

(3) 25 Percent Equity Exception. The *gross revenues* and *total assets* of a person or entity that holds an interest in the applicant (or licensee), and its *affiliates*, shall not be considered so long as:

(i) Such person or entity, together with its *affiliates*, holds only *nonattributable equity* equaling no more than 25 percent of the applicant's (or licensee's) total equity;

(ii) Except as provided in paragraph (b)(5) of this section, such person or entity is not a member of the applicant's (or licensee's) *control group*; and

(iii) The applicant (or licensee) has a *control group* that complies with the minimum equity requirements of paragraph (b)(5) of this section, and, if the applicant (or licensee) is a corporation, owns at least 50.1 percent of the applicant's (or licensee's) voting interests, and, if the applicant (or licensee) is a partnership, holds all of its general partnership interests.

(4) 49.9 Percent Equity Exception. The *gross revenues* and *total assets* of a person or entity that holds an interest in the applicant (or licensee), and its *affiliates*, shall not be considered so long as:

(i) Such person or entity, together with its *affiliates*, holds only *nonattributable equity* equaling no more than 49.9 percent of the applicant's (or licensee's) total equity;

(ii) Except as provided in paragraph (b)(6) of this section, such person or entity is not a member of the applicant's (or licensee's) *control group*; and

(iii) The applicant (or licensee) has a *control group* that complies with the minimum equity requirements of paragraph (b)(6) of this section and, if the applicant (or licensee) is a corporation, owns at least 50.1 percent of the applicant's (or licensee's) voting interests, and, if the applicant (or licensee) is a partnership, holds all of its general partnership interests.

(5) Control Group Minimum 25 Percent Equity Requirement. In order to be eligible to exclude *gross revenues* and *total assets* of persons or entities identified in paragraph (b)(3) of this section, an applicant (or licensee) must comply with the following requirements:

(i) Except for an applicant (or licensee) whose sole control group member is a *preexisting entity*, as provided in paragraph (b)(5)(ii) of this section, at the time the applicant's short-form application (Form 175) is filed and until at least three years following the date of initial license grant, the applicant's (or licensee's) *control group* must own at least 25 percent of the applicant's (or licensee's) total equity as follows:

(A) At least 15 percent of the applicant's (or licensee's) total equity must be held by *qualifying investors*, either unconditionally or in the form of options exercisable, at the option of the holder, at any time and at any exercise price equal to or less than the market value at the time the applicant files its short-form application (Form 175);

(B) Such *qualifying investors* must have both *de jure* and *de facto* control of the applicant;

(C) The remaining 10 percent of the applicant's (or licensee's) total equity may be owned by any of the following:

(1) Such *qualifying investors*, either unconditionally or in the form of stock options not subject to the restrictions of paragraph (b)(5)(i)(A) of this section;

(2) *Institutional investors*, either unconditionally or in the form of stock options;

(3) Noncontrolling *existing investors* in any *preexisting entity* that is a member of the *control group*, either unconditionally or in the form of stock options; or

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

(D) Following termination of the three-year period specified in paragraph (b)(5)(i) of this section, *qualifying investors* must continue to own at least 10 percent of the applicant's (or licensee's) total equity, either unconditionally or in the form of stock options subject to the restrictions in paragraph (b)(5)(i)(A) of this section. The restrictions specified in paragraph (b)(5)(i)(C)(1)-(4) of this section no longer apply to the remaining equity after termination of such three-year period.

(ii) At the election of an applicant (or licensee) whose *control group's* sole member is a *preexisting entity*, the 25 percent minimum equity requirements set forth in paragraph (b)(5)(i) of this section shall apply, except that only 10 percent of the applicant's (or licensee's) total equity must be held by *qualifying investors* and that the remaining 15 percent of the applicant's (or licensee's) total equity may be held by *qualifying investors* or noncontrolling *existing investors* in such *control group* member or individuals that are members of the applicant's (or licensee's) management. These restrictions on the identity of the holder(s) of the remaining 15 percent of the licensee's total equity no longer apply after termination of the three-year period specified in paragraph (b)(5)(i) of this section.

(6) Control Group Minimum 50.1 Percent Equity Requirement. In order to be eligible to exclude *gross revenues* and *total assets* of persons or entities identified in paragraph (b)(4) of this section, an applicant (or licensee) must comply with the following requirements:

(i) Except for an applicant (or licensee) whose sole control group member is a *preexisting entity*, as provided in paragraph (b)(6)(ii) of this section, at the time the applicant's short-form application (Form 175) is filed and until at least three years following the date of initial license grant, the applicant's (or licensee's) *control group* must own at least 50.1 percent of the applicant's (or licensee's) total equity as follows:

(A) At least 30 percent of the applicant's (or licensee's) total equity must be held by *qualifying minority and/or women investors*, either unconditionally or in the form of options exercisable, at the option of the holder, at any time and at any exercise price equal to or less than the market value at the time the applicant files its short-form application (Form 175);

(B) Such *qualifying minority and/or women investors* must have both *de jure* and *de facto* control of the applicant;

(C) The remaining 20.1 percent of the applicant's (or licensee's) total equity may be owned by any of the following:

(1) Such *qualifying minority and/or women investors*, either unconditionally or in the form of stock options not subject to the restrictions of paragraph (b)(6)(i)(A) of this section;

(2) *Institutional investors*, either unconditionally or in the form of stock options;

(3) Noncontrolling *existing investors* in any *preexisting entity* that is a member of the *control group*, either unconditionally or in the form of stock options; or

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

(D) Following termination of the three-year period specified in paragraph (b)(6)(i) of this section, *qualifying minority and/or women investors* must continue to own at least 20 percent of the applicant's (or licensee's) total equity, either unconditionally or in the form of stock options subject to the restrictions in paragraph (b)(6)(i)(A) of this section. The restrictions specified in paragraph (b)(6)(i)(C)(1)-(4) of this section no longer apply to the remaining equity after termination of such three-year period.

(ii) At the election of an applicant (or licensee) whose *control group's* sole member is a *preexisting entity*, the 50.1 percent minimum equity requirements set forth in paragraph (b)(6)(i) of this section shall apply, except that only 20 percent of the applicant's (or licensee's) total equity must be held by *qualifying minority and/or women investors* and that the remaining 30.1 percent of the applicant's (or licensee's) total equity may be held by *qualifying minority and/or women investors* or noncontrolling *existing investors* in such *control group* member or individuals that are members of the applicant's (or licensee's) management. These restrictions on the identity of the holder(s) of the remaining 30.1 percent of the licensee's total equity no longer apply after termination of the three-year period specified in paragraph (b)(6)(i) of this section.

(7) Calculation of Certain Interests. Except as provided in paragraphs (b)(5) and

(b)(6) of this section, ownership interests shall be calculated on a fully diluted basis; all agreements such as warrants, stock options and convertible debentures will generally be treated as if the rights thereunder already have been fully exercised, except that such agreements may not be used to appear to terminate or divest ownership interests before they actually do so, in order to comply with the *nonattributable equity* requirements in paragraphs (b)(3)(i) and (b)(4)(i) of this section.

(8) Aggregation of Affiliate Interests. Persons or entities that hold interests in an applicant (or licensee) that are *affiliates* of each other or have an identity of interests identified in § 24.720(1)(3) will be treated as though they were one person or entity and their ownership interests aggregated for purposes of determining an applicant's (or licensee's) compliance with the *nonattributable equity* requirements in paragraphs (b)(3)(i) and (b)(4)(i) of this section.

Example 1: ABC Corp. is owned by individuals, A, B, and C, each having an equal one-third voting interest in ABC Corp. A and B together, with two-thirds of the stock have the power to control ABC Corp. and have an identity of interest. If A and B invest in DE Corp., a broadband PCS applicant for block C, A and B's separate interests in DE Corp. must be aggregated because A and B are to be treated as one person.

Example 2: ABC Corp. has a subsidiary BC Corp., of which it holds a controlling 51 percent of the stock. If ABC Corp. and BC Corp., both invest in DE Corp., their separate interests in DE Corp. must be aggregated because ABC Corp. and BC Corp. are affiliates of each other.

(c) Short-form and Long-Form Applications: Certifications and Disclosure.

(1) Short-form Application. In addition to certifications and disclosures required by Part 1, subpart Q of the this Chapter and § 24.813, each applicant for a license for frequency Block C or frequency Block F shall certify on its short-form application (Form 175) that it is eligible to bid on and obtain such license(s), and (if applicable) that it is eligible for designated entity status pursuant to this section and § 24.720, and shall append the following information as an exhibit to its Form 175:

(i) For an applicant that is a *publicly traded corporation with widely disbursed voting power*:

(A) A certified statement that such applicant complies with the requirements of the definition of *publicly traded corporation with widely disbursed voting power* set forth in § 24.720(m);

(B) The identity of each *affiliate* of the applicant if not disclosed pursuant to § 24.813; and

(C) The applicant's *gross revenues* and *total assets*, computed in accordance with paragraphs (a) and (b) of this section.

(ii) For all other applicants:

(A) The identity of each member of the applicant's *control group*, regardless of the size of each member's total interest in the applicant, and the percentage and type of interest held;

(B) The citizenship and the gender or minority group classification for each member of the applicant's *control group* if the applicant is claiming status as a *business owned by members of minority groups and/or women*;

(C) The status of each *control group* member that is an *institutional investor*, an *existing investor*, and/or a member of the applicant's management;

(D) The identity of each *affiliate* of the applicant and each *affiliate* of individuals or entities identified pursuant to paragraphs (c)(1)(ii)(A) and (c)(1)(ii)(C) of this section if not disclosed pursuant to § 24.813;

(E) A certification that the applicant's sole *control group* member is a *preexisting entity*, if the applicant makes the election in either paragraph (b)(5)(ii) or (b)(6)(ii) of this section; and

(F) The applicant's *gross revenues* and *total assets*, computed in accordance with paragraphs (a) and (b) of this section.

(iii) For each applicant claiming status as a *small business consortium*, the information specified in paragraph (c)(1)(ii) of this section, for each member of such consortium.

(2) Long-form Application. In addition to the requirements in subpart I of this part and other applicable rules (e.g., §§ 24.204(f), 20.6(e), 20.9(b)), each applicant submitting a long-form application for license(s) for frequency blocks C and F shall, in an exhibit to its long-form application:

(i) Disclose separately and in the aggregate the *gross revenues* and *total assets*, computed in accordance with paragraphs (a) and (b) of this section, for each of the following: the applicant; the applicant's *affiliates*; the applicant's *control group* members; the applicant's attributable investors; and *affiliates* of its attributable investors;

(ii) List and summarize all agreements or other instruments (with appropriate references to specific provisions in the text of such agreements and instruments) that support the applicant's eligibility for a license(s) for frequency Block C or frequency Block F and its eligibility under §§ 24.711 through 24.720, including the establishment of *de facto* and *de*

jure control; such agreements and instruments include articles of incorporation and bylaws, shareholder agreements, voting or other trust agreements, partnership agreements, management agreements, joint marketing agreements, franchise agreements, and any other relevant agreements (including letters of intent), oral or written; and

(iii) List and summarize any investor protection agreements and identify specifically any such provisions in those agreements identified pursuant to paragraph (c)(2)(ii) of this section, including rights of first refusal, supermajority clauses, options, veto rights, and rights to hire and fire employees and to appoint members to boards of directors or management committees.

(3) **Records Maintenance.** All applicants, including those that are winning bidders, shall maintain at their principal place of business an updated file of ownership, revenue and asset information, including those documents referenced in paragraphs (c)(2)(ii) and (c)(2)(iii) of this section and any other documents necessary to establish eligibility under this section or under the definitions of *small business* and/or *business owned by members of minority groups and/or women*. Licensees (and their successors in interest) shall maintain such files for the term of the license. Applicants that do not obtain the license(s) for which they applied shall maintain such files until the grant of such license(s) is final, or one year from the date of the filing of their short-form application(s) (Form 175), whichever is earlier.

(d) **Audits.**

(1) Applicants and licensees claiming eligibility under this section or §§ 24.711 through 24.720 shall be subject to audits by the Commission, using in-house and contract resources. Selection for audit may be random, on information, or on the basis of other factors.

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

(e) **Definitions.** The terms *affiliate*, *business owned by members of minority groups and women*, *consortium of small businesses*, *control group*, *existing investor*, *gross revenues*, *institutional investor*, *members of minority groups*, *nonattributable equity*, *preexisting entity*, *publicly traded corporation with widely dispersed voting power*, *qualifying investor*, *qualifying minority and/or woman investor*, and *total assets* used in this section are defined in § 24.720.

2. Section 24.711 is amended to read as follows:

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

(a) Upfront Payments and Down Payments.

(1) Each eligible bidder for licenses on frequency Blocks C or F subject to auction shall pay an upfront payment of \$0.015 per MHz per pop for the maximum number of licenses (in terms of MHz-pops) on which it intends to bid pursuant to § 1.2106 of this Chapter and procedures specified by Public Notice.

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

(b) Installment Payments. Each eligible licensee of frequency Block C or F may pay the remaining 90 percent of the net auction price for the license in installment payments pursuant to § 1.2110(e) of this Chapter and under the following terms:

(1) For an eligible licensee with gross revenues exceeding \$75 million (calculated in accordance with § 24.709(a)(2) and (b)) in each of the two preceding years, interest shall be imposed based on the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted, plus 3.5 percent; payments shall include both principal and interest amortized over the term of the license, beginning one year after the date of the initial license grant.

(2) For an eligible licensee with *gross revenues* not exceeding \$75 million (calculated in accordance with § 24.709(a)(2) and (b)) in each of the two preceding years or an eligible licensee in a BTA market other than the fifty largest markets, interest shall be imposed based on the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted, plus 2.5 percent; payments shall include interest only for the first year and payments of interest and principal amortized over the remaining nine years of the license term.

(3) For an eligible licensee that qualifies as a *small business* or as a *consortium of small businesses*, interest shall be imposed based on the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted, plus 2.5 percent; payments shall include interest only for the first two years and payments of interest and principal amortized over the remaining eight years of the license term.

(4) For an eligible licensee that qualifies as a *business owned by members of minority*

groups and/or women, interest shall be imposed based on the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted; payments shall include interest only for the first three years and payments of interest and principal amortized over the remaining seven years of the license term.

(5) For an eligible licensee that qualifies as a *small business owned by members of minority groups and/or women* or as a *consortium of small business owned by members of minority groups and/or women*, interest shall be imposed based on the rate for ten-year U.S. Treasury obligations applicable on the date the license is granted; payments shall include interest only for the first six years and payments of interest and principal amortized over the remaining four years of the license term.

(c) Unjust Enrichment.

(1) If a licensee that utilizes installment financing under this section seeks to assign or transfer control of its license to an entity not meeting the eligibility standards for installment payments, the licensee must make full payment of the remaining unpaid principal and any unpaid interest accrued through the date of assignment or transfer as a condition of approval.

(2) If a licensee that utilizes installment financing under this section seeks to make any change in ownership structure that would result in the licensee losing eligibility for installment payments, the licensee shall first seek Commission approval and must make full payment of the remaining unpaid principal and any unpaid interest accrued through the date of such change as a condition of approval. A licensee's (or other attributable entity's) increased *gross revenues* or increased *total assets* due to *nonattributable equity* investments (*i.e.*, from sources whose *gross revenues* and *total assets* are not considered under § 24.709(b)), debt financing, revenue from operations or other investments, business development or expanded service shall not be considered to result in the licensee losing eligibility for installment payments.

(3) If a licensee seeks to make any change in ownership that would result in the licensee qualifying for a less favorable installment plan under this section, the licensee shall seek Commission approval and must adjust its payment plan to reflect its new eligibility status. A licensee may not switch its payment plan to a more favorable plan.

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

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

* * * * *

(d) Unjust Enrichment.

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

4. Section 24.720 is revised to read as follows:

§ 24.720 Definitions.

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

(b) Small Business; Consortium of Small Businesses.

(1) A *small business* is an entity that, together with its *affiliates* and persons or entities that hold interests in such entity and their *affiliates*, has average annual *gross revenues* that are not more than \$40 million for the preceding three years.

(2) For purposes of determining whether an entity meets the \$40 million average annual *gross revenues* size standard set forth in paragraph (b)(1) of this section, the *gross revenues* of the entity, its *affiliates*, persons or entities holding interests in the entity and their *affiliates* shall be considered on a cumulative basis and aggregated, subject to the exceptions set forth in § 24.709(b).

(3) A *small business consortium* is a conglomerate organization formed as a joint venture between or among mutually-independent business firms, each of which individually satisfies the definition of a *small business* in paragraphs (b)(1) and (b)(2) of this section.

(c) Business Owned by Members of Minority Groups and/or Women. A *business owned by members of minority groups and/or women* is an entity:

(1) In which the *qualifying investor* members of an applicant's *control group* are members of minority groups and/or women who are United States citizens; and

(2) That complies with the requirements of § 24.709(b)(3) and (b)(5) or § 24.709(b)(4) and (b)(6).

(d) *Small Business Owned by Members of Minority Groups and/or Women; Consortium of Small Businesses Owned by Members of Minority Groups and/or Women.* A *small business owned by members of minority groups and/or women* is an entity that meets the definitions in both paragraphs (b) and (c) of this section. A *consortium of small businesses owned by members of minority groups and/or women* is a conglomerate organization formed as a joint venture between mutually-independent business firms, each of which individually satisfies the definitions in paragraphs (b) and (c) of this section.

(e) *Rural Telephone Company.* A *rural telephone company* is a local exchange carrier having 100,000 or fewer access lines, including all *affiliates*.

(f) *Gross Revenues.* *Gross revenues* shall mean all income received by an entity, whether earned or passive, before any deductions are made for costs of doing business (*e.g.* cost of goods sold), as evidenced by audited financial statements for the relevant number of calendar years preceding January 1, 1994, or, if audited financial statements were not prepared on a calendar-year basis, for the most recently completed fiscal years preceding the filing of the applicant's short-form application (Form 175). For applications filed after June 30, 1995, gross revenues shall be evidenced by audited financial statements for the preceding relevant number of calendar or fiscal years. If an entity was not in existence for all or part of the relevant period, gross revenues shall be evidenced by the audited financial statements of the entity's predecessor-in-interest or, if there is no identifiable predecessor-in-interest, unaudited financial statements certified by the applicant as accurate.

(g) *Total assets.* *Total assets* shall mean the book value (except where generally accepted accounting principles (GAAP) require market valuation) of all property owned by an entity, whether real or personal, tangible or intangible, as evidenced by the most recent audited financial statements.

(h) *Institutional Investor.* An *institutional investor* is an insurance company, a bank holding stock in trust accounts through its trust department, or an investment company as defined in 15 U.S.C. § 80a-3(a), without reference to, or incorporation of, the exemptions set forth in 15 U.S.C. § 80a-3(b) and (c); provided that, if such investment company is owned, in whole or in part, by other entities, such investment company, such other entities and the *affiliates* of such other entities, taken as a whole, must be primarily engaged in the business of investing, reinvesting or trading in securities or in distributing or providing investment management services for securities.

(i) *Members of Minority Groups.* *Members of minority groups* includes Blacks, Hispanics,

American Indians, Alaskan Natives, Asians, and Pacific Islanders.

(j) Nonattributable Equity.

(1) *Nonattributable equity* shall mean:

(i) For corporations, voting stock or non-voting stock that includes no more than twenty-five percent of the total voting equity, including the right to vote such stock through a voting trust or other arrangement;

(ii) For partnerships, joint ventures and other non-corporate entities, limited partnership interests and similar interests that do not afford the power to exercise control of the entity.

(2) For purposes of assessing compliance with the equity limits in § 24.709(b)(3)(i) and (b)(4)(i), where such interests are not held directly in the applicant, the total equity held by a person or entity shall be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain.

(k) Control Group. A *control group* is an entity, or a group of individuals or entities, that possesses *de jure* control and *de facto* control of an applicant or licensee, and as to which the applicant's or licensee's charters, bylaws, agreements and any other relevant documents (and amendments thereto) provide:

(1) That the entity and/or its members own unconditionally at least 50.1 percent of the total voting interests of a corporation;

(2) That the entity and/or its members receive at least 50.1 percent of the annual distribution of any dividends paid on the voting stock of a corporation;

(3) That, in the event of dissolution or liquidation of a corporation, the entity and/or its members are entitled to receive 100 percent of the value of each share of stock in its possession and a percentage of the retained earnings of the concern that is equivalent to the amount of equity held in the corporation; and

(4) That, for other types of businesses, the entity and/or its members have the right to receive dividends, profits and regular and liquidating distributions from the business in proportion to the amount of equity held in the business.

Note: Voting control does not always assure de facto control, such as, for example, when the voting stock of the *control group* is widely dispersed (*see, e.g.,* § 24.720(1)(2)(iii)).

(l) Affiliate.

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

(i) Directly or indirectly controls or has the power to control the applicant, or

(ii) Is directly or indirectly controlled by the applicant, or

(iii) Is directly or indirectly controlled by a third party or parties that also controls or has the power to control the applicant, or

(iv) Has an "identity of interest" with the applicant.

(2) Nature of control in determining affiliation.

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

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

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

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

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

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

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

Example 2. One shareholder in Corporation Y, shareholder A, has an attributable interest in a PCS application. Another shareholder in Corporation Y, shareholder B, has a nonattributable interest in the same PCS application. While neither shareholder has enough shares to individually control Corporation Y, together they have the power to control Corporation Y. Through the common investment of shareholders A and B in the PCS application, Corporation Y would still be deemed an affiliate of the applicant.

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

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

(A) The family members are estranged,

(B) The family ties are remote, or

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

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

(4) Affiliation through stock ownership.

(i) An applicant is presumed to control or have the power to control a concern if he

or she owns or controls or has the power to control 50 percent or more of its voting stock.

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

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

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

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

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

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

(6) Affiliation under voting trusts.

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

will.

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

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

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

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

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

(10) Affiliation under joint venture arrangements.

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

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

(11) Exclusions from affiliation coverage.

(i) For purposes of § 24.709(a)(2) and paragraph (b)(2) of this section, Indian tribes

or Alaska Regional or Village Corporations organized pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601, *et seq.*), or entities owned and controlled by such tribes or corporations, are not considered *affiliates* of an applicant (or licensee) that is owned and controlled by such tribes, corporations or entities, and that otherwise complies with the requirements of § 24.709(b)(3) and (b)(5) or § 24.709(b)(4) and (b)(6), except that *gross revenues* derived from gaming activities conducted by affiliated entities pursuant to the Indian Gaming Regulatory Act (25 U.S.C. § 2701 *et seq.*) will be counted in determining such applicant's (or licensee's) compliance with the financial requirements of § 24.709(a) and paragraph (b) of this section, unless such applicant establishes that it will not receive a substantial unfair competitive advantage because significant legal constraints restrict the applicant's ability to access such *gross revenues*.

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

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

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

(2) In which no person

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

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

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

(4) The term *person* shall be defined as in section 13(d) of the Securities and

Exchange Act of 1934, as amended (15 U.S.C. § 78(m)), and shall also include investors that are commonly controlled under the indicia of control set forth in the definition of *affiliate* in paragraphs (1)(2) through (10) of this section.

(n) *Qualifying Investor; Qualifying Minority and/or Woman Investor.*

(1) A *qualifying investor* is a person who is (or holds an interest in) a member of the applicant's (or licensee's) *control group* whose *gross revenues* and *total assets*, when aggregated with those of all other attributable investors and *affiliates*, do not exceed the *gross revenues* and *total assets* limits specified in § 24.709(a), or, in the case of an applicant (or licensee) that is a *small business*, do not exceed the *gross revenues* limit specified in paragraph (b) of this section.

(2) A *qualifying minority and/or woman investor* is a person who is a *qualifying investor* under paragraph (n)(1), who is (or holds an interest in) a member of the applicant's (or licensee's) *control group* and who is a *member of a minority group* or a woman and a United States citizen.

(3) For purposes of assessing compliance with the minimum equity requirements of § 24.709(b)(5) and (6), where such equity interests are not held directly in the applicant, interests held by *qualifying investors* and *qualifying minority and/or woman investors* shall be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain.

(o) *Preexisting Entity; Existing Investor.* A *preexisting entity* is an entity was operating and earning revenues for at least two years prior to December 31, 1994. An *existing investor* is a person or entity that was an owner of record of a *preexisting entity's* equity as of November 10, 1994, and any person or entity acquiring de minimis equity holdings in a *preexisting entity* after that date.

Note: In applying the term *existing investor* to de minimis interests in *preexisting entities* obtained or increased after November 10, 1994, the Commission will scrutinize any significant restructuring of the *preexisting entity* that occurs after that date and will presume that any change of equity that is five percent or less of the *preexisting entity's* total equity is de minimis. The burden is on the applicant (or licensee) to demonstrate that changes that exceed five percent are not significant.

5. Section 24.839 is amended by revising paragraphs (a) and (d) to read as follows:

§ 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(c), 24.712(d), 24.713(b) (unjust enrichment) and 1.2111(a) of this Chapter (reporting requirement).

* * * * *

(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 at the time the application for assignment or transfer of control is filed, or the proposed assignee or transferee holds other license(s) for frequency Blocks C and F and, at the time of receipt of such license(s), met the eligibility criteria set forth in § 24.709;

* * * * *

Appendix C

Changes in Control Group Voting and Ownership Thresholds

Old Rules \longrightarrow New Rules

Option A

	Attributable Investor	Control Group	Control Group Equity
Voting Stock	15% \longrightarrow 25%	50.1%	25% \longrightarrow 15% <small>*</small>
Equity	25%	25%	0% \longrightarrow 10% <small>Institutional Investors Management Options Preexisting shareholders</small>

* After year 3, qualifying individuals need only hold 10% of the equity.

Option B (for minority- and women-owned businesses only)

	Attributable Investor	Control Group	Control Group Equity
Voting Stock	15% \longrightarrow 25%	50.1%	50.1% \longrightarrow 30% <small>**</small>
Equity	49.9%	50.1%	0% \longrightarrow 20.1% <small>Institutional Investors Management Options Preexisting shareholders</small>

** After year 3, qualifying individuals need only hold 20% of the equity.

**SEPARATE STATEMENT
OF
CHAIRMAN REED E. HUNDT**

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

On June 29, 1994, the Commission adopted widely-praised rules that increase opportunities for women and minorities to own and operate the telecommunications companies of the next century. Today we adopted revisions to these rules to further assist women- and minority- controlled businesses, as well as small businesses, to attract the financial backing necessary to compete in the auctions and have an opportunity to operate what we hope will be many successful businesses.

While I support the order on reconsideration, I write separately because I believe we have not done as much as we could and should to make sure that our rules promote long-term participation of designated entities (DEs) in the personal communications service (PCS) business, and correspondingly to discourage those who desire only short term participation. Further, I believe we could and should have done more to make sure that the benefits of our measures to promote DE participation will be enjoyed by a sufficiently large number of DEs.

Let me be very clear. What we have done is sound. I only believe that we should have done more.

We must be mindful that some investors may attempt to manipulate our rules to the end of obliging DEs to relinquish control of their companies, as soon as our rules permit sales to non-DEs. Such attempts may be natural, and not necessarily ill-intended. But just as we ought to protect comparatively powerless consumers from monopoly pricing, so also is it part of our duty to assist wireless communications enterprises to cope with the pressure that investors may put on such entities to exit from their businesses sooner than they may wish. Our rules prohibit designated entities from transferring their licenses to any party during the first three years of the license term. In years 3-5, the DE may sell or transfer the license only to another DE. After year 5, a DE may sell or transfer the license to anyone, including a non-DE, subject to unjust enrichment penalties.

Various DEs have reported that in their negotiations with some strategic investors, the investors expressed less interest when the DEs characterized themselves as potential long-term partners. Instead, some investors appear to prefer DEs who commit to selling in five years. In order to minimize the number of

applicants that simply want to cash out rather than actually participate in the communications infrastructure, designated entities have suggested proposals to extend the DE holding term to seven years. See, e.g., Letter from the Minority Enterprise Legal Defense and Education Fund, Inc., November 2, 1994. These designated entities argue that a seven-year holding period would help them attract investors who are interested in backing DEs that want to be long-term providers of PCS services.

I agree with the Minority Enterprise Legal Defense and Education Fund. I favor a rule that extends until year seven the time during which a DE's license can be sold or transferred only to another DE. I believe that such a rule would encourage long-term participation in the PCS market by designated entities, giving them valuable experience and a long-term equity stake in the business. It would also attract investors who are interested in DEs as long-term partners, not just those looking for control of the PCS licenses in the entrepreneurs' block.

Congress directed the Commission to ensure that designated entities "are given the opportunity to participate in the provision of spectrum-based services." 47 U.S.C. Section 309(j)(4)(D) (emphasis added). Thus, the Commission should do more than simply provide entry-level opportunities for those designated entities that do not intend to become long-term participants in the provision of PCS. I believe that an extension of the holding period from five to seven years would better fulfill our Congressional directive and would ensure that the benefits of the rules we adopt today will endure.

Because my colleagues on the Commission have not chosen to extend the holding period for DEs to seven years, it is particularly important that we use our substantial enforcement powers to the fullest extent to ensure that women, minority and small businesses who win DE licenses control those licenses. DEs must have the opportunity to determine the direction of the business - what services will be provided, at what cost, to whom, and to determine the fate of the business -- whether it will expand, whether it will be sold, and to whom it will be sold. Any attempt to take that decision-making power away from DEs, or to minimize their choices by manipulating contractual or financial arrangements, will be scrutinized with great care as a potential violation of our rules requiring de facto and de jure control by the DE.

As Chairman of the Commission, I will not tolerate abuses of our measures to assist designated entities. We will be vigilant in ensuring that these measures benefit only bona fide DEs; those who abuse our rules will be penalized to the full extent of the law. Immediately after the recent Interactive Video and Data Services (IVDS) auctions, the Commission, on its own motion, initiated an investigation under Section 403 of the Communications Act to investigate allegations of abuse of our designated entity rules. The Commission will use its

considerable enforcement powers in the PCS service as well, and plans to use the substantial resources of the Field Operations Bureau to conduct on-site audits of designated entities, to weed out fraudulent operations, and to ensure that DEs control their PCS operations.

Finally, I am concerned that we have not gone far enough to ensure that the benefits of the DE incentives in broadband PCS are disseminated among a large number of DEs. Our rules permit a single DE to acquire up to 10 percent of the licenses in the entrepreneurs' block. Under our rules, a single DE could acquire the licenses for the top 98 markets, which today would give that DE coverage of 67 percent of the nation's population. It would be a better result to impose a moderate population cap, for example 25 percent, in addition to the cap on the number of licenses. This would ensure a minimum of at least four large-scale DEs, rather than only one, without unduly interfering with efforts to pursue nationwide or regional strategies.

With these changes, I believe that a good decision would become the best decision that the Commission could make. We can and will, however, pursue other strategies, including aggressive enforcement of our rules, to ensure that a larger number of DEs will have opportunities to become long-term participants in the PCS industry.

SEPARATE STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

**RE: Implementation of Section 309 (j) of the Communications Act--
Competitive Bidding (PP Docket No. 93-253)**

The Commission by its adoption of this Order modifies the auction bidding rules for small, minority and women-owned businesses ("designated entities" or "DEs"). I believe that these modifications will prove beneficial for designated entities as they seek to form capital and strategic alliances to be successful participants in the broadband personal communications services ("PCS") arena. I write separately to emphasize my concern that the Commission not attempt to tailor its rules to each set of unusual circumstances in its endeavor to be sensitive to the obstacles confronted by designated entities.

I am pleased that numerous concerns raised by DEs about the realities of capital formation and strategic investment have been addressed by the Commission in this Order. I have consistently stated that designated entities must bring additional incentives to the negotiating table to attract the capital that will be needed to participate as a PCS player.¹ I am concerned, however, that we not strive to address the particular needs of each designated entity seeking to bid in the entrepreneurs' blocks as it may result in the unintentional "tipping" of the level playing field that we have attempted to develop through our auction bidding rules. Notwithstanding my concerns, I applaud the Commission's efforts to remain responsive to the general issues raised by the DE community as they position themselves to participate in PCS.

¹See Second Report and Order in PP Docket No. 93-253, 9 FCC Rcd 2348, (Separate Statement of Commissioner Andrew C. Barrett).

SEPARATE STATEMENT
OF
COMMISSIONER SUSAN NESS

Re: Implementation of Competitive Bidding (PP Docket No. 93-253)

The order we adopt today reaffirms and revises the rules for participation in the auctions for the broadband PCS Entrepreneurs' Blocks. We have clarified the rules in some respects and modified them in others, but in large measure we have maintained the framework we adopted in July. In evaluating the record, our challenge was to devise appropriate measures to afford women, minorities, and other designated entities opportunities to participate fully in emerging wireless communications markets.

As we charted our future direction, I found it helpful to survey the path that has already been taken. When Congress decided to give the FCC auction authority, it directed the Commission to design a competitive bidding system that did not funnel opportunities for participation in new wireless businesses merely to those with "deep pockets." Congress was quite explicit. It said that the competitive bidding system, among other things, must promote "economic opportunity and competition . . ." The system must ensure 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."

The Commission takes this mandate seriously. As we implement this mandate, we need to bridge two, sometimes conflicting, objectives. We want to provide the flexibility necessary to enable designated entities adequately to capitalize their PCS ventures and we want to ensure that they retain a real economic stake in their business.

In recent weeks, I have heard a lot about exit strategies, about supermajority provisions, rights of first refusal, puts, calls, and management agreements. Potential investors have legitimate interests in protecting their investment and limiting their risks. The Commission has equally legitimate concerns. We do not want to see designated entity firms acquiring licenses, at reduced rates and on preferential terms, only to turn them over to the "deep pockets" at the end of the license holding period. If this happens, in my view, we will have made little progress.

This is not an easy balance. It has required the Commission to ask some hard questions and make some tough decisions. My main test for any modification to these rules has been to ask: will this enhance the ability of the designated entities to obtain access to capital in a manner consistent with reasonable financial principles?

I have also sought to minimize opportunity for "gaming" the process. As a matter of fairness, we must have a compelling reason to make any changes to the rules adopted in our earlier order that might impact business plans of prospective bidders.

We cannot and should not micro-manage. Nor should we exceed our congressional directive to give designated entities the opportunity to participate in the provision of wireless services. There were other measures proposed to benefit designated entities that we have declined to adopt -- correctly, in my view -- because our role is to provide an opportunity, not a guarantee, for participation.

Our Nation's radio spectrum is a scarce resource and, as its steward, the Commission has the obligation to be careful in how it is distributed. Will our efforts to meet our mandate to ensure widespread dissemination of licenses for wireless spectrum provide the public benefit Congress envisioned? The answer to that question will not come in six months, nor even in five years, but rather, in ten years or more as these emerging businesses become thriving enterprises.