

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

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

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<sup>210</sup> CTIA Petition at 6; BET Petition at 14-15.

<sup>211</sup> CTIA Petition at 6.

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

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

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

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

#### **b. Ownership Interests**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### **D. Special Provisions For Designated Entities**

##### **1. Bidding Credits**

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

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

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<sup>225</sup> *Fifth Report and Order*, FCC 94-178 at ¶ 130.

<sup>226</sup> See 47 C.F.R. §§ 24.712(a)-(c).

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

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

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

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

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

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

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<sup>230</sup> See NABOB Petition at 6-7.

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

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

<sup>233</sup> GTE Petition at 10.

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

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

<sup>236</sup> *Id.*

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

## 2. Installment Payments

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

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<sup>237</sup> BET Opposition at 15-16.

<sup>238</sup> Omnipoint Opposition at 7-12; Columbia PCS Opposition at 2-3; and BET Opposition at 7.

<sup>239</sup> *Fifth Report and Order*, FCC 94-178 at ¶ 135.

<sup>240</sup> *Id.* at ¶ 136.

<sup>241</sup> *Id.* at ¶ 137.

<sup>242</sup> *Id.*

<sup>243</sup> See generally 47 C.F.R. § 24.711.

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

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

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

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

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

<sup>246</sup> *Id.* at 4.

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

<sup>248</sup> Hernandez Petition at 5.

<sup>249</sup> Vanguard Opposition at 4.

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

### 3. Rural Telephone Company Provisions

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

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

<sup>251</sup> *Fifth Report and Order*, FCC 94-178 at ¶ 198.

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

<sup>253</sup> *Fifth Report and Order*, FCC 94-178 at ¶ 151.

other licensees through private negotiation and agreement either before or after the auction.<sup>254</sup>

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

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

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

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<sup>254</sup> *Id.*

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

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

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

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

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

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

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

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

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

<sup>260</sup> See 47 C.F.R. § 24.819.

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

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

<sup>263</sup> *Fifth Report and Order*, FCC 94-178 at ¶ 153.

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

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

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

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

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<sup>264</sup> BET Opposition at 16.

<sup>265</sup> *Id.* at 16-17.

<sup>266</sup> *Fifth Report and Order*, FCC 94-178 at ¶ 151.

<sup>267</sup> *See id.*

### a. Single Entity Purchase Limit

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

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

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

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<sup>268</sup> *Id.* at ¶¶ 169-171.

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

<sup>270</sup> SBPCS Petition for Reconsideration (SBPCS Petition), filed Aug. 22, 1994, at 4.

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

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

**b. Restrictions on Transfer or Assignment**

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

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

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<sup>272</sup> See Columbia PCS Opposition at 4-6.

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

<sup>274</sup> See 47 C.F.R. § 24.709(a)(3).

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

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

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

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

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

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

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

does occur during the five-year holding period.<sup>279</sup>

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

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

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

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<sup>279</sup> See AIDE Petition at 17-19.

<sup>280</sup> See CTIA Petition at 2-4.

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

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

until a broadband PCS licensee had met our five-year construction requirements.<sup>283</sup> We also determined that in-region cellular interests should not be permitted to acquire 10 MHz of broadband PCS spectrum until the year 2000 -- when they would be eligible for an additional 5 MHz of spectrum in their service areas.<sup>284</sup> CTIA's proposal would permit disaggregation sooner than is permissible under our PCS service rules, and should be rejected for reasons that we have previously established.<sup>285</sup>

125. In addition, we wish to clarify the application of our holding rule to our financial caps.<sup>286</sup> As we have stated, under certain circumstances we will allow licensees to retain their eligibility during the holding period, even if the company has grown beyond our size limitations for the entrepreneurs' block and for small business eligibility. Thus, we will permit entrepreneurs' block licensees to transfer their licenses in years four through five to other entrepreneurs' block licensees even if it would result in growth beyond the permissible gross assets and total revenues caps, as long as it otherwise complies with our control group and equity requirements. We believe this encourages designated entities to grow, instead of penalizing them for their success, which was a concern expressed by some commenters.<sup>287</sup>

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

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<sup>283</sup> See *Broadband PCS Reconsideration Order*, FCC 94-144 at ¶¶ 69-70, *further recon. Third Memorandum Opinion and Order* in Gen. Docket 90-314, FCC 94-265 (released Oct. 19, 1994).

<sup>284</sup> *Id.* at ¶ 67. See also 47 C.F.R. § 24.404.

<sup>285</sup> See *Second Report and Order* in Gen. Docket 90-314, 8 FCC Rcd 7700 (1993), *recon. Memorandum Opinion and Order*, 9 FCC Rcd 4441 (1994), *Order on Reconsideration*, 9 FCC Rcd 4441 (1994), *on further recon. Third Memorandum Opinion and Order*, FCC 94-265 (released Oct. 19, 1994). See also BET Petition at 3 (opposing CTIA proposal); McCaw Opposition to Petitions for Reconsideration (McCaw Opposition), filed Sept. 9, 1994, at 2-3 (supporting CTIA proposal).

<sup>286</sup> See *Fifth Report and Order*, FCC 94-178 at ¶ 167 (for a discussion of application of holding rule to the financial caps).

<sup>287</sup> See, e.g., MasTec Opposition to Petitions for Reconsideration (MasTec Opposition), filed Sept. 9, 1994, at 8; MEANS/SDN Opposition at 9-10; Omnipoint at 3.

original entrepreneurs' block auction.

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

## F. Miscellaneous

### 1. Audits

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

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

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

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

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

## 2. Defaults

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

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

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

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

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

far into the license term the default occurs, the reasons for default, whether the licensee has met construction build-out requirements, the licensee's financial condition, and whether the licensee is seeking a buyer under a distress sale policy. Following a grace period without successful resumption of payment or upon denial of a grace period request, we will declare the license cancelled and take appropriate measures under the Commission's debt collection rules and procedures."<sup>292</sup>

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

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

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

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

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<sup>292</sup> *Id.*

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

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

#### IV. PROCEDURAL MATTERS

##### A. Final Regulatory Flexibility Analysis

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

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

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

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

##### B. Ordering Clauses

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

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

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

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

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

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

141. **IT IS FURTHER ORDERED** that these rule changes made herein **WILL BECOME EFFECTIVE** sixty (60) days after publication in the *Federal Register*. This action is taken pursuant to Sections 4(i), 303(r) and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r) and 309(j).

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

FEDERAL COMMUNICATIONS COMMISSION

  
William F. Caton  
Acting Secretary

## Appendix A

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

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

### **Oppositions filed in Response to Petitions for Reconsideration**

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

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

**Replies filed in Response to Petitions for Reconsideration**

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

**Ex parte filings in Response to Fifth Report and Order**

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

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

## Appendix B

### Amended Rules

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

1. Section 24.709 is revised to read as follows:

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

##### **(a) General Rule.**

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

(2) The *gross revenues* and *total assets* of the applicant (or licensee), and its *affiliates*, and (except as provided in paragraph (b) of this section) of persons or entities that hold interests in the applicant (or licensee), and their *affiliates*, shall be attributed to the applicant and considered on a cumulative basis and aggregated for purposes of determining whether the applicant (or licensee) is eligible for a license for frequency block C or frequency block F under this section.

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

##### **(b) Exceptions to General Rule.**

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

(2) **Publicly-Traded Corporations.** Where an applicant (or licensee) is a *publicly traded corporation with widely dispersed voting power*, the *gross revenues* and *total assets* of a person or entity that holds an interest in the applicant (or licensee), and its *affiliates*, shall not be considered.