses and provide service. For that purpose, the law does not mandate the use of any particular procedure, but it specifically approves the use of "tax certificates, bidding preferences, and other procedures." The use of any such procedure is, in our view, mandated where necessary to achieve Congress's objective of ensuring that designated entities have the opportunity to participate in broadband PCS.

94. In addition to this mandate, the statute sets forth various congressional objectives. For example, it provides that in establishing eligibility criteria and bidding methodologies the Commission shall "promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women." 47 U.S.C. § 309(j)(3)(B); *see also id.* § 309(j)(4)(C) (requiring the Commission when prescribing area designations and bandwidth assignments, to promote "economic opportunity for a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women).[64] Further, Section 309(j)(4)(A) provides that to promote the statute's 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 * * * and combinations of such schedules and methods."

95. To satisfy these statutory mandates and objectives, we established in the *Second Report and Order* eligibility criteria and general rules that would govern the special measures for small businesses, rural telephone companies, and businesses owned by members of minority groups and women. We also identified several measures, including installment payments, spectrum set-asides, bidding credits and tax certificates, that we could choose from in establishing rules for auctionable spectrum-based services. We stated that we would decide whether and how to use these special provisions, or others, when we developed specific competitive bidding rules for particular services. In addition, we set forth rules designed to prevent unjust enrichment by designated entities who transfer ownership in licenses obtained through the use of these special measures or who otherwise lose their designated entity status.

96. We intend in the new broadband personal communications service to meet fully the statutory mandate of Section 309(j)(4)(D), as well as the 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. As explained more fully in this Order, in some respects it is necessary to do more to ensure that businesses owned by members of minority groups and women have a meaningful opportunity to participate in the provision of personal communications services than is necessary to ensure participation by other designated entities. In particular, we have concluded that steps such as adoption of bidding credits, tax certificates, alternate payment plans and relaxed attribution rules, must be taken to encourage investment in minority and women-owned businesses. These special provisions are tailored to address the major problem facing minorities and women desiring to offer PCS—lack of access to capital. Moreover, because broadband PCS licenses in many cases are expected to be auctioned for large sums of money in the competitive bidding process, and because buildout costs are likely to be high, it is necessary to do more to ensure that designated entities have the opportunity to participate in broadband PCS than is necessary in other, less costly spectrum-based services. In our view, these steps and the others we adopt are required to fulfill Congress' mandate that designated entities have the opportunity to participate in the provision of PCS. The measures we adopt today will also increase the likelihood that designated entities who win licenses in the auctions become strong competitors in the provision of broadband PCS service.

97. In instructing the Commission to ensure the opportunity for designated entities to participate in auctions and spectrum-based services, Congress was well aware of the difficulties these groups encounter in accessing capital. Indeed, less than two years ago, Congress made specific findings in the Small Business Credit and Business Opportunity Enhancement Act of 1992, that "small business concerns, which represent higher degrees of risk in financial markets than do large businesses, are experiencing increased difficulties in obtaining credit."[65] Because of these problems, Congress resolved to consider carefully legislation and regulations "to ensure that small business concerns are not negatively impacted" and to give priority to passage of "legislation and regulations that enhance the viability of small business concerns."[66]

98. Congress also recognized that these funding problems are even more severe for minority and women-owned businesses, who face discrimination in the private lending market. For example, Congress explicitly found that businesses owned by minorities and women have particular difficulties in obtaining capital and that problems encountered by minorities in this regard are "extraordinary."[67] A number of studies also amply support the existence of widespread discrimination against minorities in lending practices. In October 1992, the year prior to passage of the auction law, the Federal Reserve Bank of Boston released an important and highly-publicized study demonstrating that a black or Hispanic applicant in the Boston area is roughly 60 percent more likely to be denied a mortgage loan than a similarly situated white applicant.[68] The researchers measured every variable mentioned as important in numerous conversations with lenders, underwriters, and examiners and found that minority applicants are more likely to be denied mortgages even where they have the same obligation ratios, credit history, loan to value and property characteristics as white applicants. The lending discrimination that occurs, the study found, does not involve the application of specific rules, but instead occurs where discretionary decisions are made. Based on the Boston study, it is reasonable to expect that race would affect business loans that are based on more subjective criteria to an even greater extent than the mortgage loan

[64] As noted in the Second Report and Order, the statute also requires the Commission to promote the purposes specified in Section 1 of the Communications Act, which include, among other things, "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." 47 U.S.C. § 151; Second Report and Order at n. 3.

[65] Small Business Credit and Business Opportunity Enhancement Act of 1992, Section 331(a)(3), Pub. Law 102-366, Sept. 4, 1992.

[66] *Id.*, Section 331(b) (2), (3).

[67] *Id.*, Sections 112(4), 331(a)(4).

[68] Mortgage Lending in Boston: Interpreting HMDA Data, Federal Reserve Bank of Boston, Working Paper 92-7 (October 1992).

process, which uses more standard rules.

99. Importantly, the Boston study also found that, because most loan applicants have some negative attributes, most loan denials will appear legitimate by some objective standard. Accordingly, the study stated, the lending discrimination that occurs is very difficult to document at the institution level, so legal remedies may be largely ineffective. Indeed, Congress had already attempted to address discriminatory lending practices through laws that bar discrimination in lending, such as the Equal Credit Opportunity Act, enacted in 1974 and amended many times since then. Congress, therefore, could reasonably assume, based on the Boston study, and its legislative experience regarding discriminatory lending practices, that minority applicants for licenses issued in spectrum auctions would face substantial (albeit subtle) barriers to obtaining financing. Any legal remedies, even if effective, would, moreover, come too late to ensure that minorities are able to participate in spectrum auctions and obtain licenses.

100. Similar evidence presented in testimony before the House Minority Enterprise Subcommittee on May 20, 1994 indicates that African American business borrowers have difficulty raising capital mainly because they have less equity to invest, they receive fewer loan dollars per dollar of equity investment, and they are less likely to have alternate loan sources, such as affluent family or friends. Assuming two hypothetical college educated, similarly-situated male entrepreneurs, one black, one white, the testimony indicated that the white candidate would have access to $1.85 in bank loans for each dollar of owner equity invested, while the black candidate would have access to only $1.16. According to the testimony, the problems associated with lower incomes and intergenerational wealth, as well as the discriminatory treatment minorities receive from financial institutions, make it much more likely that minorities will be shut out of capital intensive industries, such as telecommunications. This testimony also noted that African American representation in communications is so low that it was not possible to generate meaningful summary statistics on underrepresentation.[69]

101. The inability to access capital is also a major impediment to the successful participation of women in broadband PCS auctions. In enacting the Women's Business Ownership Act in 1988, Congress made findings that women, as a group, are subject to discrimination that adversely affects their ability to raise or secure capital.[70] As AWRT documents, these discriminatory barriers still exist today. Indeed, AWRT reports that while venture capital is an important source of funding for telecommunications companies, women-owned companies received only approximately one percent of the $3 billion invested by institutional venture capitalists in 1993. Citing a 1992 National Women's Business Council report, AWRT further argues that even successful women-owned companies did not overcome these financing obstacles after they had reached a level of funding and profitability adequate for most other businesses.[71]

102. A study prepared in 1993 by the National Foundation for Women Business Owners (NFWBO) further illustrates the barriers faced by women-owned businesses. For example, it finds that women-owned firms are 22 percent more likely to report problems dealing with their banks than are businesses at large. In addition, the NFWBO study finds that the largest single type of short-term financing used by women business owners is credit cards and that over half of women-owned firms use credit cards for such purposes, as compared to 18 percent of all small to medium-sized businesses, which generally use bank loans and vendor credit for short-term credit needs. With regard to long-term financing, the study states that a greater proportion of women-owned firms are turning, or are forced to turn, to private sources, and to a wider variety of sources, to fulfill their needs. Based on these findings, the NFWBO study concludes that removal of financial barriers would encourage stronger growth among women-owned businesses, resulting in much greater growth throughout the economy.[72]

103. If we are to meet the congressional goals of promoting economic opportunity and competition by disseminating licenses among a wide variety of providers, we must find ways to counteract these barriers to entry. Over the years, both Congress and the Commission have tried various methods to enhance access to the broadcast and cable industries by minorities and women. For example, in the late 1960s, the FCC began to promote nondiscriminatory employment policies by broadcast licensees. These equal employment opportunity efforts have taken the form of Commission rules and policies that require licensees not to discriminate, to report hiring and promotion statistics, and to implement affirmative action programs.[73] The Commission also has adopted similar equal employment rules for licensees in the common carrier, public mobile, and international fixed public radio communication services,[74] as well for cable operators.[75] The cable EEO rules were recently revised as part of the implementation of the Cable Act of 1992, and they now apply to cable entities, satellite master antenna television operators serving 50 or more subscribers and any multichannel video programming distributor.[76]

104. A decade after it first addressed discriminatory hiring practices, the Commission began to look into the serious underrepresentation of minorities among owners of broadcast stations. Recognizing that it could play an important role in alleviating this problem through the licensing process, the Commission adopted its tax certificate and distress sale policies in 1978 to encourage minority ownership of broadcast facilities.[77] It noted that full minority participation in the ownership and management of broadcast facilities would result in a more diverse selection of programming and would inevitably enhance the diversity of control of a

[69] Testimony of Dr. Timothy Bates, Visiting Fellow, The Woodrow Wilson Center, before the U.S. House of Representatives Committee on Small Business, Subcommittee on Minority Enterprise, Finance, and Urban Development (House Minority Enterprise Subcommittee), May 20, 1994.

[70] Pub. L. 100–533 (1988). In 1991, Congress enacted the Women's Business Development Act of 1991 to further assist the development of small businesses owned by women. *See* Pub. L. 102–191 (1991).

[71] *See* Letter of AWRT to the Honorable Kweisi Mfume, Chairman, House Minority Enterprise Subcommittee, June 1, 1994.

[72] *See* The National Foundation for Women Business Owners, Financing the Business, A Report on Financial Issues from the 1992 Biennial Membership Survey of Women Business Owners, October 1993.

[73] 47 CFR § 73.2080 (broadcasters must "establish, maintain, and carry out a positive continuing program of specific practices designed to ensure equal opportunity in every aspect of the station's employment policy and practice").

[74] 47 CFR §§ 21.307, 22.307, 23.55.

[75] 47 CFR §§ 76.71–76.79.

[76] *See* 47 U.S.C. § 554. In addition, the Commission has proposed adopting EEO requirements for all CMRS licensees, including PCS licensees. Regulatory Treatment of Mobile Services, Further Notice of Proposed Rule Making, GN Docket 93–252, FCC 94–100, 59 FR 28042, May 31, 1994.

[77] *See* Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, 92 FCC 2d 849 (1982) (1982 Policy Statement); *see also* Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 FCC 2d 979 (1978) (1978 Policy Statement).

valuable resource, the electromagnetic spectrum.[78]

105. In implementing these ownership policies, the Commission identified lack of access to capital as one of the principal barriers to minority entry. Thus, in 1981, the Commission created the Advisory Committee on Alternative Financing for Minority Opportunities in Telecommunications (the "Rivera Committee") to investigate financing methods and to give recommendations to the FCC on ways to encourage minority ownership of telecommunications facilities.[79] The Rivera Committee confirmed that the shortage of capital is a principal problem facing minorities seeking ownership opportunities and further found that this shortage was due to minority inexperience in obtaining financial institution misconceptions about potential minority borrowers, and marketplace structural problems, such as high interest rates and low broadcast industry earnings growth. Among other things, the Rivera Committee suggested educational and outreach programs and expanding the tax certificate program to nonbroadcast properties such as common carrier and land mobile. In response to this recommendation, the FCC submitted draft legislation to Congress proposing to broaden the scope of the Commission's authority to issue tax certificates in connection with the sale or exchange of any type of telecommunications facilities.[80] On March 24, 1983, The Minority Telecommunications Ownership Tax Act of 1983, H.R. 2331, which incorporated the Commission's proposals, was introduced in the House of Representatives.[81]

106. Congress also took steps to address the problem of minority underrepresentation in communications. In 1982, it mandated the grant of a "significant preference" to minority applicants participating in lotteries for spectrum-based services. 47 U.S.C. § 309(i)(3)(A). And, in 1988 and each fiscal year thereafter, Congress attached a provision to the FCC appropriations legislation, which precluded the Commission from spending any appropriated funds to examine or change its minority broadcast preference policies.[82]

107. These efforts have met with limited success. The record shows that women and minorities have not gained substantial ownership representation in either the broadcast or non-broadcast telecommunications industries. For example, a 1993 report conducted by the National Telecommunications and Information Administration's (NTIA) Minority Telecommunications Development Program shows that, as of August 1993, only 2.7 percent of commercial broadcast stations were owned by minorities. Another study commissioned by the Commerce Department's Minority Business Development Agency in 1991 found that only one half of one percent of the telecommunications firms in the country were minority owned. The study also identified only 15 minority cable operators and 11 minority firms engaged in the delivery of cellular, specialized mobile radio, radio paging or messaging services in the United States.[83] And, according to the last available U.S. Census, only 24 percent of the communications firms in the country were owned by women, and these women-owned firms generated only approximately 8.7 percent of the revenues earned by communications companies.[84] When companies without paid employees are removed from the equation, firms with women owners represent only 14.5 percent of the communications companies in the country.[85] One result of these low numbers is that there are very few minority or women-owned businesses that bring experience or infrastructure to PCS. They thus face an additional barrier relative to many existing service providers.

108. Small businesses also have not become major participants in the telecommunications industry. For instance, one commenter asserts that ten large companies—six Regional Bell Operating Companies (RBOCs), AirTouch (formerly owned by Pacific Telesis), McCaw, GTE and Sprint—control nearly 86 percent of the cellular industry. This commenter further contends that nine of these ten companies control 95 percent of the cellular licenses and population in the 50 BTAs that have one million or more people.[86]

109. Congress directed the Commission to ensure that, together with other designated entities, rural telephone companies have the opportunity to participate in the provision of PCS. Rural areas, because of their more dispersed populations, tend to be less profitable to serve than more densely populated urban areas. Therefore, service to these areas may not be a priority for many PCS licensees. Rural telephone companies, however, are well positioned because of their existing infrastructure to serve these areas profitably. We, therefore, have adopted special provisions to encourage their participation, increasing the likelihood of rapid introduction of service to rural areas.

110. In the new auction law, Congress directed the Commission to remedy this serious imbalance in the participation by certain groups, especially minorities and women. The record indicates that, in the absence of meaningful efforts to assist designated entities, there would be good reason to think that participation by these groups, particularly businesses owned by women and minorities, would continue to be severely limited. Indeed, the auction law itself envisions a process that requires payment of funds to acquire an initial license, unlike existing licensing methods such as comparative hearings or lotteries. It is therefore possible that participation by those with limited access to capital could be further diminished by operation of the statute, absent affirmative provisions to create competitive opportunity for designated entities. The measures we adopt in this *Fifth Report and Order* thus will carry out Congress's directive to provide meaningful opportunities for small

[78] Because of the role of cable television systems in retransmitting broadcast signals, the Commission has also issued tax certificates in connection with sales of cable systems. *See* Statement of Policy on Minority Ownership of CATV Systems, FCC 82-524, released December 22, 1982.

[79] Strategies for Advancing Minority Ownership Opportunities in Telecommunications, The Final Report of the Advisory Committee on Alternative Financing for Minority Opportunities in Telecommunications to the Federal Communications Commission, May 1982 (Rivera Committee Report).

[80] *See* Federal Communications Draft Legislation Revising Section 1071 of the Internal Revenue Code of 1994 (January 17, 1983).

[81] The Minority Telecommunications Ownership Tax Act of 1983, H.R. 2331, 98th Congress, 1st Sess., March 24, 1983.

[82] *See* Continuing Appropriations Act for Fiscal Year 1988, Pub. L. 100-102, 101 Stat. 1329-31; Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1994, Pub. L. 103-121, 107 Stat. 1167.

[83] *See* Testimony of Larry Irving, Assistant Secretary for Communications and Information, U.S. Department of Commerce, before the House Minority Enterprise Subcommittee, May 20, 1994. In his testimony at this same hearing, FCC Chairman Reed Hundt cited some of these statistics and noted that in light of this serious underrepresentation, there remains "a fundamental obligation for both Congress and the FCC to examine new and creative ways to ensure minority opportunity." Testimony of Reed E. Hundt, Chairman, Federal Communications Commission, before the House Minority Enterprise Subcommittee, May 20, 1994.

[84] *See* Women-Owned Businesses, 1987 Economic Censuses, U.S. Department of Commerce, issued August 1990, at 7, 147. The census data includes partnerships, and subchapter S corporations. We have no statistics regarding women representation among owners of larger communications companies.

[85] *Id.*

[86] *Ex parte* filing of DCR Communications, May 31, 1994.

entities, rural telephone companies, and businesses owned by women and minorities to provide broadband PCS services. The rules also are expressly designed to address the funding problems that face these groups and that are their principal barriers to entry.

111. We also intend that designated entities who win licenses have the opportunity to become strong competitors in this service. While the new broadband PCS service presents tremendous opportunities for designated entities to participate in the provision of the next generation of innovative wireless mobile telecommunications services, it is expected to be a highly competitive service, and the estimated costs of acquiring a license and constructing facilities are substantial. In the *Broadband PCS Reconsideration Order*, which was adopted June 9, 1994, we took specific steps to assist designated entities to become viable competitors in the provision of broadband PCS. For example, we modified the PCS spectrum allocation plan by shifting all channels blocks to a contiguous lower segment of the "emerging technologies band" in part to bolster the ability of designated entities to obtain more competitively viable licenses. In addition, we relaxed some of the ownership and attribution rules with respect to cellular operators' participation in PCS to foster investment in designated entity ventures,[87] and we also relaxed the PCS/cellular cross-ownership rule for designated entities with cellular holdings to allow them to further expand their opportunities in broadband PCS.[88] Further, we took steps that will result in lower capital costs for designated entities that obtain PCS licenses, including adoption of a band plan that will reduce the costs of clearing the PCS spectrum of incumbent microwave users as well as relaxing the construction requirements.

112. The measures we establish today to encourage the entry of designated entities also are designed to promote strong, long-term *bona fide* competitors. For example, we have revised the definition of a small business set forth in the *Second Report and Order* to include entities with up to $40 million in gross revenues, and we will allow these small businesses to pool their resources and form consortia to bid in the entrepreneurs' blocks. We also adopt rules that allow entrepreneurial businesses, small businesses, and businesses owned by women and minorities to raise capital by attracting passive equity investors. At the same time, we have designed these rules to ensure that the special provisions adopted for such businesses accrue to the intended beneficiaries.

B. Summary of Special Provisions for Designated Entities

113. As discussed more fully below, many commenters in this proceeding believe that the inability of designated entities to obtain adequate funding has a profoundly adverse effect on the potential for these businesses to bid successfully in auctions against very large, established businesses. Therefore, we take a number of steps in this Order to help address this imbalance.

- We establish two "entrepreneurs' blocks" (frequency blocks C and F) in which large companies (those with $125 million or more in annual gross revenues or $500 million or more in total assets) will be prohibited from bidding.
- Bidding credits will be granted both to small businesses and to businesses owned by women and minorities in the entrepreneurs' blocks to provide them with a better opportunity to compete successfully in broadband PCS auctions.
- Certain winning bidders in frequency blocks C and F will be permitted to pay the license price in installments, and the interest rate and moratorium on principal payments will be adjusted to assist small businesses and women and minority-owned businesses.
- We adopt a tax certificate program for minority and women-owned businesses, which will provide additional assistance in their efforts to attract equity investors.
- Rural telephone companies will be allowed to obtain broadband PCS licenses that are geographically partitioned from larger PCS service areas to provide them more flexibility to serve rural subscribers.[89]
- Bidders in the entrepreneurs' blocks will be required to pay an upfront payment of only $0.015 per MHz per pop, in contrast to the $0.02 per MHz per pop required in the other blocks.

114. The following chart highlights the major provisions adopted for businesses bidding in the entrepreneurs' blocks.[90]

	Bidding credits (percent)	Installment payments	Tax certificates for investors
Entrepreneurial Businesses ($40 MM–$125 MM in revenue and less than $500 MM in total assets).	0	Interest only for 1 year; rate equal to 10-year Treasury note plus 2.5%; (for businesses with revenues greater than $75 MM, available only in top 50 markets).	No.
Small Businesses (less than $40 MM revenues)	10	Interest only for 2 years; rate equal to 10-year Treasury note plus 2.5%.	No.
Businesses Owned by Minorities and/or Women ($40 MM–$125 MM in revenues).	15	Interest only for 3 years; rate equal to 10-year Treasury note.	Yes.
Small Businesses Owned by Minorities and/or Women (less than $40 MM revenues).	25	Interest only for 5 years; rate equal to 10-year Treasury note.	Yes.

[87] Broadband PCS Reconsideration Order at ¶ 127.

[88] *Id.* at ¶ 125.

[89] In a Further Notice of Proposed Rule Making in this docket, we will seek comment on whether a partitioning option for small businesses or businesses owned by women or minorities, as suggested by some of the commenters, may be appropriate. In that Further Notice, we also will seek comment or whether the Commission should impose a restriction on the assignment or transfer of control of partitioned licenses by rural telephone companies or other designated entities for some period of time.

[90] This table is not comprehensive and therefore it does not present all the provisions established for designated entities, especially those available outside the entrepreneurs' blocks.

C. Summary of Eligibility Requirements and Definitions

1. Entrepreneurs' Blocks and Small Business Eligibility

115. The following points summarize the principal rules regarding eligibility to bid in the entrepreneurs' blocks and to qualify as a small business. In addition, they summarize the attribution rules we will use to assess whether an applicant satisfies the various financial thresholds. More precise details are discussed in the subsections that follow.

Financial Caps

- *Entrepreneurs' Blocks:* To bid in the entrepreneurs' blocks, the applicant, including attributable investors and affiliates, must cumulatively have less than $125 million in gross revenues and less than $500 million in total assets. No individual attributable investor or affiliate may have $100 million or more in personal net worth.
- *Small Business:* To qualify for special measures accorded a small business, the applicant, including attributable investors and affiliates, must cumulatively have less than $40 million in gross revenues. No individual attributable investor or affiliate may have $40 million or more in personal net worth.

Attribution Rules

- *Control Group.* The gross revenues, total assets and personal net worth of certain investors are not considered so long as the applicant has a "control group" consisting of one or more individuals or entities that control the applicant, hold at least 25 percent of the equity and, for corporations, at least 50.1 percent of the voting stock.
- The gross revenues, total assets and personal net worth of each member of the control group are counted toward the financial caps.
- *Other Investors.* Where the applicant has a control group, the gross revenues, total assets and personal net worth of any other investor are not considered unless the investor holds 25 percent or more of the applicant's passive equity (which, for corporations, includes as much as 5 percent of the voting stock).
- *Passive Equity.* Passive equity is limited partnership or non-voting stock interests or voting stock interests of 5 percent or less of the issued and outstanding voting stock.
- *Option for Minority or Woman-Owned Applicants.* If the control group (considering entirely of women and/or minorities) owns at least 50.1 percent of the equity and, for corporations, at least 50.1 percent of the voting stock, then the gross revenues, total assets and personal net worth of any other investor are not considered unless the investor holds more than 49.9 percent of the applicant's passive equity (which, for corporations, includes as much as 5 percent of the voting stock).
- *Affiliates.* The gross revenues, assets and personal net worth of outside interests held by the applicant (and the attributable investors in the applicant) are counted toward the financial caps if the applicant (or the attributable investors in the applicant) control or have power to control the outside interests or if the applicant (or the attributable investors in the applicant) is under the control of the outside interests. The financial interests of spouses are also attributed to each other.

2. Definition of Women and/or Minority-Owned Business

116. The points below summarize the two structural options available to firms that wish to qualify for the special provisions adopted for businesses owned by minorities and women. These options will be discussed in more detail in the text that follows.

50.1% Equity Option

If women and/or minority principals control the applicant and own at least:
- 50.1 percent of the equity
- and 50.1 percent of the voting stock, in the case of corporations
- Then any other investor may hold:
- not more than 49.9 percent of the passive equity (which, for corporations, includes as much as 5 percent of the voting stock).

25% Equity Option

If women and/or minority principals control the applicant and own at least:
- 25 percent of the equity
- and 50.1 percent of the voting stock, in the case of corporations
- Then any other investor may hold:
- less than 25 percent of the passive equity (for corporations, any other investor also may hold not more than 5 percent of the voting stock).

117. We also have imposed numerous strict requirements to deter shams and fronts and to prevent abuse of the incentives for designated entities. The Commission intends to enforce vigorously each of these requirements. All licensees in the entrepreneurs' blocks are prohibited from voluntarily assigning or transferring their licenses for three years after grant of the application and for the next two years may assign or transfer licenses only to other entities that satisfy the financial criteria to bid in the entrepreneurs' blocks. Furthermore, a business that seeks to acquire a license from an entity paying in installments during the license period will be required, as a condition of the grant, to pay according to the installment payment terms for which it qualifies, unless they are more favorable in which case the existing terms apply. If the purchaser is not qualified for any installment payment plan, we will require payment of the unpaid balance in full before the sale will be approved. We also adopt rules to ensure that the value of the bidding credit is returned to the government in the event of a transfer of control or assignment of the license to an entity not qualifying for bidding credits or not qualifying for as high a bidding credit as the seller. In addition, we impose a one-year holding period on licenses received through the benefit of a tax certificate. We will also random audits to ensure that designated entities *de facto* and *de jure* control. These steps and our eligibility and affiliation rules will help to ensure that the measures we adopt are utilized only by *bona fide* eligible entities and to deter winning bidders seeking only to make a quick profit on the sale of PCS licenses. Ultimately, we believe that we will best fulfill our statutory mandate by creating powerful incentives for *bona fide* designated entities to attract the capital necessary to compete both in auctions for broadband PCS and in the provision of service, and be requiring a strict holding period to ensure that the public receives the benefit of this diverse ownership.

D. The Entrepreneurs' Blocks

118. As discussed above, because the auction process itself requires additional expenditures of capital to acquire licenses, this new licensing procedure in many respects holds the potential to erect an additional barrier to entry that had not existed even under the Act's previous licensing methods, comparative hearings and lotteries. As reflected in the House Committee Report, Congress was well aware of that possibility and wanted to ensure that competitive bidding should not exclude smaller entities from obtaining licenses.[91] The inability of small businesses and businesses owned by women and minorities to obtain adequate private financing creates a serious imbalance between these companies and large businesses in their prospects for competing successfully in broadband PCS auctions.

119. In addition, commenters contend that, at the outset, a small PCS business and a large local exchange carrier would value a license very differently. DCR

[91] *See* H.R. Rep. No. 103-111 at 255.

Communications, for example, argues that a local telephone company would have much lower costs of construction and operation through equipment volume discounts, existing billing, accounting, order entry and processing, and customer service systems. Furthermore, DCR contends, the telephone company might decide to use its PCS system simply as an adjunct to a cellular system it owns in a nearby market and market wireless handsets that operate in both frequencies. DCR concludes that the telephone company could justify paying the higher value for the license because it has more ready access to capital.[92]

120. This concern is echoed by a number of commenters. NTIA agrees that capital formation is a major barrier to full participation by small and minority-owned firms, asserting that capital-constrained firms are likely to assign lower values to PCS licenses than other bidders and are therefore less likely to obtain licenses in an open bidding market.[93] Another party, Impulse Telecommunications Corporation, states that "giants" can justify huge bids because they have billions of dollars of capital as well as an existing administrative, billing, operating and marketing infrastructure. In addition, Impulse asserts that PCS licenses are likely to hold strategic value for large long distance and local telephone companies, for such purposes as critical wireless access.[94] Similarly, Tri-State Radio Company states that the allocation of substantial amounts of spectrum to services such as broadband PCS has generated extensive industry expectation and speculation. With the financial stakes so high, Tri-State argues that designated entities will have little ability to bid successfully against "communications behemoths with almost unlimited financial resources."[95]

121. We agree that small entities stand little chance of acquiring licenses in these broadband auctions if required to bid against existing large companies, particularly large telephone, cellular and cable television companies. If one or more of these big firms targets a market for strategic reasons, there is almost no likelihood that it could be outbid by a small business. In the Notice, we proposed that one means to address such problems would be to set aside specific spectrum blocks in broadband PCS that would be reserved for bidding purposes to the designated entities.[96] In this Order, we have decided to adopt a modification of this proposal, which should greatly enhance the ability of all designated entities to enter auctions and bid successfully for broadband PCS licenses. Specifically, we establish two entrepreneurs' blocks, C and F, in which eligibility to bid is limited to entities that, together with their affiliates and certain investors, have gross revenues of less than $125 million in each of the last two years and total assets of less than $500 million. In addition, we will prohibit an applicant from bidding in these blocks if any one individual investor in the applicant has $100 million or greater in personal net worth. Together with a reduced upfront payment requirement, we believe this proposal will encourage smaller entities to enter the auctions for broadband PCS licenses and will ensure that "entrepreneurial" businesses are granted nearly half of all the broadband PCS licenses being auctioned.

122. NTIA strongly supports this measure, arguing that it "would be the most direct mechanism for preserving opportunities for small companies in an auction environment." According to NTIA, reserving two entrepreneurs' blocks helps significantly in satisfying the congressional directive that competitive bidding not result in an increase in concentration in the telecommunications industries.[97] Similarly, Columbia PCS contends that establishment of entrepreneurs' blocks "provides a good balance between Congress's clear mandate to provide opportunities for designated entities and avoid undue concentration of PCS licenses on the one hand with the goal of capturing the value of allocated spectrum for the American public on the other."[98]

123. The $125 million gross revenue/ $500 million asset caps have the effect of excluding the large companies that would easily be able to outbid designated entities and frustrate Congress's goal of disseminating licenses among a diversity of licensees. At the same time, this restriction does not exclude many firms that, while not large in comparison with other telecommunications companies, nevertheless are likely to have the financial ability to provide sustained competition for the PCS licensees on the MTA blocks. For example, the $125 million gross revenue figure corresponds roughly to the Commission's definition of a Tier 2, or medium-sized, local exchange carrier,[99] and would include virtually all of the independently owned rural telephone companies. Limiting the personal net worth of any individual investor or affiliate of the applicant to $100 million will prevent a very wealthy individual from leveraging his or her personal assets to allow the applicant to circumvent the size limitations of the entrepreneurs' blocks.

124. As noted previously, many commenters asked us to reserve spectrum blocks for bidding only by designated entities. The entrepreneurs' blocks plan adopted herein is similar in concept to the set-aside proposals set forth by the commenters. Therefore, in determining which of the blocks in each market should constitute the entrepreneurs' blocks, we paid close attention to the concerns of those who had advocated set-asides in the first instance. Although the broadband PCS band plan has changed since the Commission first proposed set-asides in the Notice and parties first submitted their proposals in this docket, the general concerns of these parties about

[92] *Ex parte* filing of DCR Communications, May 31, 1994.

[93] NTIA Comments at 26.

[94] *Ex parte* filing of Impulse Telecommunications Corporation, May 27, 1994.

[95] Tri-State Comments at 11. *See also* comments of NAMTEC (designated entities should not have to compete against "more entrenched parties"), National Rural Telecom Association (the only way small entities can have real opportunity is if they do not have to bid against "extremely 'deep pocket' applicants"), The Small Business PCS Association (it will not be possible for designated entities "to compete in an auction against some of the largest companies and wealthiest individuals in the United States"), JMP (without preferences for designated entities, large telecommunications firms will "monopolize" the auctions), Minority PCS Coalition at 6, Telephone Association of Michigan at 9–10, Iowa Network at 9, AWRT at 8, Telephone Electronics at 7–8, Sloan at 2.

[96] Notice at ¶ 121.

[97] *Ex parte* filing of NTIA, June 21, 1994.

[98] *Ex parte* filing of Columbia PCS, June 2, 1994. Columbia PCS further states that this measure would spur investment in designated entities and increase their ability to compete against one another and others. *Id.*

[99] Local exchange carriers are categorized as Tier 1 and Tier 2 companies by applying the criterion that Sections 32.11(a) and 32.11(e) of the Commission's Rules use to distinguish Class A and Class B companies, respectively. Class A companies are those companies having annual revenues from regulated telecommunications operations of $100 million or more; Class B companies are those companies having annual revenues from regulated telecommunications operations of less than $100 million. The initial classification of a company is determined by its lowest annual operating revenues for the five immediately preceding years. A company's classification is changed when its annual operating revenue exceeds or is under the $100 million mark in each of five consecutive years. The Commission imposes more relaxed regulatory requirements on Tier 2 LECs than on Tier 1 LECs. *See* Automated Reporting Requirements for Certain Class A and Tier 1 Telephone Companies, 2 FCC Rcd 5770, 5772, 52 FR 35918, Sept. 24, 1987; Commission Requirements for Cost Support Material to be Filed with 1994 Annual Access Tariffs and for Other Cost Support Material, 9 FCC Rcd 1060 n. 3 (Comm. Carr. Bur. 1994); Commission Requirements for Cost Support Material to be Filed with Access Tariffs on March 1, 1985, Public Notice, Mimeo No. 2133 (Comm. Carr. Bur. released Jan. 25, 1985).

the amount of spectrum and geographic territory necessary to compete effectively remain pertinent. Moreover, we adopted the revised broadband PCS band plan in advance of this Order, which afforded interested parties the opportunity to make additional presentations on designated entity incentives in light of the new band plan.

125. A number of commenters approved of the Notice's proposal to set aside one 20 MHz BTA block and one 10 MHz BTA block. The Small Business PCS Association asserted, moreover, that implementation of the set-aside proposal would offer "a major opportunity" for small businesses, that a 20 MHz block is "probably ideal" for development by small entrepreneurs, and that even a 10 MHz block could sustain a viable PCS System.[100] Telepoint makes similar assertions.

126. A considerable number of commenters, however, contended that the Commission's proposal to set aside a 20 MHz block and a 10 MHz block would be inadequate. Telephone Electronics and AWCC asserted, for instance, that a provider operating with only a 10 MHz or 20 MHz license could not offer a full range of PCS services with quality equivalent to the like offerings of a provider operating with a 20 MHz license. Unique and AWCC thus argued that PCS licensees in the set-aside spectrum would consequently be unable to obtain commercial funding on terms as favorable to those available to operators with 30 MHz licenses. Independent Cellular Network maintained that the competitive disadvantages of the proposed set-aside channels, due to their lesser bandwidth, could not be obviated through aggregation, because of the greater transaction costs that would be incurred above those associated with acquisition of a single 30 MHz license.

127. We believe that designating frequency blocks C and F as entrepreneurs' blocks meets the concerns of most of the designated entity commenters. Frequency block C provides 30 MHz of spectrum and, thus, satisfies the concerns of those parties who believe they must have this amount of bandwidth to compete effectively. The MHz block F license, on the other hand, fulfills the needs of other designated entities who argued in favor of small blocks. Moreover, since the C and F blocks are adjacent, they can be aggregated efficiently by one or more licensees. This plan also makes available to eligible bidders in the entrepreneurs' blocks 986 licenses, or slightly under 50 percent of all broadband PCS licenses. Finally, it does not foreclose opportunities for other parties. Bidders ineligible for the entrepreneurs' blocks will have the opportunity to bid on 99 30 MHz MTA licenses throughout the country, as well as 986 10 MHz BTA licenses nationwide.

128. *Five-Year Holding and Limited Transfer Period.* In establishing the entrepreneurs' blocks, we recognize the congressionally mandated objective will not be served if parties take advantage of bidding in these blocks and immediately assign or transfer control of the authorizations to other entities. Such a practice could unjustly enrich the auction winners and would undermine the congressional goal of giving designated entities the opportunity to provide spectrum-based services. Therefore, we will prohibit licensees in the entrepreneurs' blocks from voluntarily assigning or transferring control of their licenses for a period of three years from the date of the license grant.[101] And, for the next two years of the license term, we will permit the licensee to assign or transfer control of its authorization only to an entity that satisfies the entrepreneurs' blocks entry criteria.[102] During this five-year period, licensees will continue to be bound by the financial eligibility requirements, as set forth below.[103] In addition, a transferee or assignee who receives a C or F block license during the five-year period will remain subject to the transfer restrictions for the balance of the holding period.[104] The Commission will conduct random pre and post-auction audits to ensure that applicants receiving preferences are in compliance with the FCC's rules.

129. Our goals are to create significant opportunities for entrepreneurs, small businesses, and businesses owned by minorities and women to compete in auctions for licenses and attract sufficient capital to build-out those licenses and provide service. We recognize the critical need to attract capital, which requires flexibility. We are very concerned, however, that such flexibility not undermine our more fundamental objective, which is to ensure that designated entities retain *de facto* and *de jure* control of their companies at all times. We believe that the five-year holding and limited transfer period, which we have adopted in this Order, will help to promote this objective. Some question remains, however, as to whether a longer holding period (*e.g.*, seven years) would more fully meet this goal.

E. Bidding Credits

130. In the Notice, we indicated that we might use spectrum set-asides for designated entities in the broadband PCS service but did not expressly propose to use bidding credits. For two other services, IVDS and narrowband PCS, however, we did conclude recently that the use of bidding credits in auctions would be an effective tool to ensure that women and minority-owned businesses have opportunities to participate in the provision of those services.[105] On further reflection, and based on the many comments in the record favoring this approach, we believe that bidding credits are necessary to ensure that women and minority-owned businesses and small businesses participate in broadband PCS. Accordingly, we adopt a bidding credit plan for winning bidders in the entrepreneurs' blocks that gives small businesses a 10 percent credit, women and minority-owned businesses a 15 percent credit, and small businesses owned by women and minorities an aggregate credit of 25 percent.

131. At the outset, we note that we are confining the bidding credit option to the entrepreneurs' blocks because, given the extremely capital intensive nature of

[100] The Small Business PCS Association stated that a small business operating in a single BTA service region could effectively compete with large companies operating in larger service areas. This is so, it contended, mainly because PCS providers with large service areas would not realize such great economies of scale as many have supposed and because small firms could counter such advantages by forming buying cooperatives. Comments of Small Business PCS Association at 2–3.

[101] We will consider exceptions to this three-year holding period rule on a case-by-case basis in the event of a judicial order decreeing bankruptcy or a judicial foreclosure if the licensee proposes to assign or transfer its authorization to an entity that meets the financial thresholds for bidding in the entrepreneurs' blocks. In addition, we note that a transfer is considered "involuntary" if it is made pursuant to a court decree requiring the sale or transfer of the licensee's stock or assets. *Paramount Pictures, Inc.*, 43 FCC 453 (1949); *C.f. William Penn Broadcasting*, 16 FCC 2d 1050 (1969).

[102] We note that a licensee assigning its authorization pursuant to this limited transfer period might be subject to the repayment provisions associated with installment payments and bidding credits. *See infra* ¶¶ 134, 141. We also clarify that rural telephone companies receiving partitioned licenses in the entrepreneurs' blocks are subject to this five-year holding and limited transfer period.

[103] *See infra* ¶¶ 156–168. In addition, for purposes of the installment payment and bidding credit provisions set forth below, licensees will continue to be bound by the financial eligibility requirements throughout the term of the license.

[104] For example, if a C-block authorization is assigned to an eligible business in year four of the license term, it will be required to hold that license until the original five-year period expires, subject to the same exceptions that applied to the original licensee.

[105] *See* Third Report and Order, FCC 94–98, 59 FR 26741, May 24, 1994; Fourth Report and Order, 9 FCC Rcd 2330, 59 FR 24947, May 13, 1994.

broadband PCS, we do not think bidding credits in an uninsulated block would have a meaningful effect.[106] Indeed, in *ex parte* presentations to the Commission, many commenters have indicated that, without spectrum set-asides for broadband PCS, bidding credits would not be sufficient to assist designated entities in outbidding very large entities who are likely to bid for licenses in this service. DCR Communications states, for example, that all of the existing large telecommunications carriers can justify must larger payments for licenses than could an individual entrepreneur, regardless of a bidder's credit. Therefore, it believes no entrepreneur will win a bid for any PCS market that is desirable to any of the large companies.[107] Many other commenters echo this concern.[108] Some state that, if bidding credits alone are used, extraordinarily large credits, even on the order of 50 percent or more, would be ineffective.[109] As described above, in order to afford designated entities a realistic opportunity to obtain licenses in the broadband PCS service, we have taken measures to exclude very large businesses from bidding for licenses in the C and F blocks. These measures will enhance the value of the bidding credits for small businesses and businesses owned by minorities and women. In this context, we believe that bidding credits will have a significant effect on the ability of small businesses and businesses owned by women and minorities to participate successfully in auctions for licenses in these blocks.

132. As explained above, the capital access problems faced by small firms and women and minority-owned firms make special provisions like bidding credits appropriate for these designated entities in broadband PCS.[110] In effect, the bidding credit will function as a discount on the bid price a firm will actually have to pay to obtain a license and, thus, will address directly the financing obstacles encountered by these entities. Moreover, as noted previously, women and minorities face discrimination in lending and other barriers to entry not encountered by other firms, including other designated entities. Therefore, as one of the measures designed to counter these increased capital formation difficulties, we will provide them with a slightly higher bidding credit than that granted to small businesses. Thus, women and minorities will receive a 15 percent payment discount that is applied against the amounts they bid on licenses. Absent such measures targeted specifically to women and minorities, it would be virtually impossible to assure that these groups achieve any meaningful measure of opportunity for actual participation in the provision of broadband PCS. Similarly, it is reasonable to assume that small firms owned by women and minorities suffer the problems endemic to both groups and that a cumulative bidding credit of 25 percent is therefore appropriate. We believe that these measures will help women and minorities to attract the capital necessary for obtaining a license and constructing and operating a broadband PCS system, consistent with the intent of Congress.

133. The definition of a minority or women-owned firm and of a small business are set forth below.[111] To receive a 10 percent bidding credit, a small business must satisfy a gross revenue test. As explained more fully below in the small business definition section, a consortium consisting entirely of small businesses also is eligible for a 10 percent bidding credit even if the combined gross revenues of the consortium exceed the small business gross revenues threshold. In addition, a small business that is owned by women and minorities must satisfy the definition of a business owned by minorities and women as well as the small business definition to receive a 25 percent bidding credit. Finally, a consortium of small firms owned by women and/or minorities is eligible for a 25 percent bidding credit, provided that each member of the consortium meets the definition of a small business and a minority and/or women-owned firm.

134. *Unjust Enrichment Applicable to Bidding Credits.* To ensure that bidding credits benefit the parties to whom they are directed, we adopt strict repayment penalties. If, within the original term, a licensee applies to assign or transfer control of a license to an entity that is not eligible for as a high a level of bidding credit, then the difference between the bidding credit obtained by the assigning party and the bidding credit for which the acquiring party would qualify must be paid to the U.S. Treasury as a condition of approval of the transfer. For example, an assignment of a license from a small minority-owned firm to a women-owned firm with revenues greater than $40 million would require repayment of 10 percent of the original bid price (25 percent less 15 percent) to the Treasury. A sale to an entity that would not qualify for bidding credits will entail full payment of the bidding credit as a condition of transfer. Small businesses also will be bound by the financial eligibility rules during the entire license term as set forth below. Thus, if after licensing an investor purchases an "attributable" interest in the business and, as a result, the gross revenues of the firm exceed the $40 million small business cap, this repayment provision will apply.[112] These repayment provisions apply throughout the original term of the license to help promote the long-term holding of licenses by those parties receiving bidding credits.

F. Installment Payments

135. A significant barrier for most businesses small enough to qualify to bid in the entrepreneurs' blocks will be access to adequate private financing to ensure their ability to compete against larger firms in the PCS marketplace.[113] In the *Second Report and Order*, we concluded that installment payments are an effective means to address the inability of small businesses to obtain financing and will enable these entities to compete more effectively for the auctioned spectrum. We also determined that small businesses eligible for installment payments would only be required to pay half of the down payment (10 percent of the winning bid, as opposed to 20 percent) five days after the auction closes, with the remaining 10 percent payment deferred until five days after grant of the license. Finally, we indicated that installment payments should be made available to small

[106] We also are concerned that allowing bidding credits in the MTA blocks would increase substantially the incentive for businesses to engage in shams and fronts.

[107] *Ex parte* filing of DCR, May 31, 1994, at 4–5.

[108] *See ex parte* filings of DigiVox Corporation, May 31, 1994, at 3 (the use of bidding credits to the exclusion of frequency set-asides will not fulfill the objectives of Section 309(j)), Communications International Wireless Corp., May 27, 1994, at 1 (bidding credits alone cannot level the playing field between designated entities and members of the Fortune 100 companies), CWCC, May 27, 1994, at 2 (bidding credits alone cannot level the playing field for designated entities).

[109] *Ex parte* filings of AWCC, May 26, 1994 at 2, Columbia PCS, June 2, 1994 at 2.

[110] Although we did not grant bidding credits to small businesses in the narrowband PCS or IVDS services, we believe that, given the exponentially greater expense likely to be incurred in acquiring broadband PCS licenses and construct the systems, bidding credits are a proper means to ensure that these firms have the opportunity to participate in this service. We note that for narrowband PCS and IVDS, the cost of license acquisition and implementation of service is anticipated to be considerably more modest.

[111] *See infra* ¶¶ 172–192.

[112] *See infra* ¶¶ 158–168, for a discussion of which investor interests are "attributable" for purposes of calculating the gross revenues caps.

[113] *See e.g.*, comments of SBA Chief Counsel of Advocacy at 6, 20–21. NTIA at 27; SBAC Report at 2 (September 15, 1993).

businesses at an interest rate equal to the rate for U.S. Treasury obligations. *See Second Report and Order* at ¶¶ 236–240.

136. In light of the expected substantial capital required to acquire and construct broadband PCS licenses, we conclude that installment payments are an appropriate measure for most businesses that obtain broadband PCS licenses in the entrepreneurs' blocks. By allowing payment in installments, the government is in effect extending credit to licensees, thus reducing the amount of private financing needed prior to and after the auction. Such low cost government financing will promote long-term participation by these businesses, which, because of their smaller size, lack access to sufficient capital to compete effectively with larger PCS licensees. Under the rules we adopt today, installment payments are available to small entities that do not technically qualify as small businesses for purposes of other measures we have adopted, such as bidding credits. We believe, however, that, given the enormous costs of broadband PCS and the likelihood of very large participants in the other blocks, this option is fully consistent with the congressional intent in enacting Section 309(j)(4)(A) to avoid a competitive bidding program that has the effect of favoring incumbent providers of other communications services, with established revenue streams, over smaller entities.[114]

137. Under the plan we adopt here, all licensees that satisfy the gross revenues, total assets and personal net worth criteria to bid in the entrepreneurs' blocks will be allowed to pay in installments for licenses granted in those blocks in the 50 largest BTAs. In the smaller BTAs, however, only businesses owned by women and minorities and those licensees with less than $75 million in gross revenues will be able to use installment payments.[115] This distinction is based on the expected lower costs to acquire licenses and construct systems in the smaller BTAs. Thus, with the exception of companies owned by women or minorities, which face additional problems accessing capital, we do not think that a firm with gross revenues exceeding $75 million will require government financing to be competitive in the small BTAs.[116]

138. The installment payment option will enable qualified businesses to pay their winning bid over time. These businesses must make the applicable upfront payment in full before the auction, but are required to make a post-auction down payment equaling only ten percent of their winning bids, half of which will be due five business days after the auction closes. Payment of the other half of the down payment will be deferred until five business days after the license is granted. In general, the remaining 90 percent of the auction price will be paid in installments 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 plus 2.5 percent. Under this general rule, only payments of interest will be due for the first year with principal and interest payments amortized over the remaining nine years of the license. Timely payment of all installments will be a condition of the license grant and failure to make sure timely payment will be grounds for revocation of the license.[117]

139. *Enhanced Installment Payments.* As explained previously, small businesses and businesses owned by minorities and women face capital access difficulties not encountered by other firms and, thus, require special measures to ensure their opportunity to participate in broadband PCS. Accordingly, we will provide an "enhanced" installment payment plan for these entities. Pursuant to this enhanced installment payment plan, small businesses (as defined below) who win licenses in the entrepreneurs' blocks will be required to pay interest only for the first two years of the license term at the same interest rate as set forth in the general rule. Businesses owned by women and/or minorities will be able to make interest-only payments for three years. Interest will accrue at the Treasury note rate without the additional 2.5 percent.[118] And, finally, businesses that are both small and owned by women and/or minorities will be required to pay only interest for five years. Interest will accrue at the Treasury note rate.

140. These enhanced installment payments are narrowly tailored to the needs of the various designated entities, as reflected in the record in this proceeding. We believe that varying the moratorium on principal in the early years of the loan and varying the interest rate based on these needs will allow small businesses and companies owned by women and/or minorities to bid higher in auctions, thereby increasing their changes for obtaining licenses. In addition, it will allow them to concentrate their resources on infrastructure build-out and, therefore, it will increase the likelihood that they become viable PCS competitors.

141. *Unjust Enrichment Applicable to Installment Payments.* To ensure that large businesses do not become the unintended beneficiaries of measures meant for smaller firms, we will use the unjust enrichment provisions adopted in the *Second Report and Order* applicable to installment payments. Specifically, if a licensee that was awarded installment payments seeks to assign or transfer control of its license to an entity not meeting the applicable eligibility standards set out above during the term of the license, we will require payment of the remaining principal and any interest accrued through the date of assignment as a condition of the license assignment or transfer. *See Second Report and Order* at ¶ 263; 47 CFR 1.2111(c). Moreover, if an entity seeks to assign or transfer control of a license to an entity that does not qualify for as favorable an installment payment plan, the installment payment plan, if any, for which the acquiring entity qualifies will become effective immediately upon transfer. Thus, a higher interest rate and earlier payment of principal may begin to be applied. For example, a transfer of a license in the fourth year after license grant from a small minority-owned firm to a small non-minority owned firm would require that the firm begin principal payments and the balance would begin accruing interest at a rate 2.5 percent above the rate that had been in effect.[119] Finally, if an investor

[114] *See* H.R. Rep. No. 103–111 at 255 (Commission has the authority to design alternative payment schedules in order that the auction process does not inadvertently favor only those with "deep pockets" over new or small companies).

[115] We will apply the same $500 million total assets and $100 million personal net worth standards for purposes of determining eligibility for installment payments in all BTAs. The attribution rules set forth with regard to eligibility to bid in the entrepreneurs' blocks also will apply in all BTAs. *See infra* ¶¶ 158–168.

[116] We note that a consortium of small businesses is eligible for installment payments in any market so long as each member of the consortium satisfies the definition of a small business, as set forth in Section VII.J.2, *infra*.

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

[118] To be eligible for these "enhanced" installment payments, a firm must satisfy either of the two alternative definitions of a women or minority-owned business, as set forth in ¶¶ 181–192, *infra*, as well as the applicable financial caps.

[119] We recognize that because of the five-year holding and limited transfer requirements in the entrepreneurs' blocks, these unjust enrichment provisions have limited applicability during the first five years of the license term. Nevertheless, there are some situations in which licensees are permitted to assign or transfer their licenses during this period and the provisions would then apply if the buyer would not have been qualified for installment payments or as favorable an installment payment plan. Furthermore, the unjust enrichment

subsequently purchases an "attributable" interest in the businesses and, as a result, the gross revenues or total assets of the business exceed the applicable financial caps, this unjust enrichment provision will also apply.[120]

G. Tax Certificates

142. Congress instructed the Commission to consider the use of tax certificates to help ensure designated entity participation in spectrum-based services. *See* 47 U.S.C. § 309(j)(4)(D). In the *Second Report and Order* we observed that tax certificates could be useful as a means of attracting investors to designated entity enterprises and to encourage licensees to assign or transfer control of licenses to designated entities in post-auction transactions. We stated further that we would examine the feasibility of using this measure in subsequent service-specific auction rules. *Second Report and Order* at ¶ 251.

143. We believe that tax certificates, which allow the recipients to defer capital gains taxes made on sales, are an appropriate tool to assist women and minority-owned businesses to attract start-up capital from non-controlling investors in broadband PCS. As explained above, due to discrimination in private lending markets and other factors, these designated entities face added obstacles in accessing capital. Therefore, in order to ensure that such businesses have a meaningful opportunity to participate in auctions, it is necessary to adopt measures to encourage investment in minority and woman-owned companies. Moreover, because of the severe underrepresentation of women and minorities in telecommunications, we believe that it is appropriate to give PCS licensees the incentive, through the grant of tax certificates, to assign or transfer their authorizations to such entities in post-auction sales. This measure will provide added assurance that minority and women-owned entities have the opportunity to participate in broadband PCS services, as mandated by Congress. Accordingly, we will issue tax certificates to non-controlling initial investors in minority and women-owned broadband PCS applicants (in any frequency block), upon the sale of their non-controlling interests. We will also issue tax certificates to broadband PCS licensees (in any frequency block) who assign or transfer control of their licenses to minority and women-owned entities.

144. We have used tax certificates over the years to encourage broadcast licensees and cable television operators to transfer their stations and systems to minority buyers.[121] We also have granted tax certificates to shareholders in minority-controlled broadcast or cable entities who sell their shares, when such interests were acquired to assist in the financing of the acquisition of the facility.[122] These broadcast and cable tax certificates are issued pursuant to the Internal Revenue Code, 26 U.S.C. § 1071. While Congress' goal in authorizing tax certificates under Section 309(j)(4)(D) of the Act is somewhat different, and focuses on ensuring the opportunity for designated entities to participate in auctions and spectrum-based services, we think that tax certificates will be equally valuable in the broadband PCS context. Issuance of tax certificates to investors in minority and women-owned businesses and licensees that sell to minorities and women will augment the other measures we adopt today to encourage minorities and women to participate in broadband PCS and will increase the ability of these entities to access financing for that purpose.

145. In implementing this program, we will borrow from our existing tax certificate program and grant tax certificates, upon request, that will enable the licensees and investors meeting the criteria outlined here to defer the gain realized upon a sale by: (1) Treating it as an involuntary conversion under 26 U.S.C. § 1033, with the recognition of gain avoided by the acquisition of qualified replacement property; or (2) electing to reduce the basis of certain depreciable property; or both. Tax certificates will be available to initial investors in minority and woman-owned businesses who provide "start-up" financing, which allows these businesses to acquire licenses at auction or in the post-auction market, and those investors who purchase interests within the first year after license issuance, which allows for the stabilization of the designated entities' capital base. The definition of a minority or women-owned entity is set forth below[123] and, with regard to our investor tax certificate policy, the entity in which the investment is made must satisfy that definition at the time of the original investment as well as after the investor's shares are sold. For post-auction market sales, tax certificates will be issued only to licensees who sell to entities that meet that definition. Tax certificates will be granted only upon completion of the sale, although parties may request a declaratory ruling from the Commission regarding the tax certificate consequences of prospective transactions.

146. *One-Year Holding Period.* As with our other tax certificate policies, we are concerned about avoiding "sham" arrangements to obtain tax certificates and, pursuant to Section 309(j)(4)(E), thus adopt measures to prevent abuses. As in our existing tax certificate program,[124] we will impose a one-year holding requirement on the transfer of control or assignment of broadband PCS licenses by women and minority-owned businesses who obtained such licenses through the benefit of tax certificates. We believe that the rapid resale of such licenses at a profit would subvert our goal of ensuring the opportunity to participate by minority or woman-owned businesses. If the buyer itself is a women or minority-owned business, however, our objectives still will be satisfied. Thus, as an exception to the holding requirement, we will permit the assignment or transfer of control of licenses during this period to other qualified minority and women-owned businesses. We note, however, that the assignee or transferee who receives this license before the end of the original one-year holding period will also be subject to a one-year holding requirement, from the date of consummation of the assignment or transfer.

147. Finally, in the *Broadband PCS Reconsideration Order*, we indicated that we would address in this proceeding proposals for issuing tax certificates to cellular operators who divest their cellular holdings in order to come into compliance with our rules governing cellular operators' participation in broadband PCS. Several commenters argued that tax certificates should be issued to all such companies who divest their holdings.[125] To accomplish the directive in Section 309(j)(4)(D) that minority groups and women are given the opportunity to

provisions are applicable for the full ten-year license term.

[120] *See infra* ¶¶ 158–168, for a discussion of which investor interests are "attributable" for purposes of calculating the gross revenues and total assets thresholds.

[121] *See* 1982 Policy Statement; 1978 Policy Statement. We have also employed tax certificates as a means of encouraging fixed microwave operators to relocate from spectrum allocated to emerging technologies. *See* Third Report and Order and Memorandum Opinion and Order, ET Docket No. 92–9, 8 FCC Rcd 6589, 58 FR 46547, Sept. 2, 1993.

[122] *See* 1982 Policy Statement, 92 FCC 2d at 855–58.

[123] *See infra* ¶¶ 181–192.

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

[125] *See, e.g.*, Petitions for Reconsideration of GTE Service Corporation and Comcast Corporation of Second Report and Order in GEN Docket 90–314.

participate in the provision of spectrum-based services, we have decided to issue tax certificates to such cellular companies so long as their cellular interests are divested to businesses owned by minorities and/or women, as defined in this order. In this manner, we can further implement Congress's goal to facilitate the participation of minorities and women in spectrum-based services. We will also impose a one-year holding period requirement on the assignment or transfer of control of cellular licenses obtained by women and minority-owned businesses through the benefit of this tax certificate policy.

H. Provisions for Rural Telephone Companies

148. After the release of the *Second Report and Order*, rural telephone companies made numerous *ex parte* presentations concerning how we can best ensure that rural areas are provided broadband PCS. In addition, we have received several petitions for reconsideration of the *Second Report and Order* that address our definition of rural telephone companies in the generic auction rules. In this Order, we address the treatment of rural telephone companies for purposes of competitive bidding for broadband PCS licenses and address below some of the issues raised in petitions for reconsideration of the *Second Report and Order* concerning the definition of these entities.

149. In the *Broadband PCS Reconsideration Order*, we adopted an important measure that will help rural telephone companies become viable providers of PCS services. In response to numerous requests from rural telephone company interests, we increased from 20 percent to 40 percent the cellular attribution threshold for rural telephone companies with non-controlling cellular interests in their areas. *See Broadband PCS Reconsideration Order* at ¶ 125. This action increases the number of rural telephone companies that will be eligible to hold PCS licenses. In taking this action, we recognized that their existing infrastructure makes rural telephone companies well suited to introduce PCS services rapidly into their service areas and adjacent areas. Thus, this action will help speed service to rural areas, which tend to be less profitable to serve for companies without existing infrastructure than more densely populated urban areas.

150. We suggested in the *Second Report and Order* that allowing broadband PCS licenses to be geographically partitioned may be a means to permit rural telephone companies to hold licenses to provide service in their telephone service areas.[126] Many rural telephone companies proposed some form of partitioning in their comments, arguing that if they were required to bid on entire BTA or MTA licenses to obtain licenses covering their wireline service areas, they would be effectively barred from entering the broadband PCS industry. They contend that under a partitioning plan, they would be able to serve areas in which they already provide service, while the remainder of the PCS service area could be served by other providers. Such a plan, they argue, would encourage rural telephone companies to take advantage of existing infrastructure in providing PCS services, thereby speeding service to rural areas.[127] We believe that these proposals have merit, and therefore we now adopt a license partitioning system to provide these designated entities the enhanced opportunity to participate in the provision of broadband PCS and to deploy broadband PCS in their rural services areas rapidly.

151. Our partitioning system will allow rural telephone companies to obtain broadband PCS licenses that are geographically partitioned from larger PCS service areas. These companies will be permitted to acquire partitioned broadband PCS licenses in either of two ways in any frequency blocks: (1) They may form bidding consortia consisting entirely of rural telephone companies to participate in auctions, and then partition the licenses won among consortia participants, and (2) they may acquire partitioned broadband PCS licenses from other licensees through private negotiation and agreement either before or after the auction. Each rural telephone company member of a consortium will, following the auction, be required to file a long-form application for its respective, mutually agreed-upon geographic area. If rural telephone company consortia are formed to bid on licenses in the entrepreneurs' blocks, the eligibility rules for those blocks will apply (*i.e.*, the cumulative gross revenues and assets of the consortium members may not exceed the financial caps for eligibility in these blocks).[128] We will require that partitioned areas conform to established geopolitical boundaries (such as county lines) and that each area include all portions of the wireline service area of the rural telephone company applicant that lies within the PCS service area. In addition, if a rural telephone company receives a partitioned license post-auction from another PCS licensee, the partitioned area must be reasonably related to the rural telephone company's wireline service area that lies within the PCS service area.[129] We recognize that rural telephone companies will require some flexibility in fashioning the areas in which they will receive partitioned licenses, so we do not adopt a strict rule concerning the reasonableness of the partitioned area. Generally, we will presume as reasonable a partitioned area that contains no more than twice the population of that portion of a rural telephone company's wireline service area that lies within the PCS service area. Each licensee in each partitioned area will be responsible for meeting the build-out requirements in its area.

152. Allowing partitioning of rural areas served by rural telephone companies provides a viable opportunity for many of these designated entities who desire to offer PCS to their customers as a complement to their local telephone services. For example, rural telephone companies who cannot afford or do not desire to bid for or construct PCS systems for an entire BTA can thus acquire licenses in areas they wish to serve or form bidding consortia and partition the entire BTA among themselves. We believe that rural partitioning is an efficient method of getting a license in the hands of an entity that will provide rapid service to rural areas.

153. We have decided not to adopt any other auction-related measures specifically for rural telephone companies in this Order. We believe that the partitioning plan we are adopting will provide rural telephone companies with substantial capabilities to acquire licenses to provide broadband

[126] *See* Second Report and Order at ¶ 243, n. 186. We note that although we stated in n. 186 that we would consider partitioning for rural telephone companies in the reconsideration of the broadband PCS service rules, we have concluded that this issue should be addressed along with other issues concerning designated entities. *See* Broadband PCS Reconsideration Order at ¶ 83, n. 113. In our deliberations on this issue, we incorporate into this proceeding the record developed in GEN Docket No. 90–314.

[127] *See, e.g.*, comments of GVNW at 2–4, Rural Cellular Association at 16, U.S. Intelco at 16.

[128] As discussed below, we will permit a consortium consisting entirely of small businesses to exceed the entrepreneurs' blocks financial thresholds. *See infra* ¶¶ 179–180. Therefore, if each member of a consortium of rural telephone companies also satisfies the definition of a small business, we will allow the consortium to bid in the entrepreneurs' blocks even if it exceeds the gross revenues and total assets caps.

[129] This provision will not apply when rural telephone companies form consortia only among themselves and then partition the license area. In this circumstance, one or more partitioned areas may have to be larger in order for the entire PCS service area to be served.

PCS in their rural telephone service areas, consistent with our statutory mandate. In addition, our eligibility criteria for bidding in the entrepreneurs' blocks, discussed below, will permit virtually all telephone companies whose service areas are predominantly rural to bid on licenses in frequency blocks C and F without competition from the large telephone companies and other deep-pocketed bidders. Thus, virtually all rural telephone companies will be able to bid for broadband PCS licenses and defer payment in accordance with the installment payment plans we are adopting for the entrepreneurs' blocks. We also note that if a rural telephone company meets the definition of a small business or a business owned by minorities and/or women, it would enjoy a bidding credit and "enhanced" installment payments applicable to those groups when bidding on licenses in these blocks. We do not think that any other measures are necessary in order to satisfy the statute's directive that we ensure that rural telephone companies have the opportunity to participate in the provision of spectrum-based services, and to satisfy our goals to ensure that PCS is provided to all areas of the country including rural areas.

I. Upfront Payments

154. Upfront payment requirements are designed to ensure that bidders are qualified and serious and to provide the Commission with a source of funds in the event that it becomes necessary to assess default or bid withdrawal penalties.[130] The upfront payment ensures that bids during the course of the auction are *bona fide* and convey information about the value of the underlying licenses. Our standard upfront payment for broadband PCS is $0.02 per MHz per pop, which is equivalent to roughly six percent of the license value, based on an estimate in a Congressional Budget Office report of the total value of the auctionable spectrum.[131] A number of commenters assert that the Commission could enhance the opportunity of designated entities to participate in competitive bidding by reducing the required upfront payment for those applicants.[132] We agree that the $0.02 per MHz per pop upfront payment requirement might impose a barrier for smaller entities wishing to participate in the auctions. Moreover, we note that most bidders in the entrepreneurs' blocks will be entitled to pay for their licenses in installments, which requires a down payment of only five percent of the winning bid. We are concerned that requiring an upfront payment that may be larger than the down payment that the winning bidder is required to tender could discourage auction participation.

155. For these reasons, we will reduce the upfront payment requirement to $0.015 per MHz per pop for bidders in the entrepreneurs' blocks. This 25 percent discount should facilitate auction participation by capital-constrained companies and permit them to conserve resources for infrastructure development after winning a license Moreover, since the upfront payment is still substantial, ranging from slightly below $20,000 for a 30 MHz license in the smallest BTAs to more than $10 million for the New York BTA, insincere bidding will be discouraged and the Commission will have access to funds if it must collect default or bid withdrawal penalty payments.

J. Definitions and Eligibility

1. Eligibility to Bid in the Entrepreneurs' Blocks

156. As noted previously, eligibility to bid in the two entrepreneurs' blocks, C and F, is limited to companies that, together with their affiliates and investors, had gross revenues of less than $125 million in each of the last two years and have total assets of less than $500 million at the time their short form applications are filed. In addition, we will prohibit an applicant from bidding in these blocks if any one individual investor or principal in the applicant has $100 million or greater in personal net worth at the short form application filing date.

157. In determining whether an applicant satisfies these financial thresholds, we will count the gross revenues and total assets of the applicant as well as those of its investors with "attributable" interests. The subsection that follows discusses what interests are attributable for these purposes. In addition, it sets forth exceptions to these attribution rules for minority and women-owned applicants and for publicly-traded companies.

a. Attribution Rules for the Entrepreneurs' Blocks

158. *Qualified "Entrepreneurs".* As a general rule, the gross revenues and total assets of all investors in, and affiliates of, an applicant are counted on a cumulative, fully-diluted basis for purposes of determining whether the $125 million/$500 million thresholds have been exceeded, and on an individual basis regarding the $100 personal net worth standard.[133] There are two exceptions to this rule, however. First, applicants that meet the definition of a small business may, as discussed below, form consortia of small businesses that, on an aggregate basis, exceed the gross revenue/total asset caps. Second, the gross revenues, total assets, personal net worth, and affiliations of any investor in the applicant are not considered so long as the investor holds less than 25 percent of the applicant's passive equity. For corporations, we shall use the term passive equity investors to mean investors who hold only non-voting stock or *de minimis* amounts of voting stock that include no more than five percent of the voting interests. Where different classes of stock are held, however, the total amount of equity must still be less than 25 percent to meet this requirement. For partnerships, the term means limited partnership interests that do not have the power to exercise control of the entity.[134] The passive investor exception will be available, however, only so long as the applicant remains under the control of one or more entities or individuals (defined as the "control group") and the control group holds at least 25 percent of the applicant's equity and, in the case of corporate applicants, at least 50.1 percent of the voting stock.[135] In the case of partnership applicants, the control group must hold all the general partnership interests. Winning bidders are required to identify on their long-form applications the identity of the members of this control group and the means of ensuring control (such as a voting trust agreement). The gross revenues, total assets and personal net worth (if applicable) of each member of the control group and each member's affiliates will be counted toward the $125 million gross revenues/$500 million total assets thresholds or the individual $100 million personal net worth standard, regardless of the size of

[130] Second Report and Order, ¶¶ 169–80.

[131] *Id.* at ¶ 177.

[132] *See e.g.*, comments of AWCC at 31–32, Minnesota Equal Access at 2, NAMTEC at 20, Rural Cellular Corp. at 2, U.S. Intelco at 22–23.

[133] By "fully-diluted," we mean the agreements such as stock options, warrants and convertible debentures will generally be considered to have a present effect and will be treated as if the rights thereunder already have been fully exercised.

[134] Applicants must be prepared to demonstrate that the limited partners do not have influence over the affairs of the applicant that is inconsistent with their roles as passive investors. For purposes of our rules, we presume that any general partner has the power to control a partnership. Therefore, each general partner in a partnership will be considered part of the partnership's control group.

[135] So long as the applicant remains under the *de jure* and *de facto* control of the control group, we shall not bar passive investors from entering into management agreements with applicants.

the member's total interest in the applicant.

159. The attribution levels we have selected here are intended to balance the competing considerations that apply in this particular context and may differ from those we have used in other circumstances. As a general matter, the 25 percent limitation on equity investment interests will serve as a safeguard that the very large entities who are excluded from bidding in these blocks do not, through their investments in qualified firms, circumvent the gross revenue/total asset caps. At the same time, it will afford qualified bidders a reasonable measure of flexibility in obtaining needed financing from other entities, while ensuring that such entities do not acquire controlling interests in the eligible bidders.[136] Similarly, the five percent threshold for attributing revenues of investors with voting stock in corporate applicants is designed to keep ineligible parties from exerting undue control over eligible firms.[137] For all of these reasons, we also will attribute the gross revenues and total assets of entities, or the personal net worth of individuals, that otherwise constitute "affiliates" of the applicant.[138]

160. *Qualified Woman and Minority-Owned "Entrepreneurs".* As discussed above, the record demonstrates that women and minorities have especially acute problems in obtaining financing, due in part to discriminatory lending practices by private financial institutions. To address these special problems and to afford women and minority-owned businesses more flexibility in attracting financing, it is necessary to provide these entities with an alternative, somewhat more relaxed option regarding the attribution of revenues of passive investors. Under this alternative standard, we will not attribute to the applicant the gross revenues, assets, or net worth of any single investor in a minority or woman-owned applicant unless it holds more than 49.9 percent of the passive equity (which is defined to include as much as five percent of a corporation's voting stock). To guard against abuses, however, the control group of applicants choosing this option would have to own at least 50.1 percent of the applicant's equity, as well as retain control and hold at least 50.1 percent of the voting stock.[139] As discussed above with regard to general eligibility to bid in the entrepreneurs' blocks, winning bidders must identify on their long-form applications a control group (this time consisting entirely of minorities and/or women or entities 100 percent owned and controlled by minorities and/or women) and the gross revenues and net worth of each member of the control group and each member's affiliates will be counted toward the $125 million gross revenue/$500 million total asset thresholds or the individual $100 million personal net worth limitation, regardless of the size of the member's total interest in the applicant.

161. Relaxing the attribution standard somewhat in determining eligibility of women and minority-owned companies to bid for licenses on frequency blocks C and F directly addresses what most commenters have stated to be the biggest obstacle to entry for these designated entities: obtaining adequate financing. By this measure, women and minorities who are eligible to bid in these blocks (*i.e.*, who otherwise meet the $125 million gross revenues/$500 million total asset standard) will be required to maintain control of their companies and, at the same time, will have flexibility to attract significant infusions of capital from a single investor. The requirement that the minority and women principals hold 50.1 percent of the company's equity mitigates substantially the danger that a well-capitalized investor with a substantial ownership stake will be able to assume *de facto* control of the applicant. Because this step gives large companies, who are otherwise ineligible to bid in the entrepreneurs' blocks, a significant incentive to "partner" with minority and women-owned firms, it will enhance the likelihood that these designated entities will be both successful in the auctions and become viable, long-term competitors in the PCS industry.

162. Of course, women and minority-owned firms, like any other applicant for a C or F block license, may sell a larger portion of their companies' equity, provided that they also abide by the general eligibility requirements to bid in the entrepreneurs' blocks. Specifically, the gross revenues, total assets and net worth of all investors holding 25 percent or more of the company's passive equity (as defined to include 5 percent or more of the voting stock) will be attributed toward the $125 million/$500 million caps or the $100 million personal net worth standard. In this event, the control group will be required to hold at least 25 percent of the company's equity and 50.1 percent of its voting stock.

163. *Qualified Publicly-Traded "Entrepreneurs".* We also believe that these attribution rules may impose a particular hardship on publicly traded companies, which have little control over the ownership of their stock, and whose voting stock typically is widely held. Therefore, for purposes of determining eligibility to bid in the entrepreneurs' blocks, we adopt an exception from these rules for publicly traded companies.[140] Specifically, we will not attribute the gross revenues or total assets of a shareholder in a publicly traded company that owns up to 25 percent of the corporation's equity, even if that equity is represented by up to 15 percent of the voting stock. To take advantage of this exception, however, the eligible control group of the applicant still must control the corporation, hold at least 50.1 percent of the voting stock, and at least 25 percent of the company's equity.[141]

164. *De Facto Control Issues.* We shall codify in our rules a provision explaining more explicitly the term "control," so that applicants will have clear guidance concerning the requirement that a control group maintains *de facto* as well as *de jure* control of the firms that are eligible for special treatment under the rules for broadband PCS. For this purpose, we shall borrow from certain SBA rules that are used to determine when a firm should be deemed an affiliate of a small

[136] Several commenters have suggested that we establish an attribution threshold for investors in a broadband PCS applicant. *See, e.g., ex parte* filings of Columbia PCS, June 2, 1994 (20 percent threshold), and Impulse Telecommunications Corporation, May 27, 1994 (10 percent threshold).

[137] In the event that the five percent voting stock limitation proves to be overly restrictive, we may consider whether a higher threshold (*e.g.*, 15 percent) would be sufficient to meet our concerns about undue control from large investors.

[138] The definition of an "affiliate" is set forth in subsection 5, *infra*.

[139] As noted previously, the control group of a partnership applicant must hold all of the general partnership interests.

[140] "Publicly-traded company" shall mean a business entity organized under the laws of the United States whose shares, debt or other ownership interests are traded on an organized securities exchange within the United States.

[141] We note that this exception for publicly held companies is only applicable for purposes of assessing eligibility to bid in the entrepreneurs' blocks and for the general installment payment option. In the event that a publicly traded company can demonstrate that the 15 percent threshold would impose a serious hardship, the Commission would entertain a request to raise the threshold in individual cases. Companies seeking such relief must also demonstrate that raising the threshold would not contravene the Commission's control objectives, as described in this Order. We do not believe, however, that publicly traded corporations with individual shareholders owning up to 15 percent active equity require additional special provisions such as bidding credits, "enhanced" installment payments, or tax certificates to overcome capital access problems. Thus, we will not apply this exception with regard to the small business definition or the definition of a woman or minority-owned business.

business.[142] These SBA rules, which are codified in 13 CFR 121.401, provide several specific examples of instances in which an entity might have control of a firm even though the entity has less than 50 percent of the voting stock of a concern, and thus provide a useful model for our rules. Through reference to circumstances such as those described in the SBA rules, our rules will expressly alert designated entities that control of the applicant through ownership of 50.1 percent of the firm's voting interests may be insufficient to ensure *de facto* control of the applicant if, for example, the voting stock of the eligible control group is widely dispersed. In those and other circumstances, ownership of 50.1 percent of the voting stock may be insufficient to assure control of the applicant. Of course, apart from these structural issues relative to control, eligible entities must not, during the license term, abandon control of their licenses through any other mechanism. As we stated in the *Second Report and Order*, designated entities must be prepared to demonstrate that they are in control of the enterprise.[143]

165. *Financial Benefits.* To ensure that the control group has a substantial financial stake in the venture, we shall adopt certain additional requirements, also borrowed from SBA rules. As noted previously, we shall require that at least 50.1 percent of each class of voting stock and at least 25 percent (or 50.1 percent for the alternative option for minority and women-owned businesses) of the aggregate of all outstanding shares of stock to be unconditionally owned by the control group members. In addition, 50.1 percent of the annual distribution of dividends paid on the voting stock of a corporate applicant concern must be paid to these members. Also, in the event stock is sold, the control group members must be entitled to receive 100 percent of the value of each share of stock in his or her possession. Similarly, in the event of dissolution or liquidation of the corporation, the control group members must be entitled to receive at least 25 percent (or 50.1 percent, as the case may be) of the retained earnings of the concern and 100 percent of the value of each share of the stock in his or her possession, subject, of course, to any applicable laws requiring that debt be paid before distribution of equity.

166. Partnerships and other non-corporate entities will be subject to similar requirements. Indicia of ownership that we will consider in non-corporate cases include (but are not limited to) (a) the right to share in the profits and losses, and receive assets or liabilities upon liquidation, of the enterprise *pro rata* in relationship to the designated entity's ownership percentage and (b) the absence of opportunities to dilute the interest of the designated entity (through capital calls or otherwise) in the venture. As with corporations, our concern is ensuring that the economic opportunities and benefits provided through these rules flow to designated entities, as Congress directed.

167. *Application of the Five-Year Holding Rule.* Finally, we explain how these attribution rules apply with regard to the five-year holding and limited transfer period for C and F block licensees. During this five-year period, a C or F block licensee must not sell more than 25 percent of its passive equity to a single investor if the resulting attribution of that investor's gross revenues or total assets would bring the company over the $125 million gross revenues/$500 million total assets thresholds, or if that investor's personal net worth exceeds the $100 million personal net worth cap. Similarly, while individual members of the control group may change (if it would not result in a transfer of control of the company), the control group must maintain control and at least 25 percent of the equity and 50.1 percent of the voting stock.[144] A company will be permitted to grow beyond these gross revenues/total assets caps, however, through equity investment by non-attributable (i.e. passive) investors, debt financing, revenue from operations, business development or expanded service.[145]

168. *Abuses.* As stated above, we intend by these attribution rules to ensure that bidders and recipients of these licenses in the entrepreneurs' blocks are *bona fide* in their eligibility, and we intend to conduct random audits both before the auctions and during the 10-year initial license period to ensure that our rules are complied with in letter and spirit. If we find that large firms or individuals exceeding our personal net worth caps are able to assume control of licensees in the entrepreneurs' blocks or otherwise circumvent our rules, we will not hesitate to force divestiture of such improper interests or, in appropriate cases, issue forfeitures or revoke licenses. In this regard, we reiterate that it is our intent, and the intent of Congress, that women, minorities and small businesses be given an opportunity to participate in broadband PCS services, not merely as fronts for other entities, but as active entrepreneurs.

b. Limit on Licenses Awarded in Entrepreneurs' Blocks

169. The special provisions which we adopt for designated entities are based, in part, on our mandate to fulfill the congressional goal that we disseminate licenses among a wide variety of applicants. 47 U.S.C. § 309(j)(3)(B). Therefore, in adopting the financial assistance measures set forth in this Report and Order, we are concerned about the possibility, even if remote, that a few bidders will win a very large number of the licenses in the entrepreneurs' blocks. As a consequence, the benefits that Congress intended for designated entities would be enjoyed, in disproportionate measure, by only a few individuals or entities. Congress, in our view, did not intend that result. We shall therefore take steps to ensure that the financial assistance provided through our rules is dispersed to a reasonable number of applicants who win licenses in these blocks.

170. To achieve a fair distribution of the benefits intended by Congress, we shall impose a reasonable limit on the total number of licenses within the entrepreneurs' blocks that a single entity may win at auction. In setting this limit, we shall take care not to impose a restriction that would prevent applicants from obtaining a sufficient number of licenses to create large and efficient regional services. Specifically, we shall impose a limitation that no single entity may win more than 10 percent of the licenses available in the entrepreneurs' blocks, or 98 licenses. These licenses may all be in frequency block C or all in frequency block F, or in some combination of the two blocks. Such a limit will ensure that at least ten winning bidders enjoy the benefits of the entrepreneurs' blocks. At the same time, it will allow bidders to effectuate aggregation strategies that include large numbers of licenses and extensive geographic coverage.

171. Further, this limitation will apply only to the total number of

[142] As discussed below, these SBA affiliation rules also will be used as a basis for our own rules defining "affiliates" for purposes of determining whether particular entities meet the financial thresholds for bidding in the entrepreneurs' blocks or for qualifying as a small business.

[143] Second Report and Order at ¶ 278, citing *Intermountain Microwave*, 24 Rad. Reg. 983, 984 (1963).

[144] A minority or woman-owned company must continue to adhere to the attribution rules applicable to it, set out above.

[145] These rules will continue to apply in this manner throughout the license term with regard to a firm's continuing eligibility for installment payments, "enhanced" installment payments and bidding credits.

licenses that may be won at auctions in these blocks; it is not an ownership cap that applies to licenses that might be obtained after the auctions. For purposes of implementing this restriction, we shall consider licenses to be won by the same entity if an applicant (or other entity) that controls, or has the power to control licenses won at the auction, controls or has the power to control another license won at the auction.

2. Definition of Small Business

172. In the *Second Report and Order* we adopted a definition for small businesses based on the standard definition used by the Small Business Administration (SBA). This definition permits an applicant to qualify for installment payments based on a net worth not in excess of $6 million with average net income after Federal income taxes for the two preceding years not in excess of $2 million. 13 CFR § 121.601.[146] In the *Second Report and Order*, we noted, however, that, in certain telecommunications industry sectors, this limit may not be high enough to encompass those entities that, while needing the assistance provided by installment payments, have the financial wherewithal to construct and operate the systems. Therefore we indicated that, on a service specific basis, we might adjust this definition upward to accommodate capital intensive telecommunications businesses. *See Second Report and Order* at ¶ 267.

173. Many commenters, including the Chief Counsel for Advocacy of the SBA, argue that the SBA net worth/net revenue definition is too restrictive and will exclude businesses of sufficient size to survive, much less succeed, in the competitive broadband PCS marketplace. The SBA's Chief Counsel for Advocacy and the Suite 12 Group advocate adoption of a gross revenue test, arguing that a net worth test could be misleading as some very large companies have low net worth. The SBA's Chief Counsel for Advocacy recommends that the revenue standard be raised to include firms that (together with affiliates) have less than $40 million in gross revenue. Similarly, Suite 12 suggests a $75 million in annual sales threshold.[147] As another option, the SBA's Chief Counsel for Advocacy suggests that the Commission consider a higher revenue ceiling or adopt different size standards for different telecommunications markets.[148]

174. We expect broadband PCS to be a highly capital intensive business requiring bidders to expend tens of millions of dollars to acquire a license and construct a system even in the smaller broadband PCS markets. Thus, we believe that our current small business definition is overly restrictive because it would exclude most businesses possessing the financial resources to compete successfully in the provision of broadband PCS services. Accordingly, we modify our small business definition for broadband PCS auctions to ensure the participation of small businesses with the financial resources to compete effectively in an auction and in the provision of broadband PCS services.

175. There is substantial support in the record for a $40 million gross revenue standard. For example, the SBA recommends that for broadband PCS, a small business be defined as one whose average annual gross revenues for its past three years do not exceed $40 million.[149] It states that this definition isolates those companies that have significantly greater difficulty in obtaining capital than large enterprises. At the same time, the SBA contends that a company with $40 million in revenue is sufficiently large that it could survive in a competitive wireless communications market.[150] Similarly, the SBA Chief Counsel for Advocacy asserts that a $40 million threshold will allow participation by firms "of sufficient size to meet demands in almost all small markets and some medium-size markets without significant outside financial assistance."[151] For purposes of broadband PCS, we shall therefore define a small business as any firm, together with its attributable investors and affiliates, with average gross revenues for the three preceding years not in excess of $40 million.[152] 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.[153]

176. For purposes of determining whether an entity qualifies as a small business, we will follow the control group and attribution rules set forth with regard to eligibility to bid in the entrepreneurs' blocks. In particular, winning bidders are required to identify on their long-form applications a control group that holds at least 50.1 percent of the voting interests of the applicant (and otherwise has *de facto* control) and owns at least a 25 percent equity stake. The gross revenues of each member of the control group and each member's affiliates will be counted toward the $40 million gross revenue threshold, regardless of the size of the member's total interest in the applicant. The $40 million personal net worth limitation will also apply to each member of the

[146] The SBA has recently changed its net worth/net income standard as it applies to its Small Business Investment Company (SBIC) Program. *See* 59 Fed. Reg. 16953, 16956 (April 8, 1994). The new standard for determining eligibility for small business concerns applying for financial and/or management assistance under the SBIC program was increased to $18 million net worth and $6 million after-tax net income. 15 CFR § 121.802(a)(3)(i). The change in this size standard was attributable to an adjustment for inflation and changes in the SBIC program "designed to strengthen and expand the capabilities of SBICs to finance small businesses so that they can increase their contribution to economic growth and job creation." 59 Fed. Reg. at 16955. However, Section 121.601, which was the SBA size standard cited in the Notice and the Second Report and Order, has not been modified by the SBA. For purposes of our generic competitive bidding rules, in consultation with the SBA, we will reexamine our $6 million net worth/$2 million annual profits definition in light of the SBA's recent action.

[147] Many other commenters set forth their recommendations on the appropriate small business definition for broadband PCS preferences. *See, e.g.*, comments of Tri-State ($5 million average annual operating cash flow), Luxcel (net worth not exceeding $20 million), and Iowa Network (less than $40 million in annual revenues).

[148] Some parties recommend using the SBA's alternative 1500 employee standard. *See, e.g.*, comments of SBA Associate Administrator for Procurement Assistance at 2; CFW Communications at 2, and Iowa Network at 17. A number of other commenters, including the SBA's Chief Counsel for Advocacy, argue, however, that adoption of this alternative SBA definition would open up a huge loophole in the designated entity eligibility criteria. Specifically, they contend that telecommunications is a capital, rather than labor, intensive industry, and that an entity with 1,500 employees is likely to be extremely well capitalized and have no need for the special treatment mandated by Congress in the Budget Act. *See, e.g.*, comments of SBA Chief Counsel for Advocacy at 8, LuxCel Group, Inc. at 4, Suite 12 Group at 10–11.

[149] *Ex parte* filing of U.S. Small Business Administration, June 24, 1994.

[150] *Id.*

[151] Comments of SBA Office of Advocacy at 10. *Cf.* comments of Iowa Network and Telephone Electronics Corporation (advocating a $40 million annual revenue criterion for telephone companies) and reply comments of North American Interactive Partners and Kingwood Associates (advocating $40 million gross-revenue criterion for applicants for the fifty most-populous BTAs, based on estimated average build-out cost).

[152] The establishment of small business size standards is generally governed by Section 3 of the Small Business Act of 1953, as amended, 15 U.S.C. § 642(a). Recent amendments to that statute provide that small business size standards developed by Federal agencies must be based on the average gross revenues of such business over a period of not less than three years. *See* Pub. L. No. 102–366, Title II, § 222(a), 106 Stat. 999 (1992); 15 U.S.C. § 632 (a)(2)(B)(ii).

[153] Unlike our eligibility criteria to bid in the entrepreneurs' blocks, we do not adopt a total assets standard here. We believe that the $40 million gross revenue cap for small businesses, together with the $500 million total asset threshold we set for entry into the entrepreneurs' blocks in the first instance, should be sufficient to ensure that only *bona fide* small businesses are able to take advantage of the measures intended for those designated entities.

control group. We will not consider the gross revenues or personal net worth of any other investor unless the investor holds 25 percent or more of the outstanding passive equity in the applicant, which, as defined above, includes as much as five percent of the voting stock in a corporate applicant.

177. We also adopt the more relaxed attribution standard set forth in the entrepreneurs' blocks section with regard to investors in minority and female-owned applicants. Specifically, we will not consider the gross revenues or personal net worth of a single passive investor in a minority or female-owned small business unless the investor holds in excess of a 49.9 percent passive interest (which includes as much as five percent of a corporate applicant's voting stock), provided the women or minority control group maintains at least 50.1 percent of the equity and, in the case of a corporate applicant, at least 50.1 percent of the voting stock.[154] We believe that such revenue attribution will ensure that only *bona fide* small businesses are able to take advantage of the special provisions we have adopted, but will allow those businesses to attract sufficient equity capital to be truly viable contenders in the PCS industry.

178. These financial eligibility rules will continue to apply throughout the license term. Thus, firms that received bidding credits and "enhanced" installment payments based on their small business status will be subject to the repayment penalties outlined above, if an investor subsequently purchases an "attributable" interest (*e.g.* 25 percent or more of the firm's equity) and, as a result, the gross revenues of the firm exceed the $40 million gross revenues cap, or the personal net worth of the investor exceeds the $40 million personal net worth threshold.

179. Finally, we will allow a consortium of small businesses to qualify for any of the measures adopted in this order applicable to individual small businesses. As used here, the term "consortium" means a conglomerate organization formed as a joint venture among mutually-independent business firms, each of which individually satisfies the definition of a small business.

180. Several commenters argue that a consortium should not qualify for special treatment unless the consortium itself meets the established definitional criteria.[155] They contend that the FCC should not allow consortia to be used as a means of circumventing the usual prerequisites for these special provisions. In the *Second Report and Order*, we concluded that consortia might be permitted to receive benefits based on participation in the consortium by one or more designated entities, but believed such a consortium should not be entitled to qualify for measures designed specifically for designated entities. As a general matter, we shall continue to adhere to that principle. We think, however, that in the broadband PCS service, allowing small businesses to pool their resources in this manner is necessary to help them overcome capital formation problems and thereby ensure their opportunity to participate in auctions and to become strong broadband PCS competitors. Because of the exceptionally large capital requirements in this service, we agree with the SBA Chief Counsel for Advocacy that, so long as individual members of the consortium satisfy the definition of a small business, the congressional objective of ensuring opportunities for small business will be fully met. Individual small entities that join to form consortia, as distinguished from a single entity with gross revenues in excess of $40 million, still are likely to encounter capital access problems and, thus, should qualify for members aimed at small businesses. We do not believe however, that this congressional goal will be satisfied if special measures are allowed for consortia that are "predominantly" or "significantly" owned and/or controlled by small businesses, as recommended by several commenters.[156] This would have the effect of eviscerating our small business definitional criteria and would not further the ability of *bona fide* small businesses to participate in PCS services.

3. Definition of Women and Minority-Owned Business

181. As discussed above, we have taken steps in this order to address the special funding problems faced by minority and women-owned firms and thereby to ensure that these groups have the opportunity to participate and become strong competitors in the broadband PCS service.[157] We thus have adopted a tax certificate program for women and minorities to allow more sources of potential funding, have relaxed the attribution standard used to determine eligibility to bid for licenses on frequency blocks C and F, and have adopted special measures for installment payments and bidding credits.

182. As also indicated above, for purposes of implementing these steps, we have departed from the definition of a minority and woman-owned firm that was adopted in the *Second Report and Order*. There, we found generally that to establish ownership by minorities and women, a strict eligibility standard should be adopted that required minorities or women to have at least a 50.1 percent equity stake and a 50.1 percent controlling interest in the designated entity. *Second Report and Order* at ¶ 277; 47 CFR § 1.2110(b)(2). For the broadband PCS auctions, we retain the requirement that minorities and/or women control the applicant and hold at least 50.1 percent of a corporate applicant's voting stock. However, to establish their eligibility for certain benefits, summarized below, we shall impose an additional requirement that, even where minorities and women hold at least 50.1 percent of the applicant's equity, other investors in the applicant may own only passive interests, which, for corporate applicants, is defined to include as much as five percent of the voting stock. In addition, provided that certain restrictions are met, we shall also allow women and minority-owed firms the option to reduce to 25 percent the 50.1 percent minimum equity amount that must be held.

183. We emphasized in the *Second Report and Order* that we did not intend to restrict the use of various equity financing mechanisms and incentives to attract financing, provided that the minority and women principals continued to own 50.1 percent of the equity, calculated on a fully-diluted basis, and that their equity interest entitled them to a substantial stake in the profits and liquidation value of the venture relative to the non-controlling principals. We noted, however, that different standards that meet the same objectives may be appropriate in other contexts. *Second Report and Order* at ¶ 278. In view of the evidence of discriminatory lending experiences faced by minority and women entrepreneurs and the exceptional great financial resources believed to be

[154] *See supra* ¶ 160.

[155] *See* comments of McCaw at 21 and Myers at 6.

[156] *See, e.g.*, comments of Rural Cellular Corp. at 2, Bell Atlantic at 17, NAMTEC at 19, and AT&T at 25–26.

[157] As noted in the Second Report and Order, the members of the following groups will be considered "minorities" for purposes of our rules: "[T]hose of Black, Hispanic Surnamed, American Eskimo, Aleut, American Indian and Asiatic American extraction." *See* Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 FCC 2d 979, 980 n.8 (1978); Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, 92 FCC 2d 849, 489 n.1 (1982). Moreover, as adopted in the Second Report and Order, minority and women-owned businesses will be eligible for special measures only if the minority and women principals are also United States citizens.

required by broadband PCS applicants, we conclude that it is appropriate to allow more flexibility with regard to the 50.1 percent equity requirements for this service in order to open doors to more sources of equity financing for women and minority-owned firms.

184. We shall therefore allow women and minority-owned firms the following options. First, they may satisfy the general definition set forth in the *Second Report and Order*, which requires the minority and/or female principles to control the applicant, own at least 50.1 percent of its equity and, in the case of corporate applicants, hold at least 50.1 percent of the voting stock. Under this option, other investors may own as much as a 49.9 percent passive equity interest. As noted above regarding eligibility to bid in the entrepreneurs' blocks, passive equity in the corporate context means only non-voting stock may be held, or stock that includes no more than five percent of the voting interests.[158] For partnerships, the term means limited partnership interests that do not have the power to exercise control of the equity. In addition, as required in the *Second Report and Order*, all investor interests will be calculated on a fully-diluted basis, meaning that agreements such as stock options, warrants and convertible debentures generally will be considered to have a present effect and will be treated as if the rights thereunder have been fully exercised.[159] We recognize that the requirement that other investors own only passive interests is a departure from the definition of a minority or women-owned business adopted in the *Second Report and Order*, but because of the very significant financial contribution that may be made by such other investors in designated entities, we believe that the passive equity requirement is appropriate as an additional safeguard to ensure that minorities and/or women retain control of the applicant.

185. As a second option, women and minority-owned firms may sell up to 75 percent of the company's equity, provided that no single investor may hold 25 percent or more of the firm's passive equity, which is defined in the same manner as above. For example, a corporation with 100 shares of voting stock and 100 shares of non-voting stock, with the 200 shares representing the total outstanding shares of the company, could qualify as a minority or women-owned business under the following circumstances. The minority or women principals would have to own at least 51 shares of voting stock, which satisfies the requirement that they have voting control and, in this case, also meets the requirements that they hold at least 25 percent of the equity. Two other investors could each own 44 shares of non-voting stock and five shares of voting stock, which represents 24.5 percent of the company's equity for each of the shareholders. A third investor could own the remaining 12 shares of non-voting stock and five shares of the voting stock, or 8.5 percent of the equity. The remaining 34 shares of voting stock may be sold to other investors provided that no single investor owns more than five shares.

186. Whichever option is chosen, we will require establishment of a "control group" in much the same way we did for purposes of eligibility to bid in the entrepreneurs' blocks. Specifically, winning bidders, transferees or assignees must identify on their long-form applications a control group (consisting entirely of minorities and/or women or entities 100 percent owned and controlled by minorities and women) that has *de jure* and *de facto* control of the applicant and holds either at least 50.1 or 25 percent of the applicant's equity, depending upon which option is elected.

187. We believe that a modification of our 50.1 percent equity requirement will best achieve Congress' objective of providing effective and long-term economic opportunities for women and minority-owned firms in broadband PCS. At the same time, we shall maintain strict enforcement of the requirement that actual control reside with the qualified designated entities. Thus, to establish their eligibility for tax certificates, enhanced installment payments, bidding credits and relaxed cellular attribution rules, women and minority-owned applicants electing to use the 25 percent equity option may not in any instance allow an individual investor who is not in the control group to own more than a 25 percent passive equity interest. This restriction will apply even in circumstances in which allowing an investor to exceed these limitations would not result in the applicant's exceeding the gross revenues and other financial standards that apply to other bidders in the entrepreneurs' blocks and other situations involving financial caps. These structural safeguards, as well as the general requirement that other investors hold only passive interests in women and minority-owned applicants, will help to ensure that control truly remains with the women and minority designated entities.

188. For example, a women or minority-owned firm electing to use the 25 percent option may have a non-eligible investor with more than a 25 percent passive stake and still qualify to bid in the entrepreneurs' blocks or for benefits that apply to small businesses, as long as the attributable revenues of the investor do not cause the applicant to exceed the gross revenues/total assets caps. In these contexts, no additional restrictions are necessary, because women and minority-owned applicants, like other applicants, are eligible to bid in these blocks and to qualify as small businesses so long as they comply with the same restrictions on financial eligibility that apply to other applicants. Since the attribution rule itself operates to ensure compliance with size limitations, it is not necessary to impose additional restrictions on the size of interests held by investors with attributable interests. This firm will not qualify, however, for special measures applicable only to women and minority-owned businesses, such as "enhanced" installment payments or the 15 or 25 percent bidding credits, because it has a single non-eligible investor with more than a 25 percent passive interest. In circumstances in which women and minorities are required to retain only 25 percent of the firm's equity, this additional structural restriction is appropriate because the objective in this context is to ensure not merely financial eligibility, but that women and minorities retain control of the license.

189. We set forth previously rules defining more explicitly the term "control" for purposes of determining whether a "control group" maintains *de facto* as well as *de jure* control of an applicant.[160] Those rules apply equally to the minority and women principals of minority and women-owned applicants. Consistent with our general policies with regard to women-owned applicants for purposes of our multiple ownership

[158] For example, under this option, a corporate applicant with two classes of issued and outstanding stock, 100 shares of voting stock and 100 shares of non-voting stock, could sell to a single non-eligible entity 49.9 percent of the applicant's equity, consisting of 5 shares of the corporate's voting stock and 94 shares of its non-voting stock. Under this scenario, eligible minorities or women, in order to retain at least 50.1 percent of the value of all outstanding shares of the corporation's stock, must own all of the corporation's remaining shares of stock; that is, 95 shares of voting stock and six shares of non-voting stock.

[159] As also noted in the Second Report and Order, we will consider departing from the requirement that the equity of investors in minority and women-owned businesses must be calculated on a fully-diluted basis only upon a demonstration, in individual cases, that options or conversion rights held by non-controlling principals will not deprive the minority and women principals of a substantial financial stake in the venture or impair their rights to control the designated equity. *See* Second Report and Order at ¶ 277.

[160] *See supra* ¶ 164.

and cross-ownership rules in this broadcast context, we shall not adopt, at this time, any special rules or presumptions to determine whether women-owned applicants exercise independent control of their firms. *See* In the Matter of Clarification of Commission Policies Regarding Spousal Attribution, 7 FCC Rcd 1920, 57 FR 8845, Mar. 13, 1992.

190. Our requirement that control rest with minorities and/or women and the clarifications above ensure that parties do not attempt to evade the statutory requirement to provide economic opportunities and ensure participation by businesses owned by these groups. We reaffirm our commitment to investigate all allegations of fronts, shams or other methods used by those who try to obtain a benefit to which they are not lawfully entitled. In this vein, we again admonish parties that we will conduct random pre- and post-auction audits to ensure that applicants receiving these benefits are *bona fide* designated entities.

191. We also note here that we are departing from the provision in the *Second Report and Order* that bars publicly traded companies from qualifying as minority and woman-owned businesses for purposes of participating in auctions. Most of the steps taken to assist these designated entities in this Order (*e.g.*, bidding credits and installment payments) are confined to winning bidders in the entrepreneurs' blocks, where there is a financial limit on the size of participants. Because of the expected large capital entry costs of broadband PCS, we believe that even publicly traded companies owned by women and minorities that qualify to bid in blocks C and F require additional measures, such as bidding credits and installment payments, to be able to participate successfully. We emphasize, however, that the exception to the attribution rules for publicly traded companies to be eligible to bid in the entrepreneurs' blocks does not apply here.[161] To qualify for measures targeted exclusively to women and minority-owned businesses, a company must satisfy the definition set forth in this section.

192. As noted above, applicants owned by women and minorities must meet the limitations on gross revenues, total assets and personal net worth to qualify for entry into the entrepreneurs' blocks. The size limitations do not apply, however, to all measures designed to assist applicants owned by minorities and/or women. The tax certificate policy applies to all broadband PCS licenses and is not limited to licenses in the entrepreneurs' blocks. Therefore, businesses owned by minorities and women need not meet the gross revenue and other financial restrictions to qualify for tax certificates. Similarly, the relaxed cellular attribution threshold for minority and women-owned firms adopted in the *Broadband PCS Reconsideration Order* is not limited to the entrepreneurs' blocks. Thus, minority and women-owned firms that do not meet the gross revenues, total assets and net worth restrictions may nevertheless qualify for the 40 percent cellular attribution rule. But minority and women-owned firms must satisfy the Commission's structural ownership requirements to receive the benefits of tax certificates and the relaxed cellular attribution rule; that is, they are subject to the limitation that interests held by investors who are not women and minorities must be passive.

4. Definition of Rural Telephone Company

193. As discussed above, we have adopted several measures to assist rural telephone companies in the broadband PCS service. We decide here the definition of rural telephone companies who are eligible for those benefits. As explained below, for this service, we shall depart from the definition adopted in the *Second Report and Order* and define rural telephone companies as local exchange carriers having 100,000 or fewer access lines, including all affiliates.

194. As we pointed out in the *Second Report and Order*,[162] most of those responding to our tentative conclusion in the Notice concerning the definition of a rural telephone company contended that the proposed definition, which was based on the standard contained in Section 63.58 of the Commission's Rules, was too restrictive. A variety of more inclusive definitions were recommended.[163] Some commenters advocated a definition in which a company would qualify if it satisfied either of two alternative criteria based on population of communities served or number of access lines.[164] Others advocated adoption of a definition focusing simply on the number of access lines provided.[165] One commenter advocated a definition focusing exclusively on revenues rather than access lines, with the standard for rural telephone company status at annual revenues under $100 million.[166] In addition, some advocated a somewhat more restrictive definition.[167]

195. Many commenters suggested limiting rural telephone eligibility to carriers serving communities with no more than 10,000 inhabitants, asserting that such a standard better comports with common notions about which telephone companies are "rural."[168] A number of other commenters supported a definition of rural telephone company that would include a limitation on the size of the company. OPASTCO, for example, asserted that such a limitation would comport with the statutory mandate to ensure opportunity for rural telephone companies because "the problem such companies face in the competitive bidding arena" is as much a function of their size as of the rural character of their service areas."[169] NTCA similarly contended that small companies have shown the interest and commitment needed to fulfill the explicit statutory goal of "rapid deployment of new * * * services for * * * those residing in rural areas," citing as support a report on the deployment of digital switching by small LECs.[170] Other parties suggested

[161] With regard to qualifying to bid in the entrepreneurs' blocks, we stated that we would not attribute the revenues or assets of an investor that owns up to 15 percent of a publicly traded applicant's voting stock. For privately held companies, the voting stock threshold is five percent. *See supra* ¶¶ 158, 163.

[162] Second Report and Order at ¶¶279–282.

[163] *See, e.g.*, comments of Saco River, Telephone Electronics, and Iowa Network (advocating amending the proposed definition merely by raising the population threshold to 10,000), and comments of Chickasaw (advocating definition including companies that predominantly, but not exclusively, serve customers in communities of less than 10,000 in non-urbanized areas).

[164] *See, e.g.*, comments of Telocator, TDS, NYNEX, NOTA, NTCA and Saco River (recommending a definition including companies that either provide service only within communities of 10,000 or less in non-urbanized areas or provide 10,000 or fewer access lines (and no more than 150,000 in conjunction with affiliates)); comments of OPASTCO (recommending defining rural telephone companies as those that either provide exchange service only within communities of 10,000 or less in non-urbanized areas or that provide 50,000 or fewer access lines; and comments of SBA Chief Counsel for Advocacy (recommending a definition including companies serving communities of 20,000 or less in non-urbanized areas or providing 50,000 or fewer access lines (including lines provided by affiliates)).

[165] *See, e.g.*, comments of STCL, MEBTEL, CFW, Minnesota Equal Access Network, Rural Cellular Assn., Rural Cellular Corp., Rochester Tel. Corp, McCaw, DialPage, APC, TDS and Gulf Telephone Co. (suggesting caps between 25,000 and 150,000 access lines).

[166] Comments of PMN.

[167] *See, e.g.*, comments of GTE (definition would apply only to companies that exclusively serve customers in communities of 10,000 or less in non-urbanized areas and that provide wireline exchange service to 10,000 or fewer customers).

[168] *See, e.g.*, comments of OPASTCO, Iowa Network, Saco River and Telephone Electronics.

[169] Comments of OPASTCO at 5.

[170] Comments of NTCA at 7–8.

that we look to the unenacted antecedent of the Budget Act, S. 1134, in which a rural company was defined as an entity that either (a) "provides telephone exchange service by wire in a rural area" (*i.e.*, a non-urbanized area containing no incorporated place with more than 10,000 inhabitants), (b) "provides telephone exchange service by wire to less than 10,000 subscribers," or (c) "is a telephone utility whose income accrues to a State or political subdivision thereof."

196. In the *Second Report and Order*, we adopted a definition of "rural telephone company" that includes independently owned and operated local exchange carriers that (1) do not serve communities with more than 10,000 inhabitants in the licensed area, and (2) do not have more than 50,000 access lines, including all affiliates. 47 CFR § 1.2110(b)(3). We stated our belief that a limitation on the size of eligible rural telephone companies is appropriate because Congress did not intend for us to give special treatment to large LECs that happen to serve small rural communities. *See Second Report and Order* at ¶ 282.

197. Several parties who filed petitions for reconsideration of the *Second Report and Order* argue that the definition adopted for rural telephone companies may be too restrictive given the capital intensive nature of broadband PCS.[171] We also note that NTCA argued in its comments in this proceeding that it is neither necessary nor appropriate to use the same criteria to define rural telephone companies in rules pertaining to different services, technologies, and industries.[172] Likewise, in an *ex parte* letter, OPASTCO states that by defining rural telephone company for purposes of broadband PCS as a local exchange carrier with less than $100 million in revenue, the Commission will properly capture in the defined class locally-owned telephone companies who are truly interested in providing services to rural areas.[173] OPASTCO notes that the "same universe of companies" that would fall under such a revenue threshold would be captured by a definition that includes all telephone companies having 100,000 or fewer access lines.[174]

198. Our challenge in establishing a definition of a rural telephone company for broadband PCS is to achieve the congressional goal of promoting the rapid deployment of this new service in rural areas by targeting only those telephone companies whose service territories are predominantly rural in nature, and who are thus likely to be able to use on their existing wireline telephone networks to build broadband PCS infrastructures to serve rural America. For purposes of our rules governing broadband PCS licenses, we believe that this goal can best be achieved if we define rural telephone companies as those local exchange carriers having 100,000 or fewer access lines, including all affiliates. We agree with OPASTCO that such a definition will include virtually all of the telephone companies who genuinely are interested in providing services to rural areas. This definition will encourage participation by legitimate rural telephone companies without providing special treatment to large LECs. Therefore, we will better achieve the congressional goal of providing service rapidly to rural areas without giving benefits to large companies that do not require such assistance. Rural telephone companies that satisfy this definition thus will be eligible for rural partitioning, as discussed above.[175]

199. Anchorage Telephone Company argues in a petition for reconsideration of the *Second Report and Order* that our definition of a rural telephone company should include telephone companies that are owned by governmental authorities. Anchorage contends that Congress meant to mandate special consideration not only for telephone carriers serving rural areas but also for all municipally-owned telcos, even those with wholly or predominantly urban service areas.[176] This argument is based on its interpretation of the Senate bill that was antecedent to the enacted Budget Act. Anchorage argues that the Senate bill containing the prototype of a mandate for special consideration for rural telephone companies directed the FCC to grant "rural program licenses" to "qualified" common carriers and explicitly said that the category of "qualified" carriers included all state-owned and municipally-owned telephone companies. Anchorage further states that the report of the conference committee that drafted the Budget Act declares that the Senate's "findings" are incorporated by reference.[177] Anchorage also asserts that without the aid of special assistance it and most other state-owned and municipal telcos won't be able to purchase spectrum licenses at auction because it is politically infeasible for them to generate and retain enough surplus revenue to fund such investments, due to popular aversion to increases in taxes or telephone rates.[178]

200. We find no merit in Anchorage's arguments. There is no specific evidence that Congress intended the term "rural telephone companies" to include all state or municipally-owned telephone companies. To the contrary, the fact that an antecedent bill contained an explicit mandate for preferential treatment of government-owned telephone companies that was deleted from the enacted bill could just as easily be interpreted as an indication that Congress rejected such a rule. Further, we disagree that state and municipal governments lack the means to participate successfully in auctions. Such governments have substantial capabilities to raise funds through private financing, bond offerings and taxation. Therefore, our definition of a rural telephone company will not encompass telephone companies that are owned by government authorities.

5. Definition of an Affiliate

201. Many of the eligibility criteria set forth above are based on the size of the entity applying for a broadband PCS license and/or seeking special treatment under our designated entity policies. Each of these size standards ($125 million gross revenues/$500 million total assets/$100 million personal net worth, $40 million gross revenues/$40 million personal net worth, and 100,000 access lines) requires applicants to include, among other parties, "affiliates" when calculating their attributable gross revenues, total assets, net worth or access lines. This affiliation requirement is intended to prevent entities that, for all practical purposes, do not meet these size standards from receiving benefits targeted to smaller entities.[179] We adopt specific affiliation rules for purposes of applying these eligibility criteria based in part on the Small Business Administration's affiliation rules.[180]

202. In the *Second Report and Order*, we referenced the SBA's affiliation rules for purposes of defining generally

[171] *See, e.g.*, petitions of South Dakota Network (SDN), U.S. Intelco, NTCA, Rural Cellular Association and TDS. We note that similar arguments have been made with respect to other services.

[172] *See* comments of NTCA at 4.

[173] *Ex parte* filing of filing of OPASTCO, June 2, 1994, at 2; *see also* comments of PMN at 7–8.

[174] *Id.*

[175] Such companies also will be eligible for special treatment under our cellular attribution rules for broadband PCS. *See* 47 CFR § 24.204(d)(2)(ii).

[176] Anchorage Petition at 2–3.

[177] *Id.*

[178] *Id.* at 4–5.

[179] *See, e.g.*, Second Report and Order at ¶272.

[180] *See* 13 CFR § 121.401 (1993) (formerly at 13 CFR § 121.3 (1989)).

whether an entity qualifies as a small business and gave examples of how the affiliation rules would be applied. We continue to believe that the SBA's affiliation rules provide a solid foundation on which to build our own affiliation rules for purposes of the small business definition for broadband PCS and for the other size standards adopted in this order.[181] Accordingly, for purposes of these eligibility restrictions, we will again borrow from the SBA's rules for outside affiliations. In addition, to ensure that applicants have clear guidance concerning these matters, we shall include in our rules more detailed information concerning the circumstances in which an entity will be deemed an affiliate of the applicant.

203. Like the eligibility rules we have adopted here governing size limitations for broadband PCS, the SBA's rules provide that size determinations shall include the applicant and all of its "affiliates."[182] At the outset, before considering in more detail all the types of affiliations that might exist when guided by the SBA rules, we review briefly our own rules described above, concerning attributable interests. Those rules provide that, so long as a control group is established, the gross revenues, assets or net worth of an investor in a PCS applicant or licensee will be attributed to the applicant or licensee only if the investor holds more than 25 percent of the applicant's passive equity or is part of a control group that controls the applicant. Therefore, only where an investor has such attributable interests in the broadband PCS applicant or licensee do we need to examine whether the investor has a relationship with other persons or outside entities that rises to the level of an affiliation with the PCS applicant, and if so, whether the affiliate's revenues or net worth, when aggregated with the applicant's, exceed our size eligibility thresholds.

204. *General Principles of Affiliation.* When such an attributable interest exists, an affiliation under the SBA rules would arise, first, from "control" of an entity or the "power to control it." Thus, under the SBA rules, entities are affiliates of each other when either directly or indirectly (i) one concern controls or has the power to control the other, or (ii) a third party or parties controls or has the power to control both. 13 CFR § 121.401(a)(2)(i), (ii). In determining control, the SBA's rules provide generally that every business concern is considered to have one or more parties who directly or indirectly control or have the power to control it. The rules, in addition, provide specific examples of where control resides under various scenarios, such as through stock ownership or occupancy of director, officer or management positions. The rules also articulate general principles of control, and note, for example, that control may be affirmative or negative and that it is immaterial whether control is exercised so long as the power to control exists. 13 CFR § 121.401(c)(1). Second, an affiliation, under SBA rules, may also arise out of an "identity of interest" between or among parties. 13 CFR § 121.401(a)(2)(iii), (d). We shall adopt these same general provisions in our affiliation rules for broadband PCS.

205. In adopting these affiliation rules, we emphasize that these rules will not be applied in a manner that defeats the objectives of our attribution rules. Our attribution rules expressly permit applicants to disregard the gross revenues, total assets and net worth of passive investors, provided that an eligible control group has *de facto* and *de jure* control of the applicant. Our attribution rules are designed to preserve control of the applicant by eligible entities, yet allow investment in the applicant by entities that do not meet the size restrictions in our rules. Therefore, so long as the requirements of our attribution rules are met, the affiliation rules will not be used to defeat the underlying policy objectives of allowing such passive investors. More specifically, if a control group has *de facto* and *de jure* control of the applicant, we shall not construe the affiliation rules in a manner that causes the interests of passive investors to be attributed to the applicant.

206. Applying these SBA affiliation rules, and affiliation would arise, for example, where an entity with an attributable interest in a broadband PCS applicant is under the control of another entity. An affiliation would also arise where an entity with an attributable interest in a broadband PCS applicant controls, or has the power to control, another entity. For example, if a 10 percent voting shareholder of a PCS applicant is also a shareholder in a large Corporation X, when should Corporation X be deemed an affiliate of the PCS applicant as a result of the shareholder's ownership interest in both entities? Under the SBA rules and the rules we adopt here, Corporation X would be deemed an affiliate of the applicant if the shareholder controlled or had the power to control Corporation X, in which case, Corporation X's gross revenues must be included in determining the applicant's gross revenues.

207. For purposes of determining control, ownership interests will be calculated on a fully-diluted basis. Thus, for example, stock options, convertible debentures, and agreements to merge (including agreements in principle) will generally be considered to have a present effect on the power to control or own an interest in either an outside entity or the PCS applicant or licensee.[183] We will treat such options, debentures, and agreements generally as though the rights held thereunder had been exercised.[184] However, an affiliate cannot use such options and debentures to appear to terminate its control over or relationship with another concern before it actually does so.[185]

208. *Voting and Other Trusts.* In a similar vein, we also borrow from the SBA's rules and our own rules in other services to find affiliation under certain voting trusts in order to prevent a circumvention of eligibility rules. The SBA's rules provide that a voting trust, or similar agreement, cannot be used to separate voting power from beneficial ownership of voting stock for the purpose of shifting control of or the power to control an outside concern, if the primary purpose of the trust is to meet size eligibility rules.[186] Similarly,

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[181] SBA's affiliation rules were promulgated under the authority in Section 3 of the Small Business Act of 1953, as amended, 15 U.S.C. § 632, which provides that, to be eligible for benefits provided by SBA and other agencies, a "small-business concern" must be "independently owned and operated." *See Small Business Size Standards*, 54 FR 52634 (December 21, 1989).

[182] *See* 13 CFR § 121.401(a).

[183] We recognize that we have adopted a different rule for purposes of our broadband PCS-cellular ownership rules. *See* 47 C.F.R. § 24.204(d)(2)(v). In that context, however, our purpose was not to establish the financial position, or potential financial position, of applicants bidding in auctions.

[184] *See* 13 C.F.R. § 121.401(f). SBA's rules provide the following examples to guide the application of this provision:

Example 1. If company "A" holds an option to purchase a controlling interest in company "B," the situation is treated as though company "A" had exercised its rights and had become owner of a controlling interest in company "B." The [annual revenues] of both concerns must be taken into account in determining size.

Example 2. 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. [A and B are affiliates of each other].

[185] *Id.* SBA's rules provide this example:

If large company "A" holds 70% (70 of 100 outstanding shares) of the voting stock of company "B" and gives a third party an option to purchase 66 of the 70 shares owned by company "A," company "B" will be deemed to be an affiliate of company "A" until the third party actually exercises its option to purchase such shares. In order to prevent large company "A" from circumventing the intent of the regulation which [gives] present effect to stock options, the option is not considered to have present effect in this case.

[186] 13 CFR § 121.401(g).

under the Commission's broadcast multiple ownership rules, stock interests held in trust may be attributed to any person who holds or shares the power to vote such stock, has the sole power to sell such stock, has the right to revoke the trust at will or to replace the trustee at will.[187] Also, under the broadcast rules, if a trustee has a familial, personal or extra-trust business relationship to the grantor or the beneficiary of a trust, the stock interests held in trust will be considered assets of the grantor or beneficiary, as appropriate.[188] Because we believe the broadcast rules provide more definitive guidance in this particular area, we shall use them as a model for the affiliation rules adopted here. Thus, for example, if an investor with an attributable interest in a PCS applicant holds a beneficial interest in stock of another firm that amounts to a controlling interest in that other firm, depending on the identity of the trustee, the other firm may be considered an affiliate and its assets and gross revenues may be attributed to the PCS applicant.

209. *Officers, Directors and Key Employees.* Under the SBA's affiliation rules, affiliations also generally arise where persons serve as the officers, directors or key employees of another concern and they represent a majority or controlling element of that other concern's board of directors and/or management of the outside entity.[189] We shall adopt an identical rule. Thus, if a person with an attributable interest in a broadband PCS applicant, through his or her other key employment positions or positions on the board of another firm, controls that other firm, then the other firm will be considered an affiliate of the applicant. Such affiliations may or may not result in the applicant's exceeding our size limitations. As this rule reflects, for purposes of attributing the financial position of an outside entity in this context, officers and directors of an outside concern are not foreclosed entirely from holding attributable or non-attributable interests in a PCS applicant. Whether or not such persons control the outside entity, we also do not want to prohibit these persons, who may be experienced in the telecommunications, finance, or communications and equipment industries, from assisting start-up companies in PCS by serving as officers or directors of the applicant. Thus, under our general attribution rule, if such persons serving as officers or directors of the applicant do not control the applicant or otherwise have an attributable interest in the applicant, their outside affiliations (even if controlling) will not be considered at all for purposes of determining the applicant's eligibility under our rules.[190]

210. *Affiliation Through Identity of Interest: Family and Spousal Relationships.* As expressed in the SBA's rules, an affiliation may arise not only through control, but out of an "identity of interest" between or among parties. *See* 13 CFR § 121.401(a)(2)(iii). For example, affiliation can arise between or among members of the same family or persons with common investments in more than one concern. In determining who controls or has the power to control an entity, persons with an identity of interests may be treated as though they were one person. 13 CFR § 121.401(d). For example, if two shareholders in Corporation X are both attributable shareholders in the PCS applicant, to the extent that together they have the power to control Corporation X, Corporation X may be deemed an affiliate of the applicant.

211. Similarly, as under the SBA rules, we must consider spousal and other family relationships in determining whether an affiliation exists. Under the SBA rules for determining small business status, for example, members of the same family may be treated as though they were one person because they have an "identity of interest." 13 CFR § 121.401(d). Likewise, in order to determine whether individuals are economically disadvantaged, the SBA rules governing eligibility for participation in the government's "section 8(a)" program for socially and economically disadvantaged small businesses have special provisions for attributing spousal interests. The latter rules provide generally that half of the jointly-owned interests of an applicant and his or her spouse must be attributed to the applicant for purposes of determining the applicant's net worth. *See* 13 CFR § 124.106(a)(2)(i)(A)(1).

212. In the context of the auction eligibility rules at issue here, we begin by clarifying that our reason for considering spousal and kinship relationships is not to determine whether the spouse or other kin of a woman-owned applicant actually is controlling the applicant, thereby violating our eligibility rules for woman-owned businesses. As discussed above, our rules do not embody any presumptions concerning spousal control in that context.[191] Rather, our objective here is to ensure both that entities permitted to bid in the entrepreneurs' blocks are actually in need of special financial assistance and that otherwise ineligible entities do not circumvent the rules prohibiting entry by funding family members that purport to be eligible applicants.

213. In formulating these rules, we need to consider also that, as a practical matter, it will not be possible for us prior to the auctions to resolve all questions that pertain to the individual circumstances of particular applicants. Furthermore, if we determine subsequent to an auction that a winning bidder in fact was ineligible to bid because of spousal or kinship relationships, not only will authorization of service be delayed but, as discussed above, disqualified applicants may be subject to substantial penalties. In these circumstances, we think that the public interest requires that we endeavor, insofar as possible, to establish brightline tests for determining when the financial interests of spouses and other kin should be attributed to the applicant.

214. We have decided that, for purposes of determining whether the financial limitations in our eligibility rules have been met, we will in every instance attribute the financial interests of an applicant's spouse to the applicant. This will resolve any concern that an applicant might transfer his or her assets to a spouse in order to satisfy the personal net worth or control restrictions that apply to eligible entities. For example, an applicant could not transfer stock or other assets to his or her spouse and thereby dispose of interests that, if held by the applicant, would render the applicant ineligible. Just as importantly, this approach will resolve any concern that an applicant might participate in bidding in the entrepreneurs' blocks by using the personal assets of an ineligible spouse, which would defeat entirely the

[187] *See* 47 CFR § 73.3555 note 2(e).

[188] *Id.*

[189] *See* 13 CFR § 121.401(h). 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. 13 CFR § 121.405.

[190] SBA's size standard affiliation rules also provide that affiliations can arise in a variety of other scenarios, such as where one concern is dependent upon another for contracts and business, where firms share joint facilities, or have joint venture of franchise license agreements. To the extent we believe these rules may have general applicability in the context of our policies for broadband PCS, we shall codify them in our affiliate rules. We caution parties that issues relating to *de facto* control of the applicant (or parties with attributable interests in the applicant) could also arise under arrangements not expressly codified in the rules.

[191] *See supra* ¶ 189.

objective of excluding very large entities from bidding in these blocks.

215. In adopting this rule, we fully recognize that instances could arise in which, if all factors were considered, attributing a spouse's financial interests to the applicant could lead to harsh results. As a general matter, however, we think it provides a workable bright-line standard that resolves fully our policy concerns and avoids undesirable ambiguity concerning the nature of our requirements. As in the SBA rules, however, one exception is clearly warranted; this affiliation standard would not apply if the applicant and his or her spouse are subject to a legal separation recognized by a court of competent jurisdiction. In calculating their personal net worth, investors in the applicant who are legally separated must, of course, still include their share of interests in community property held with a spouse.

216. As indicated above, circumstances could also arise in which other kinship relationships are used as a means to evade our eligibility requirements. Because we believe kinship relationships in many cases do not present the same potential for abuse that exists with spousal relationships, particularly in terms of the "identity of interests" that are likely to exist between the persons involved, we shall adopt a more relaxed standard for determining when kinship interests must be attributed to applicants. In this area, we shall follow the same standard that is applied by the SBA when interpreting its "identity of interest" rule described above. Specifically, an identity of interests between family members and applicants will be presumed to exist, but the presumption can be rebutted by showing that the family members are estranged, or that their family ties are remote, or that the family members are not closely related in business matters. *See generally Texas-Capital Contractors, Inc. v. Abdnor*, 933 F.2d 261 (5th Cir. 1990). For purposes of determining who is a family member under this rule, we shall use a definition that is identical to the definition of "immediate family member" in the SBA's rules, 13 CFR § 124.100.

217. In appropriate cases, an applicant should be able to rebut the presumption regarding kinship affiliations with relative ease, simply by demonstrating that the applicant has no close relationship in business matters with the relevant family members. Of course, should such business relationships arise with a winning applicant after the auction, we might need to consider whether the applicant intended to circumvent the requirements of our eligibility rules. Our holding period rule, which, as discussed above, requires that winning bidders in the entrepreneurs' blocks maintain an ownership structure meeting our eligibility requirements for five years, will serve as an additional safeguard against possible abuses arising from kinship relationships.

VIII. Conclusion, Procedural Matters, and Ordering Clauses

A. Conclusion

218. In fashioning rules for competitive bidding for broadband PCS licenses, we seek to promote the public policy goals set forth for us by Congress. We believe that the rules adopted in this Fifth Report and Order satisfy this objective. These rules should facilitate the rapid implementation of new broadband communications services through advanced technologies and efficient spectrum use, thus advancing the public interest by providing consumers with competitive and innovative wireless voice and data services and also fostering economic growth. The rules will allow for the public to recover a portion of the value of the public spectrum, and will promote access to broadband PCS services by consumers, producers and new entrants by ensuring that small businesses, rural telephone companies and businesses owned by minorities and women will have genuine opportunities to participate in the auctions and in the provision of service. We expect that the advent of PCS will benefit consumers by raising the overall level of competition in many already competitive segments of the telecommunications industry and providing competition in others for the first time, promote job creation in the communications and information sector of the domestic economy, and enhance productivity and efficiency in industry as a whole.

B. Final Regulatory Flexibility Analysis

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

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

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

222. *Significant alternatives considered and rejected.* All significant alternatives have been addressed in the Fifth Report and Order.

C. Ordering Clauses

223. Accordingly, it is ordered that part 24 of the Commission's Rules is amended as set forth in the attachment hereto.

224. It is further ordered that the rules changes made herein will become effective 30 days after their publication in the **Federal Register**. This action is taken pursuant to Sections 4(i), 303(r) and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r) and 309(j).

List of Subjects in 47 CFR Part 24

Radio.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

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.

§ 24.204 [Amended]

2. Section 24.204 is amended by replacing references to "Section 24.305" and "Section 24.307" in paragraphs (f)(1) and (f)(2), respectively, with "§ 24.705" and "§ 24.707".

3. A new subpart H consisting of §§ 24.701 through 24.720 is added to Part 24 to read as follows:

Subpart H—Competitive Bidding Procedures for Broadband PCS

Sec.

24.701 Broadband PCS subject to competitive bidding.
24.702 Competitive bidding design for Broadband PCS licensing.
24.703 Competitive bidding mechanisms.
24.704 Withdrawal, default and disqualification penalties.
24.705 Bidding application (FCC Form 175 and 175–S Short-Form).
24.706 Submission of upfront payments and down payments.
24.707 Long-form applications.
24.708 License grant, denial, default, and disqualification.
24.709 Eligibility for licenses for frequency Blocks C and F.
24.710 Limitation on licenses won at auction for frequency Blocks C and F.
24.711 Installment payments for licenses for frequency Blocks C and F.
24.712 Bidding credits for licenses for frequency Blocks C and F.
24.713 Tax certificates.
24.714 Eligibility for partitioned licenses.
24.720 Definitions.

Subpart H—Competitive Bidding Procedures for Broadband PCS

§ 24.701 Broadband PCS subject to competitive bidding.

Mutually exclusive initial applications to provide broadband PCS service are subject to competitive bidding procedures. The general competitive bidding procedures found in 47 CFR Part 1, Subpart Q will apply unless otherwise provided in this part.

§ 24.702 Competitive bidding design for Broadband PCS licensing.

(a) The Commission will employ the following competitive bidding designs when choosing from among mutually exclusive initial applications to provide broadband PCS service:

(1) Simultaneous multiple round auctions.

(2) Sequential auctions.

(b) The Commission may design and test alternative procedures. The Commission will announce by Public Notice before each auction the competitive bidding design to be employed in a particular auction.

(c) The Commission may use combinatorial bidding, which would allow bidders to submit all or nothing bids on combinations of licenses, in addition to bids on individual licenses. The Commission may require that to be declared the high bid, a combinatorial bid must exceed the sum of the individual bids by a specified amount or percentage. Combinatorial bidding may be used with any type of auction design.

(d) The Commission may use single combined auctions, which combine bidding for two or more substitutable licenses and award licenses to the highest bidders until the available licenses are exhausted. This technique may be used in conjunction with any type of auction.

§ 24.703 Competitive bidding mechanisms.

(a) *Sequencing.* The Commission will establish and may vary the sequence in which broadband PCS licenses will be auctioned.

(b) *Grouping.* In the event the Commission uses either a simultaneous multiple round competitive bidding design or combinatorial bidding, the Commission will determine which licenses will be auctioned simultaneously or in combination.

(c) *Reservation Price.* The Commission may establish a reservation price, either disclosed or undisclosed, below which a license subject to auction will not be awarded.

(d) *Minimum Bid Increments.* The Commission will, by announcement before or during an auction, require minimum bid increments in dollar or percentage terms.

(e) *Stopping Rules.* The Commission will establish stopping rules before or during multiple round auctions in order to terminate an auction within a reasonable time.

(f) *Activity Rules.* The Commission will establish activity rules which require a minimum amount of bidding activity. In the event that the Commission establishes an activity rule in connection with a simultaneous multiple round auction, each bidder will be entitled to request and will be automatically granted one waiver of such rule during each auction stage.

(g) *Suggested Minimum Bid.* The Commission may establish suggested minimum bids on each license. Bids below the suggested minimum bid would count as activity under the activity rule only if no bids at or above the suggested minimum bid are received.

§ 24.704 Withdrawal, default and disqualification penalties.

(a) When the Commission conducts a simultaneous multiple round auction pursuant to § 24.702(a)(1), the Commission will impose penalties on bidders who withdraw high bids during the course of an auction, who default on payments due after an auction closes, or who are disqualified.

(1) *Bid withdrawal prior to close of auction.* A bidder who withdraws a high bid during the course of an auction will be subject to a penalty equal to the difference between the amount bid and the amount of the winning bid the next time the license is offered by the Commission. No withdrawal penalty would be assessed if the subsequent winning bid exceeds the withdrawn bid. This penalty amount will be deducted from any upfront payments or down payments that the withdrawing bidder was deposited with the Commission.

(2) *Default or disqualification after close of auction.* If a high bidder defaults or is disqualified after the close of such an auction, the defaulting bidder will be subject to the penalty in paragraph (a)(1) of this section plus an additional penalty equal to three (3) percent of the subsequent winning bid. If the subsequent winning bid exceeds the defaulting bidder's bid amount, the 3 percent penalty will be calculated based on the defaulting bidder's bid amount. These amounts will be deducted from any upfront payments or down payments that the defaulting or disqualified bidder has deposited with the Commission.

(b) When the Commission conducts sequential oral auctions pursuant to § 24.702(a)(2), the Commission may modify the penalties set forth in subsection (a) above to be paid in the event of bid withdrawal, default or disqualification; provided, however, that such penalties shall not exceed the penalties specified above.

(1) If a bid is withdrawn before the Commission has declared the bidding to be closed for the license bid on, no bid withdrawal penalty will be assessed.

(2) If a bid is withdrawn after the Commission has declared the bidding to be closed for the license bid on, the penalty specified in paragraph (a)(2) of this section will apply.

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

All applicants to participate in competitive bidding for broadband PCS licenses must submit applications on FCC Forms 175 and 175–S pursuant to the provisions of §§ 1.2105 of the Chapter and 24.813. The Commission will issue a Public Notice announcing the availability of broadband PCS licenses and, in the event that mutually exclusive applications are filed, the date of the auction for those licenses. This Public Notice also will specify the date on or before which applicants intending to participate in a broadband PCS auction must file their applications in order to be eligible for that auction, and it will contain information necessary for completion of the application as well as other important information such as the materials which must accompany the Forms, any filing fee that must accompany the application or any upfront payment that will need to be

submitted, and the location where the application must be filed.

§ 24.706 Submission of upfront payments and down payments.

(a) Where the Commission uses simultaneous multiple round auctions or oral sequential auctions, bidders will be required to submit an upfront payment in accordance with § 1.2106 of this Chapter and § 24.711(a)(1).

(b) Winning bidders in an auction must submit a down payment to the Commission in accordance with § 1.2107(b) of this Chapter and § 24.711(a)(2).

§ 24.707 Long-form applications.

Each winning bidder will be required to submit a long-form application on FCC Form 401, as modified, within ten (10) business days after being notified that it is the winning bidder. Applications on FCC Form 401 shall be submitted pursuant to the procedures set forth in Subpart I of this Part and § 1.2107 (c) and (d) of this Chapter and any associated Public Notices. Only auction winners (and applicants seeking partitioned licenses pursuant to agreements with auction winners under § 24.714) will be eligible to file applications on FCC Form 401 for initial broadband PCS licenses in the event of mutual exclusivity between applicants filing Form 175. Winning bidders need not complete Schedule B to Form 401.

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

(a) Except with respect to entities eligible for installment payments (*see* § 24.711), each winning bidder will be required to pay the balance of its winning bid in a lump sum payment within five (5) business days following the award of the license. Grant of the license will be conditioned upon full and timely payment of the winning bid amount.

(b) A bidder who withdraws its bid subsequent to the close of bidding, defaults on a payment due or is disqualified will be subject to the penalties specified in § 1.2109 of this Chapter.

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

(a) *General Rule.* (1) No application is acceptable for filing and no license shall be granted for frequency Block C or frequency Block F, unless the applicant, together with its affiliates and persons holding interests in the applicant and their affiliates, have gross revenues of less than $125 million in each of the last two calender years and total assets of less than $500 million at the time the applicant's short-form (Form 175) application is filed.

(2) No application is acceptable for filing and no license shall be granted for frequency Block C or frequency Block F, if, at the time the application is filed, the applicant (or person holding an interest in the applicant) is an individual and he or she (or affiliates) has $100 million or greater in personal net worth at the time the applicant's short-form (Form 175) application is filed.

(3) Any licensee awarded a license pursuant to this section (or pursuant to § 24.839(d)(2)) shall maintain its eligibility until at least five years from the date of initial license grant, except that increased gross revenues, increased total assets or personal net worth due to non-attributable equity investments (*i.e.*, from sources whose revenues, total assets and personal net worth are not considered under paragraph (b)(4) of this section), debt financing, revenue from operations, business development or expanded service shall not be considered.

(b) *Attribution and Aggregation of Gross Revenues, Total Assets, and Personal Net Worth.* (1) Except as specified in paragraphs (b)(3) and (4) of this section, the gross revenues and total assets of the applicant (or licensee) and its affiliates, and other persons that hold interests in the applicant (or licensee) and their affiliates shall be considered on a cumulative basis and aggregated for purposes of determining whether the applicant (or licensee) is eligible for a license for frequency Block C or frequency Block F under this section.

(2) the personal net worth of individual applicants (or licensees) and other persons that hold interests in the applicant (or licensee), and their affiliates, if under the amount in paragraph (a)(2) of this section, shall not be considered for purposes of determining whether the applicant (or licensee) is eligible for a license for frequency Block C or frequency Block F under this section.

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

(4) (i) The gross revenues, total assets and personal net worth of a person that holds an interest in the applicant (or licensee) shall not be considered for purposes of determining financial eligibility so long as:

(A) Such person holds no more than 25 percent of the applicant's (or licensee's) passive equity and is not a member of the applicant's (or licensee's) control group; and

(B) The applicant (or licensee) has a control group that owns at least 25 percent of the applicant's (or licensee's) total equity and, if a corporation, holds at least 50.1 percent of the applicant's (or licensee's) voting interests.

(ii) The gross revenues, total assets and personal net worth of a person that holds an interest in the applicant (or licensee) shall not be considered for purposes of determining financial eligibility so long as:

(A) Such person holds no more than 49.9 percent of the applicant's (or licensee's) passive equity and is not a member of the applicant's (or licensee's) control group; and

(B) The applicant (or licensee) has a control group that consists entirely of members of minority groups and/or women and that owns at least 50.1 percent of the applicant's (or licensee's) total equity and, if a corporation, at least 50.1 percent of the applicant's (or licensee's) voting interests.

(iii) The gross revenues, total assets and personal net worth of a person that holds an interest in the applicant (or licensee) shall not be considered for purposes of determining financial eligibility so long as:

(A) Such person owns no more than 25 percent of the applicant's (or licensee's) total equity, which shall include not more than 15 percent of the voting stock;

(B) The applicant (or licensee) is a publicly traded corporation; and

(C) The applicant (or licensee) has an eligible control group that holds at least 50.1 percent of the voting stock, if a corporation, and at least 25 percent of the applicant's (or licensee's) equity.

Note: Ownership interests shall be calculated on a fully diluted basis; all agreements such as warrants, stock options and convertible debentures will generally be treated as if the rights thereunder already have been fully exercised, except that the such agreements may not be used to appear to terminate or divest ownership interests before they actually do so.

(c) *Short-Form Application Certification; Long-Form Application Disclosure.* (1) All applicants for a license for frequency Block C or frequency Block F shall certify on its short-form application (Form 175) that they are eligible to bid on and obtain licenses in those blocks pursuant to this section.

(2) In addition to the requirements in subpart I, all applicants that are winning bidders on frequency Blocks C and F shall, in an exhibit to their long-form applications—

(i) Identify each member of the applicant's control group, regardless of the size of the member's total interest in

the applicant, and each member's minority group or gender classification, if applicable;

(ii) Disclose the gross revenues and total assets of the applicant and its affiliates, and other persons that hold interests in the applicant and their affiliates (including all members of the applicant's control group), unless exempted under paragraph (b)(4) of this section; and

(iii) Certify that the personal net worth of the applicant (if an individual), each affiliates and each person that hold an interest in the applicant is less than $100 million.

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

(e) *Definitions.* The terms *affiliate, business owned by members of minority groups and women, consortium of small businesses, control group, gross revenues, members of minority groups, passive equity, personal net worth, publicly traded corporation, and total assets* used in this section are defined in § 24.720.

§ 24.710 Limitation on licenses won at auction for frequency Blocks C and F.

(a) No applicant may be deemed the winning bidder of more than 98 of the licenses available for frequency Blocks C and F. Any applicant who is the high bidder for more than 98 of the licenses available for frequency Blocks C and F shall be required to withdraw its bid(s) for a sufficient number of licenses to achieve compliance with this section and may be subject to bid withdrawal penalties under § 24.704.

(b) For purposes of paragraph (a) of this section, licenses will be deemed to be won by the same bidder if an entity that controls or has the power to control any applicant that wins licenses at the auction, has the power to control any other applicant that wins licenses at the auction.

§ 24.711 Installment payments for licenses for frequency Blocks C and F.

(a) Except as provided in paragraphs (b), (c) and (d) of this section, an applicant that has $75 million or less in gross revenues in each of the preceding two calendar years and that is a winning bidder for frequency Blocks C or F in a BTA market other than the fifty largest markets and any eligible applicant that is a winning bidder for frequency Blocks C or F in one of the fifty largest BTA markets, may pay the full amount of its winning bid in installments as follows:

(1) Each eligible bidder shall pay an upfront payment of $0.015 per MHz per pop for the maximum number of licenses (in terms of MHz-pops) on which it intends to bid.

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

(3) Each eligible licensee shall pay the remainder of its winning bids in installment payments with interest imposed based on the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted, plus 2.5 percent; interest-only payments for the first year; and principal and interest payments amortized over the remaining nine years of the license.

(4) For purposes of determining whether an applicant has $75 million or less in gross revenues, gross revenues shall be attributed to the applicant and aggregated as provided in § 24.709(b), except that § 24.709(b)(4)(iii) shall not apply.

(b) An applicant that qualifies as a business owned by members of minority groups and/or women may pay the full amount of its winning bid in installments in the same manner as in paragraphs (a)(1) and (a)(2) of this section, except that interest-only payments may be paid for the first three years and interest shall be paid at the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted.

(c) An applicant that qualifies as a small business or as a consortium of small businesses may pay the full amount of its winning bid in installments in the same manner as in paragraphs (a)(1) and (a)(2) of this section, except that interest-only payments may be paid for the first two years.

(d) An applicant that qualifies as a small business owned by members of minority groups and/or women or as a consortium of small businesses owned by members of minority groups and/or women may pay the full amount of its winning bid in installments in the same manner as in paragraphs (a)(1) and (a)(2) of this section, except that interest-only payments may be paid for the first five years and interest shall be paid at the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted.

(e) *Unjust Enrichment.* (1) If a licensee that utilizes installment financing under this section seeks to assign or transfer control of its license to an entity not meeting the eligibility standards for installment payments, the licensee must make full payment of the remaining unpaid principal and any unpaid interest accrued through the date of assignment or transfer as a condition of approval.

(2) If a licensee that utilizes installment financing under this section seeks to make any change in ownership structure that would result in the licensee losing eligibility for installment payments, the licensee shall first seek Commission approval and must make full payment of the remaining unpaid principal and any unpaid interest accrued through the date of assignment or transfer as a condition of approval. Increases in gross revenues or total assets that result from equity investments that are not attributable to the licensee under § 24.709(b)(4), revenues from operations, business development or expanded service shall not be considered changes in ownership structure under this paragraph.

(3) If a licensee seeks to make any change in ownership that would result in the licensee qualifying for a less favorable installment plan under paragraphs (a), (b) or (c) of this section, the licensee shall seek Commission approval and must adjust its payment plan to reflect its new eligibility status under paragraphs (a), (b) or (c) of this section. A licensee may not switch its payment plan to a more favorable plan.

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

(a) A winning bidder that qualifies as a small business or a consortium of small businesses may use a bidding credit of ten percent to lower the cost of its winning bid.

(b) A winning bidder that qualifies as a business owned by members of minority groups and/or women may use a bidding credit of fifteen percent to lower the cost of its winning bid.

(c) A winning bidder that qualifies as a small business owned by members of minority groups and/or women or a consortium of small business owned by members of minority groups and/or women may use a bidding credit of twenty-five percent to lower the cost of its winning bid.

(d) *Unjust Enrichment.* (1) If a licensee that utilizes a bidding credit under this section seeks to assign or transfer control of its license to an entity not meeting the eligibility standards for bidding credits or seeks to make any other change in ownership that would result in the licensee no longer qualifying for bidding credits under this section, the licensee must seek

Commission approval and reimburse the government for the amount of the bidding credit as a condition of the approval of such assignment, transfer or other ownership change.

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

§ 24.713 Tax certificates.

(a) Any non-controlling initial investor in a business owned by members of minority groups and/or women and who provides "start-up" financing, which allows such business to acquire a broadband PCS license(s), and any non-controlling investor who purchases an interest in a broadband PCS license held by a business owned by members of minority groups and/or women within the first year after license issuance, may, upon the sale or such investment or interest, request from the Commission a tax certificate.

Note: For purposes of this subsection, *non-controlling investor* means any person who is not part of the control group of a business owned by members of minority groups and/or women as defined in § 24.720(k).

(b) Any broadband PCS licensee who assigns or transfer control of its license to a business owned by members of minority groups and/or women may request that the Commission issue the licensee a tax certificate. Any licensee that obtain a broadband PCS license through the benefit of a tax certificates under this subsection shall not assign or transfer control of its license within one year of its license grant date, unless such assignee or transferee qualifies as a business owned by members of minority groups and/or women, which shall not assign or transfer control of the license within one year of the grant date of the assignment or transfer.

(c) Any licensee in the Domestic Public Cellular Radio Telecommunications Service who assigns or transfer control of its cellular license(s) to a business owned by members of minority groups and/or women may request that the Commission issue the licensee a tax certificate. Such tax certificates will only be issued if the principal purpose of the assignment or transfer of control is to allow the cellular licensee to become eligible for a broadband PCS license(s) beyond the limitations imposed on the cellular licensee by § 24.204. Any licensee that obtains a cellular license through the benefit of a tax certificate under this paragraph shall not assign or transfer control of its license within one year of its license grant date, unless such assignee or transferee qualifies as a business owned by members of minority groups and/or women, which shall not assign or transfer control of the license within one year of the grant date of the assignment or transfer.

§ 24.714 Eligibility for partitioned licenses

(a) Notwithstanding § 24.202, an applicant that is a rural telephone company, as defined in § 24.720(e), may be granted a broadband PCS license that is geographically partitioned from a separately licensed MTA or BTA, so long as the MTA or BTA applicant or licensee has voluntarily agreed (in writing) to partition a portion of the license to the rural telephone company.

(b) If partitioned licenses are being applied for in conjunction with a license(s) to be awarded through competitive bidding procedures—

(1) The applicable procedures for filing short-form applications and for submitting upfront payments and down payments contained in this part and part 1 of this Chapter shall be followed by the applicant, who must disclose as part of its short-form application all parties to agreement(s) with or among rural telephone companies to partition the license pursuant to this section, if won at auction (*see* 47 CFR § 1.2105(a)(2)(viii));

(2) Each rural telephone company that is a party to an agreement to partition the license shall file a long-form application for its respective, mutually agreed-upon geographic area together with the application for the remainder of the MTA or BTA filed by the auction winner.

(c) If the partitioned license is being applied for as a partial assignment of the MTA or BTA license following grant of the initial license, request for authorization for partial assignment of a license shall be made pursuant to § 24.839.

(d) Each application for a partitioned area (long-form initial application or partial assignment application) shall contain a partitioning plan that must propose to establish a partitioned area to be licensed that meets the following criteria:

(1) Conforms to established geopolitical boundaries (such as county lines);

(2) Includes the wireline service area of the rural telephone company applicant; and

(3) Is reasonably related to the rural telephone company's wireline service area.

Note: A partitioned service area will be presumed to be reasonably related to the rural telephone company's wireline service area if the partitioned service area contains no more than twice the population overlap between the rural telephone company's wireline service area and the partitioned area.

(e) Each licensee in each partitioned area will be responsible for meeting the construction requirements in its area (*see* § 24.203).

§ 24.720 Definitions.

(a) *Scope.* The definitions in this section apply to §§ 24.709-24.715, unless otherwise specified in those sections.

(b) *Small Business; Consortium of Small Businesses.*

(1) A *small business* is an entity that

(i) Together with its affiliates has average annual gross revenues that are not more than $40 million for the preceding three calendar years;

(ii) Has no attributable investor or affiliate that has a personal net worth of $40 million or more;

(iii) Has a control group all of whose members and affiliates are considered in determining whether the entity meets the $40 million annual gross revenues and personal net worth standards; and

(iv) Such control group holds 50.1 percent of the entity's voting interest, if a corporation, and at least 25 percent of the entity's equity on a fully diluted basis, except that a business owned by members of minority groups and/or women (as defined in paragraph(c) of this section) may also qualify as a small business if a control group that is 100 percent composed of members of minority groups and/or women holds 50.1 percent of the entity's voting interests, if a corporation, and 50.1 percent of the entity's total equity on a fully diluted basis and no single other investor holds more than 49.9 percent of passive equity in the entity. Ownership interests shall be calculated on a fully diluted basis; all agreements such as warrants, stock options and convertible debentures will generally be treated as if the rights thereunder already have been fully exercised, except that the such agreements may not be used to appear to terminate or divest ownership interests before they actually do so.

(2) For purposes of determining whether an entity meets the $40 million gross revenues and $40 million personal net worth standards in paragraph (b)(1) of this section, gross revenues and personal net worth shall be attributed to the entity and aggregated as provided in § 24.709(b), except that § 24.709(b)(4)(iii) shall not apply.

(3) A small business consortium is a conglomerate organization formed as a joint venture between mutually-independent business firms, each of which individually satisfies the definition of a small business in paragraph (b)(1) of this section.

(c) *Business Owned by Members of Minority Groups and/or Women.* A business owned by members of minority groups and/or women is an entity:

(1) That has a control group composed 100 percent of members of minority groups and/or women who are United States Citizens, and

(2) Such control group owns and holds 50.1 percent of the voting interests, if a corporation, and

(i) Owns and holds 50.1 percent of the total equity in the entity, provided that all other investors hold passive interests; or

(ii) Holds 25 percent of the total equity in the entity, provided that no single other investor holds more than 25 percent passive equity interests in the entity. Ownership interests shall be calculated on a fully diluted basis; all agreements such as warrants, stock options and convertible debentures will generally be treated as if the rights thereunder already have been fully exercised, except that such agreements may not be used to appear to terminate or divest ownership interests before they actually do so.

(d) *Small Business Owned by Members of Minority Groups and/or Women; Consortium of Small Businesses Owned by Members of Minority Groups and/or Women.* A small business owned by members of minority groups and/or women is an entity that meets the definitions in both paragraphs (b) and (c) of this section. A consortium of small businesses owned by members of minority groups and/or women a conglomerate organization formed as a joint venture between mutually-independent business firms, each of which individually satisfies the definition of a small business in paragraphs (b)(1) and (c) of this section.

(e) *Rural Telephone Company.* A rural telephone company is a local exchange carrier having 100,000 or fewer access lines, including all affiliates.

(f) *Gross Revenues.* Gross revenues shall mean all income received by an entity, whether earned or passive, before any deductions are made for costs of doing business (*e.g.*, cost of goods sold), as evidenced by audited quarterly financial statements for the relevant period.

(g) *Total Assets.* Total assets shall mean the book value (except where generally accepted accounting principles (GAAP) require market valuation) of all property owned by an entity, whether real or personal, tangible or intangible, as evidenced by the most recent audited quarterly financial statements.

(h) *Personal Net Worth.* Personal net worth shall mean the market value of all assets (real and personal, tangible and intangible) owned by an individual, less all liabilities (including personal guarantees) owned by the individual in his individual capacity or as a joint obligor.

(i) *Members of Minority Groups.* Members of minority groups includes individuals of African American, Hispanic-surnamed, American Eskimo, Aleut, American Indian and Asian American extraction.

(j) *Passive Equity.* Passive equity shall mean:

(1) For corporations, non-voting stock or stock that includes no more than five percent of the voting equity;

(2) For partnerships, joint ventures and other non-corporate entities, limited partnership interests and similar interests that do not afford the power to exercise control of the entity.

(k) *Control Group.* A control group is an entity, or a group of individuals or entities that possesses *de jure* control and *de facto* control of an applicant or licensee, and as to which the applicant's or licensee's charters, bylaws, agreements and any other relevant documents (and amendments thereto) provide:

(1) That the entity and/or its members own unconditionally at least 50.1 percent of the total voting interests of a corporation;

(2) That the entity and/or its members receive at least 50.1 percent of the annual distribution of any dividends paid on the voting stock of a corporation;

(3) That, in the event of dissolution or liquidation of a corporation, the entity and/or its members are entitled to receive 100 percent of the value of each share of stock in its possession and a percentage of the retained earnings of the concern that is equivalent to the amount of equity held in the corporation; and

(4) That the entity and/or its members have the right to receive dividends, profits and regular and liquidating distributions from the business in proportion to its interest in the total equity of the applicant or licensee.

Note: Voting control does not always assure *de facto* control, such as, for example, when the voting stock of the control group is widely dispersed (*see, e.g.*, § 24.270(l)(2)(iii)).

(l) *Affiliate.* (1) An individual or entity is an affiliate of:

(i) An applicant; or

(ii) A person holding an attributable interest in an applicant under § 24.709 (both referred to herein as "the applicant") if such individual or entity—

(A) Directly or indirectly controls or has the power to control the applicant, or

(B) Is directly or indirectly controlled by the applicant, or

(C) Is directly or indirectly controlled by a third party or parties that also controls or has the power to control the applicant, or

(D) Has an "identity of interest" with the applicant.

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

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

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

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

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

Example. In a corporation where the officers and directors own various size blocks of stock totaling 40 percent of the corporation's voting stock, but no officer or director has a block sufficient to give him or

her control or the power to control and the remaining 60 percent is widely distributed with no individual stockholder having a stock interest greater than 10 percent, management has the power to control. If persons with such management control of the other entity are persons with attributable interests in the applicant, the other entity will be deemed an affiliate of the applicant.

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

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

(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. In calculating their net worth, investors who are legally separated must include their share of interests in property held jointly with a spouse.

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

(A) The family members are estranged,

(B) The family ties are remote, or

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

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

(4) Affiliation through stock ownership.

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

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

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

(5) Affiliation arising under stock options, convertible debentures, and agreements to merge. Stock options, convertible debentures, and agreements to merge (including agreements in principle) are generally considered to have a present effect on the power to control the concern. Therefore, in making a size determination, such options, debentures, and agreements are generally treated as though the rights held thereunder had been exercised. However, an affiliate cannot use such options and debentures to appear to terminate its control over another concern before it actually does so.

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

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

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

(6) Affiliation under voting trusts.

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

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

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

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

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

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

(10) Affiliation under joint venture arrangements.

(i) A joint venture for size determination purposes is an association of concerns and/or individuals, with interests in any degree or proportion, formed by contract, express or implied, to engage in and carry out a single, specific business venture for joint profit for which purpose they combine their efforts, property, money, skill and knowledge,

but not on a continuing or permanent basis for conducting business generally. The determination whether an entity is a joint venture is based upon the facts of the business operation, regardless of how the business operation may be designated by the parties involved. An agreement to share profits/losses proportionate to each party's contribution to the business operation is a significant factor in determining whether the business operation is a joint venture.

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

(m) *Publicly Traded Corporation. A publicly traded corporation* is a business entity organized under the laws of the United States whose shares, debt or other ownership interests are traded on an organized securities exchange within the United States.

4. A new subpart I consisting of §§ 24.801 through 24.844 is added to Part 24 to read as follows:

Subpart I—Interim Application, Licensing, and Processing Rules for Broadband PCS

Sec.

24.801 [Reserved]
24.802 [Reserved]
24.803 Authorization required.
24.804 Eligibility.
24.805 Formal and informal applications.
24.806 Filing of broadband PCS applications; Fees; Number of copies.
24.807 [Reserved]
24.808 [Reserved]
24.809 Standard application forms and permissive changes or minor modifications for the broadband Personal Communications Services.
24.810 [Reserved]
24.811 Miscellaneous forms.
24.812 [Reserved]
24.813 General application requirements.
24.814 [Reserved]
24.815 Technical content of applications; maintenance of list of station locations.
24.816 Station antenna structures.
24.817 [Reserved]
24.818 [Reserved]
24.819 Waiver of rules.
24.820 Defective applications.
24.821 Inconsistent or conflicting applications.
24.822 Amendment of application to participate in auction for licenses in the broadband Personal Communications Services filed on FCC Form 175.
24.823 Amendment of applications for licenses in the broadband Personal Communications Services (other than applications filed on FCC Form 175).
24.824 [Reserved]
24.825 Application for temporary authorizations.
24.826 Receipt of application; applications in the broadband Personal Communications Services filed on FCC Form 175 and other applications in the broadband Personnel Communications Services.
24.827 Public notice period.
24.828 Dismissal and return of applications.
24.829 Ownership changes and agreements to amend or to dismiss applications or pleadings.
24.830 Opposition to applications.
24.831 Mutually exclusive applications.
24.832 Consideration of applications.
24.833 [Reserved]
24.834 [Reserved]
24.835 [Reserved]
24.836 [Reserved]
24.837 [Reserved]
24.838 [Reserved]
24.839 Transfer of control or assignment of license.
24.840 [Reserved]
24.841 [Reserved]
24.842 [Reserved]
24.843 Extension of time to complete construction.
24.844 Termination of authorization.

Subpart I—Interim Application, Licensing, and Processing Rules for Broadband PCS

§ 24.801 [Reserved]

§ 24.802 [Reserved]

§ 24.803 Authorization required.

No person shall use or operate any device for the transmission of energy or communications by radio in the services authorized by this part except as provided in this part.

§ 24.804 Eligibility.

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

(1) The applicant is qualified under all applicable laws and Commission regulations, policies and decisions;

(2) There are frequencies available to provide satisfactory service; and

(3) The public interest, convenience or necessity would be served by a grant.

(b) Alien ownership. A broadband PCS authorization to provide Commercial Mobile Radio Service may not be granted to or held by:

(1) Any alien or the representative of any alien.

(2) Any corporation organized under the laws of any foreign government.

(3) Any corporation of which any officer or director is an alien or of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof or any corporation organized under the laws of a foreign country.

(4) Any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens, or of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such license.

(c) A broadband PCS authorization to provide Private Mobile Radio Service may not be granted to or held by a foreign government or a representative thereof.

§ 24.805 Formal and informal applications.

(a) Except for an authorization under any of the conditions stated in Section 308(a) of the Communications Act of 1934 (47 U.S.C. § 308(a)), the Commission may grant the following authorizations only upon written application received by it: station licenses; modifications of licenses; renewals of licenses; transfers and assignments of station licenses, or any right thereunder.

(b) Except as may be otherwise permitted by this part, a separate written application shall be filed for each instrument of authorization requested. Applications may be:

(1) "Formal applications" where the Commission has prescribed in this Part a standard form; or

(2) "Informal applications" (normally in letter form) where the Commission has not prescribed a standard form.

(c) An informal application will be accepted for filing only if:

(1) A standard form is not prescribed or clearly applicable to the authorization requested;

(2) It is a document submitted, in duplicate, with a caption which indicates clearly the nature of the request, radio service involved, location of the station, and the application file number (if known); and

(3) It contains all the technical details and informational showings required by the rules and states clearly and completely the facts involved and authorization desired.

§ 24.806 Filing of broadband PCS applications; Fees; Numbers of copies.

(a) As prescribed by §§ 24.705, 24.707 and 24.809, standard formal application forms applicable to broadband PCS may be obtained from either:

(1) Federal Communications Commission, Washington, DC 20554, or

(2) By calling the Commission's Forms Distribution Center, (202) 632–3676.

(b) Applications to participate in competitive bidding for broadband PCS service must be filed on FCC Form 175 in accordance with the rules in § 24.705 and Part 1, Subpart Q of this Chapter. In the event of mutual exclusivity

between applicants filing FCC Form 175, only auction winners will be eligible to file subsequent long-form applications on FCC Form 401 to provide broadband PCS service. Mutually exclusive applications filed on FCC Form 175 are subject to competitive bidding under those rules. Broadband PCS applicants filing FCC Form 401 need not complete Schedule B.

(c) All applications for broadband PCS licenses (other than applications to participate in competitive bidding filed on FCC Form 175) shall be submitted for filing to: Federal Communications Commission, Washington, DC 20554, Attention: Broadband PCS Processing Section.

Applications requiring fees as set forth at Part 1, Subpart G of this chapter must be filed in accordance with § 0.401(b) of this Chapter.

(d) All correspondence or amendments concerning a submitted application shall clearly identify the name of the applicant, applicant identification number or Commission file number (if known) or station call sign of the application involved, and may be sent directly to the Common Carrier Bureau, Broadband PCS Processing Section.

(e) Except as otherwise specified, all applications, amendments, correspondence, pleadings and forms (including FCC Form 175) shall be submitted on one original paper copy and with three microfiche copies, including exhibits and attachments thereto, and shall be signed as prescribed by § 1.743 of this Chapter. Filings of five pages or less are exempt from the requirement to submit on microfiche, as are emergency filings such as letters requesting special temporary authority. Those filing any amendments, correspondence, pleadings and forms must simultaneously submit the original hard copy which must be stamped "original". Abbreviations may be used if they are easily understood. In addition to the original hard copy, those filing pleadings, including pleadings under § 1.2108 of this Chapter, shall also submit two paper copies as provided in § 1.51 of this Chapter.

(1) Microfiche copies. Each microfiche copy must be a copy of the signed original. Each microfiche copy shall be a 148mm x 105mm negative (clear transparent characters appearing on an opaque background) at 24x to 27x reduction for microfiche or microfiche jackets. One of the microfiche sets must be a silver halide camera master or a copy made on silver halide film such as Kodak Direct Duplicatory Film. The microfiche must be placed in paper microfiche envelopes and submitted in a B6 (125 mm x 176 mm) or 5 x 7.5 inch envelope. All applicants must leave Row "A" (the first row for page images) of the first fiche blank for in-house identification purposes. Each microfiche copy of pleadings shall include:

(i) The month and year of the document;

(ii) The name of the document;

(ii) The name of the filing party;

(iv) The file number, applicant identification number, and call sign, if assigned;

(v) The identification number and date of the Public Notice announcing the auction in response to which the application was filed (if applicable).

(2) All applications and all amendments must have the following information printed on the mailing envelope, the microfiche envelope, and on the title area at the top of the microfiche:

(i) The name of the applicant;

(ii) The type of application (*e.g.*, 30 MHz MTA, 30 MHz BTA, 10 MHz BTA);

(iii) The month and year of the document;

(iv) The name of the document;

(v) The file number, applicant identification number, and call sign, if assigned; and

(vi) The identification number and date of the Public Notice announcing the auction in response to which the application was filed (if applicable).

§ 24.807 [Reserved]

§ 24.808 [Reserved]

§ 24.809 Standard application forms and permissive changes or minor modifications for the broadband Personal Communications Services.

(a) Applications to participate in competitive bidding for broadband PCS licenses must be filed on FCC Forms 175 and 175–S.

(b) Subsequent application by auction winners or non-mutually exclusive applicants for broadband PCS licenses under Part 24. FCC Form 401 ("Application for New or Modified Common Carrier Radio Station Under Part 22") shall be submitted by each auction winner for each broadband PCS license applied for on FCC Form 175. In the event that mutual exclusivity does not exist with respect to a license identified on an applicant's FCC Form 175, the Commission will so inform the applicant and the applicant will also file FCC Form 401. Blanket licenses are granted for each market frequency block. Applications for individual sites are not needed and will not be accepted. *See* § 24.11. Broadband PCS applicants filing FCC Form 401 need not complete Schedule B.

(c) Extensions of time and reinstatement. When a licensee cannot complete construction in accordance with the provisions of § 24.203, a timely application for extension of time (FCC Form 489) must be filed.

(d) License for mobile subscriber station—These stations are considered to be associated with and covered by the authorization issued to the carrier serving the land mobile station. No additional authorization is required.

§ 24.810 [Reserved]

§ 24.811 Miscellaneous forms.

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

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

§ 24.812 [Reserved]

§ 24.813 General application requirements.

(a) Each application (including applications filed on Forms 175 and 401) for a broadband PCS license or for consent to assign or transfer control of a broadband PCS license shall disclose fully the real party or parties in interest and must include in an exhibit the following information:

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

(2) A list of any party which holds a five percent or more interest in the applicant, or any entity in which a five percent or more interest is held by another party which holds a five percent or more interest in the applicant (*e.g.*, if Company A owns 5% of Company B (the applicant) and 5% of Company C, then Companies A and C must be listed on Company B's application).

(3) A list of the names, addresses, citizenship and principal business of any person holding five percent or more of each class of stock, warrants, options

or debt securities together with the amount and percentage held, and the name, address, citizenship and principal place of business of any person on whose account, if other than the holder, such interest is held. If any of these persons are related by blood or marriage, include such relationship in the statement.

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

(b) Each application for a broadband PCS license must:

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

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

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

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

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

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

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

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

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

(d) In addition to the general application requirements of Subpart F and §§ 1.2105 of this Chapter, 24.813 and 24.815, applicants shall submit any additional documents, exhibits, or signed written statements of fact:

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

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

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

(f) All applicants (except applicants filing FCC Form 175) are required to indicate at the time their application is filed whether or not a Commission grant of the application may have a significant environmental impact as defined by § 1.1307 of this Chapter. If answered affirmatively, the requisite environmental assessment as prescribed in § 1.1311 of this Chapter must be filed with the application and Commission environmental review must be completed prior to construction. *See* § 1.1312 of this chapter. All broadband PCS licensees are subject to continuing obligation to determine whether subsequent construction may have a significant environmental impact prior to undertaking such construction and to otherwise comply with § 1.1301 through 1.1319 of this Chapter. *See* § 1.1312 of this Chapter.

§ 24.814 [Reserved]

§ 24.815 Technical content of applications; maintenance of list of station locations.

(a) All applications required by this part shall contain all technical information required by the application forms or associated Public Notice(s). Applications other than initial applications for a broadband PCS license must also comply with all technical requirements of the rules governing the broadband PC (*see* Subparts C and E of this Part as appropriate). The following paragraphs describe a number of general technical requirements.

(b) Each application (except applications for initial licenses filed on Form 175) for a license for broadband PCS must comply with the provisions of §§ 24.229–24.238 of the Commission's Rules.

(c)–(i) [Reserved]

(j) The location of the transmitting antenna shall be considered to be the station location. Broadband PCS licensees must maintain a current list of all station locations, which must describe the transmitting antenna site by its geographical coordinates and also by conventional reference to street number, landmark, or the equivalent. All such coordinates shall be specified in terms of degrees, minutes, and seconds to the nearest second of latitude and longitude.

§ 24.816 Station antenna structures.

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

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

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

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

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

(c) A broadband PCS station antenna structure no higher than 6.1 m (20 feet) above ground level at its site or no higher than 6.1 m above any natural object or existing manmade structure, other than an antenna structure, is exempt from the requirements of paragraphs (a) and (b) of this section.

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

Administration (FAA) on FAA Form 7460–1 and the FCC on FCC Form 854.

§§ 24.817–24.818 [Reserved]

24.819 Waiver of rules.

(a) Requests for waiver.

(1) A waiver of these rules may be granted upon application or by the Commission on its own motion. Requests for waivers shall contain a statement of reason sufficient to justify a waiver. Waivers will not be granted except upon an affirmative showing:

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

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

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

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

§ 24.820 Defective applications.

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

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

(2) The application does not comply with the Commission's rules, regulations, specific requirements for additional information or other requirements. *See also* § 1.2105 of this Chapter.

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

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

(2)–(4) [Reserved]

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

(6) [Reserved]

(7) The application is filed prior to the Public Notice issued under § 24.705, announcing the application filing date for the relevant auction or after the cutoff date prescribed in that Public Notice.

(c) [Reserved]

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

§ 24.821 Inconsistent or conflicting applications.

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

§ 24.822 Amendment of application to participate in auction for licenses in the broadband Personal Communications Services filed on FCC Form 175.

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

(b) In the broadband PCS, the only amendments to FCC Form 175 which will be permitted are minor amendments to correct minor errors or defects such as typographical errors. All other amendments to FCC Form 175, such as changes in the information supplied pursuant to § 24.813(a) or changes in the identification of parties to bidding consortia, will be considered to be major amendments. An FCC Form 175 which is amended by a major amendment will be considered to be newly filed and cannot be resubmitted after applicable filing deadlines. *See also* § 1.2105 of this Chapter.

§ 24.823 Amendment of applications for licenses in the broadband Personal Communications Services (other than applications filed on FCC Form 175).

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

(1) Amendments shall comply with § 24.829, as applicable; and

(2) Amendments which resolve interference conflicts or amendments under § 24.829 may be filed at any time.

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

(c) Major amendments, minor amendments. The Commission will classify all amendments as minor except in the cases listed below. An amendment shall be deemed to be a major amendment subject to § 24.827 if it proposes a substantial change in ownership or control.

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

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

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

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

(1) [Reserved]

(2) [Reserved]

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

(4) [Reserved]

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

§ 24.824 [Reserved]

§ 24.825 Application for temporary authorizations.

(a) In circumstances requiring immediate or temporary use of facilities, request may be made for special temporary authority to install and/or operate new or modified equipment. Any such request may be submitted as an informal application in the manner set forth in § 24.805 and must contain full particulars as to the proposed operation including all facts sufficient to justify the temporary authority sought and the public interest therein. No such request will be considered unless the request is received by the Commission at least 10 days prior to the date of proposed construction or operation or, where an extension is sought, at least 10 days prior to the expiration date of the existing temporary authorization. The Commission may accept a late-filed request upon due showing of sufficient reasons for the delay in submitting such request.

(b) Special temporary authorizations may be granted without regard to the 30-day public notice requirements of § 24.827(b) when:

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

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

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

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

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

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

§ 24.826 Receipt of application; Applications in the broadband Personal Communications Services filed on FCC Form 175 and other applications in the broadband Personal Communications Services.

(a) All applications for the initial provision of broadband PCS must be submitted on FCC Forms 175 and 175–S. Mutually exclusive initial applications in the broadband Personal Communications Services are subject to competitive bidding. FCC Form 401 ("Application for New or Modified Common Carrier Radio Station Under Part 22") must be submitted by each winning bidder for each broadband PCS license for which application was made on FCC Form 175. In the event that mutual exclusivity does not exist between applicants for a broadband PCS license that have filed FCC Form 175, the sole applicant will be required to file FCC Form 401. The aforementioned Forms 175, 175–S, and 401 are subject to the provisions of 47 CFR Part 1, Subpart Q ("Competitive Bidding Proceedings") and Subpart H of this Part. Blanket licenses are granted for each market frequency block. Applications for individual sites are not needed and will not be accepted. *See* § 24.11.

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

(c) Acceptance of an application for filing merely means that it has been the subject of a preliminary review as to completeness. Such acceptance will not preclude the subsequent return or dismissal of the application if it is found to be defective or not in accordance with the Commission's rules. (*See* § 24.813 for additional information concerning the filing of applications.)

§ 24.827 Public notice period.

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

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

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

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

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

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

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

(1) For authorization of a minor technical change in the facilities of an authorized station where such a change would not be classified as a major amendment (as defined by § 24.823) were such a change to be submitted as an amendment to a pending application;

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

(3) For extension of time to complete construction of authorized facilities (*see* § 24.203;

(4) For temporary authorization pursuant to § 24.825(b);

(5) [Reserved]

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

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

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

§ 24.828 Dismissal and return of applications.

(a) Except as provided under § 24.829, any application may be dismissed without prejudice as a matter of right if the applicant requests its dismissal prior to designation for hearing or, in the case of applications filed on Forms 175 and 175–S, prior to auction. An applicant's request for the return of his application after it has been accepted for filing will be considered to be a request for dismissal without prejudice. Applicants requesting dismissal of their applications may be subject to penalties contained in § 1.2104 of this Chapter. Requests for dismissal shall comply with the provisions of § 24.829 as appropriate.

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

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

(2) The petition complies with the provisions of § 24.829 (whenever applicable) and demonstrates good cause.

(c) The Commission will dismiss an application for failure to prosecute or for failure to respond substantially within a specified time period to official correspondence or requests for additional information. Dismissal shall be without prejudice if made prior to designation for hearing or prior to auction, but dismissal may be made with prejudice for unsatisfactory compliance with § 24.829 or after designation for hearing or after the applicant is notified that it is the winning bidder under the auction process.

§ 24.829 Ownership changes and agreements to amend or to dismiss applications or pleadings.

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

(1) A major change in the ownership of an applicant to which §§ 24.823(c) and 24.823(g) apply or which would cause the applicant to lose its status as a designated entity under § 24.709, or

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

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

(c) The provisions of § 22.927 of the Commission's Rules will apply in the event of the filing of petitions to deny or other pleadings or informal objections filed against broadband PCS applications. The provisions of § 22.928 of the Commission's Rules will apply in the event of dismissal of broadband PCS applications. The provisions of § 22.929 of the Commission's Rules will apply in the event of threats to file petitions to deny or other pleadings or informal objections against broadband PCS applications.

§ 24.830 Opposition to applications.

(a) Petitions to deny (including petitions for other forms of relief) and responsive pleadings for Commission consideration must comply with § 1.2108 of this Chapter and must:

(1) Identify the application or applications (including applicant's name, station location, Commission file numbers and radio service involved) with which it is concerned;

(2) Be filed in accordance with the pleading limitations, filing periods, and other applicable provisions of §§ 1.41 through 1.52 of this Chapter except where otherwise provided in § 1.2108 of this Chapter;

(3) Contain specific allegations of fact which, except for facts of which official notice may be taken, shall be supported by affidavit of a person or persons with personal knowledge thereof, and which shall be sufficient to demonstrate that the petitioner (or respondent) is a party in interest and that a grant of, or other Commission action regarding, the application would be *prima facie* inconsistent with the public interest;

(4) Be filed within thirty (30) days after the date of public notice announcing the acceptance for filing of any such application or major amendment thereto (unless the Commission otherwise extends the filing deadline); and

(5) Contain a certificate of service showing that it has been mailed to the applicant no later than the date of filing thereof with the Commission.

(b) A petition to deny a major amendment to a previously-filed application may only raise matters directly related to the amendment which could not have been raised in connection with the underlying previously-filed application. This subsection does not apply, however, to petitioners who gain standing because of the major amendment.

§ 24.831 Mutually exclusive applications.

(a) The Commission will consider applications for broadband PCS licenses to be mutually exclusive if they relate to the same geographical boundaries (MTA or BTA) and are timely filed for the same frequency block.

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

(c) An application will be entitled to comparative consideration with one or more conflicting applications only if the Commission determines that such comparative consideration will serve the public interest.

(d)–(j) [Reserved]

§ 24.832 Consideration of applications.

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

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

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

(2) The application is not subject to a post-auction hearing or to comparative consideration pursuant to § 24.831 with another application(s);

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

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

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

(c) If the Commission should grant without a formal hearing an application for an instrument of authorization which is subject to a petition to deny filed in accordance with § 24.830, the Commission will deny the petition by the issuance of a Memorandum Opinion and Order which will concisely state the reasons for the denial and dispose of all substantial issues raised by the petition.

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

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

(2) Rejects the grant as made and explains the reasons why the application should be granted as originally requested; and

(3) Returns the instrument of authorization.

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

(1) A substantial and material question of fact is presented (*see also* § 1.2108 of this Chapter);

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

(3) The application is entitled to comparative consideration (under § 24.831) with another application (or applications).

(f) The Commission may grant, deny or take other action with respect to an application designated for a formal hearing pursuant to paragraph (e) of this section or Part 1 of this Chapter.

(g) [Reserved]

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

§ 24.833–24.838 [Reserved]

§ 24.839 Transfer of control or assignment of license.

(a) Approval required. Authorizations shall be transferred or assigned to another party, voluntarily (for example, by contract) or involuntarily (for example, by death, bankruptcy or legal disability), directly or indirectly or by transfer of control of any corporation holding such authorization, only upon application and approval by the Commission. A transfer of control or assignment of station authorization in the broadband Personal Communications Service is also subject to §§ 24.711(e), 24.712(d), 24.713(b) (unjust enrichment) and 1.2111(a) of this Chapter (reporting requirement).

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

(2) In other situations a controlling interest shall be determined on a case-by-case basis considering the distribution of ownership and the relationships of the owners, including family relationships.

(b) Forms required.

(1) Assignment.

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

(ii) In the case of involuntary assignment, FCC Form 490 shall be filed within thirty (30) days following the event giving rise to the assignment.

(2) Transfer of control.

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

(ii) In the case of involuntary transfer of control, FCC Form 490 shall be filed within thirty (30) days following the event giving rise to the transfer.

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

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

(5) If the transfer of control of a license is approved, the new licensee is held to the original construction requirement of § 24.203.

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

(d) Restrictions on Assignments and Transfers of Licenses for Frequency Blocks C and F. No assignment or transfer of control of a license for frequency Block C or frequency Block F will be granted unless—

(1) The application for assignment or transfer of control is filed after five years from the date of the initial license grant;

(2) The application for assignment or transfer of control is filed after three years from the date of the initial license grant and the proposed assignee or transferee meets the eligibility criteria set forth in § 24.709;

(3) The application is for partial assignment of a partitioned service area to a rural telephone company pursuant to § 24.714 and the assignee meets the eligibility criteria set forth in § 24.709; or

(4) The application is for an involuntary assignment or transfer of control to a bankruptcy trustee appointed under involuntary bankruptcy, an independent receiver appointed by a court of competent jurisdiction in a foreclosure action or, in the event of death or disability, to a person or entity legally qualified to succeed the decrease or disabled person under the laws of the place having jurisdiction over the estate involved; provided that, the applicant requests a waiver pursuant to this paragraph.

(e) If the assignment or transfer of control of a license is approved, the assignee or transferee is subject to the original construction requirement of § 24.203.

§§ 24.840–24.842 [Reserved]

§ 24.843 Extension of time to complete construction.

(a) If construction is not completed within the time period set forth in § 24.203, the authorization will automatically expire. Before the period for construction expires an application for an extension of time to complete construction (FCC Form 489) may be filed. *See* paragraph (b) of this section. Within 30 days after the authorization expires an application for reinstatement may be filed on FCC Form 489.

(b) Extension of Time to Complete Construction. An application for extension of time to complete construction may be made on FCC Form 489. Extension of time requests must be filed prior to the expiration of the construction period. Extensions will be

granted only if the licensee shows that the failure to complete construction is due to causes beyond its control.

(c) An application for modification of an authorization (under construction) does not extend the initial construction period. If additional time to construct is required, an FCC Form 489 must be submitted.

(d) [Reserved]

§ 24.844 Termination of authorization.

(a) Termination of authorization.

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

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

(b) Termination of special temporary authorization. A special temporary authorization shall automatically terminate upon failure to comply with the conditions in the authorization.

(c) [Reserved]

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