APPENDIX B

REGULATORY FLEXIBILITY ACT

I. Final Regulatory Flexibility Analysis

Report and Order

As required by Section 603 of the Regulatory Flexibility Act, 5 U.S.C. § 603 (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rule Making in this proceeding in ET Docket No. 95-183.[307] The Commission sought written public comments on the proposals in the *NPRM*, including on the IRFA. The Commission's Final Regulatory Flexibility Analysis (FRFA) in this *Report and Order* conforms to the RFA, as amended by the Contract With America Advancement Act of 1996 (CWAAA), Pub. L. No. 104-121, 110 Stat. 847 (1996).[308]

A. Need for and Purpose of this Action:

In this Report and Order, the Commission adopts rules and procedures intended to facilitate the efficient use of the 38.6-40.0 GHz frequency band (the "39 GHz" band)and to permit different types of services to be offered therein. The purposes of this action are to provide support spectrum for emerging technologies, as well as to permit the development of innovative point-to-point or point-to-multipoint services. The Commission amends the rules for fixed, point-to-point microwave service in the 39 GHz band , so as to conform the regulatory approach toward operations in that band with our proposals for licensing the adjacent 37.0-38.6 GHz (37 GHz) band. Action on the 37.0-38.6 GHz band (the "37 GHz" band) has been postponed. In this item the Commission retains the existing channeling plan and amends some of the existing licensing and technical rules for the 39 GHz band in order to improve the regulatory environment for the development and implementation of a broad range of point-to-point microwave operations. The Commission also is adopting rules for competitive bidding for the 39 GHz band. By these actions, the Commission is creating a flexible regulatory vehicle for facilitating the development of a variety of fixed microwave operations that will provide, *inter alia*, communications infrastructure for commercial and private mobile radio operations and competitive wireless local telephone service. The Commission concludes that the public interest is served by the geographic licensing and competitive bidding rules adopted herein.

B. Summary of Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis:

No comments were filed in direct response to the IRFA. In general comments on the *NPRM*, however, some commenters raised issues that might affect small entities. In particular, one commenter contended that in the auctions for the 39 GHz band, small entities may be at serious competitive disadvantage *vis-a-vis* large, well-financed companies, especially if the small businesses already expended substantial sums on obtaining PCS licenses. This commenter stated that if auctions are to be utilized,

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[307] Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, ET Docket No. 95-183, *Notice of Proposed Rule Making and Order*, 11 FCC Rcd 4930 (1996) *(NPRM and Order)*.

[308] Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA, Subtitle II of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), *codified at* 5 U.S.C. § 601 *et seq.)*

small business preferences must be designed to provide meaningful assistance to small business.[309] Other commenters also supported small business preferences in the auctions.[310] Various commenters contend that the upfront payment formula of $2,500 or $0.02 pop per MHz as proposed is excessive and will put a burden on small businesses.[311] Further, some commenters claim that the proposed bidding credit offered to small business entities is too low.[312] Many commenters support the concept of permitting all 39 GHz licensees to partition their licenses to any potential licensee meeting the relevant requirements.[313] These commenters state that partitioning will assist small businesses that might be able to afford a portion of a license.

C. Changes Made to the Proposed Rules

SERVICE RULES

In the *NPRM*, we proposed a partitioning scheme with respect to rural telephone companies. The Commission has determined in the *Report and Order* that the option of partitioning should be made available to all entities eligible to be licensees in the 39 GHz band. The Commission also concluded that 39 GHz licensees should be permitted to disaggregate their spectrum blocks. In the *NPRM* we also proposed to establish a maximum field strength limit that would apply at the boundaries of each service area which would provide that licensees' operations not exceeding this limit would avoid the need to complete the formal coordination process. However, in this *Report and Order* we elect not to adopt a field strength limit but will continue to use the frequency coordination procedures outlined in Section 101.103(d) of the Commission's Rules. In addition, we proposed new build-out requirements for 39 GHz licensees to ensure that the spectrum was being used efficiently. We suggested four construction build-out options, each of which depended upon a specific number of fixed stations to be built within the licensees' geographic area. In this *Report and Order*, we conclude that a substantial service standard is the most appropriate benchmark for a build-out requirement for the 39 GHz band, because it will permit flexibility in system design and market development, and provide a clear and expeditious accounting of spectrum use by licensees to ensure that service is being provided to the public.

AUCTION RULES

The Commission has delegated authority to the Wireless Telecommunications Bureau to modify the upfront payment calculation for the 39 GHz auction if circumstances warrant and such modification is in the public interest.

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309 DCR Comments at 6.

310 DCR Comments at 6; PCS Fund Comments at 10.

311 *See e.g.*, PCS Fund Comments at 6; Milliwave Limited Comments at 11, n.22; WinStar Comments at 20-21; Pacific Bell Comments at 2.

312 PCS Fund Comments at 8-10; DCR Comments at 7.

313 *See. e.g.*, DCR Comments at 2-6; AT&T Wireless Comments at 10; Pacific Bell Comments at 6.

The Commission in general adopted the proposed small business definition of an entity with not more than $40 million in average annual gross revenues for the preceding three years. As discussed below, with respect to bidding credits, the Commission created an additional category of small businesses -- very small businesses. These are entities with not more than $15 million in average annual gross revenues for the preceding three years. In determining whether an applicant qualifies as a small business, the Commission will attribute the gross revenues of all controlling principals in the small business applicant as well as the gross revenues of affiliates of the applicant. No specific equity requirements will be imposed on the controlling principals that meet the small business definition. However, in order for an applicant to qualify as a small business, qualifying small business principals must maintain "control" of the applicant. The term control will include both *de facto* and *de jure* control of the applicant.

In the *NPRM*, the Commission proposed a 10 percent bidding credit for qualified small businesses. In this item, the Commission adopts tiered bidding credits. Tiered bidding credits will promote vigorous competition not only between small businesses and large businesses but also between small businesses of different economic sizes. In addition, a tiered approach will encourage smaller businesses, that may be very well-suited to provide niche services to participate in this auction. Accordingly, small businesses with average gross revenues of not more than $40 million for the preceding three years will receive a 25 percent bidding credit. Smaller businesses with average gross revenues of not more than $15 million for the preceding three years will receive a 35 percent bidding credit. Bidding credits for small businesses will not be cumulative.

D. Description and Estimate of the Small Entities Subject to the Rules:

The rules adopted in this Report and Order will allow cellular, PCS, and other small communication entities that require support spectrum to obtain licenses through competitive bidding. Pursuant to 47 C.F.R. §101.1209, the Commission has defined "small business entity" in the 39 GHz auction as a firm that had gross revenues of less than $40 million in the three previous calendar years. Approval for this regulation defining "small business entity" in the context of 39 GHz was requested from the Small Business Administration on May 8, 1997.

1. Estimates for Cellular Licensees

The Commission has not developed a definition of small entities applicable to cellular licensees. Therefore, the applicable definition of small entity is the definition under the Small Business Administration (SBA) rules applicable to radiotelephone companies. This definition provides that a small entity is a radiotelephone company employing fewer than 1,500 persons.[314] Since the Regulatory Flexibility Act amendments were not in effect until the record in this proceeding was closed, the Commission was unable to request information regarding the number of small cellular businesses and is unable at this time to determine the precise number of cellular firms which are small businesses.

The size data provided by the SBA does not enable us to make a meaningful estimate of the number of cellular providers which are small entities because it combines all radiotelephone companies

[314] 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) Code 4812.

with 500 or more employees.[315] We therefore used the 1992 Census of Transportation, Communications, and Utilities, conducted by the Bureau of the Census, which is the most recent information available. This document shows that only 12 radiotelephone firms out of a total of 1,178 such firms which operated during 1992 had 1,000 or more employees.[316] Therefore, even if all 12 of these firms were cellular telephone companies, nearly all cellular carriers were small businesses under the SBA's definition. We assume, for purposes of our evaluations and conclusions in this FRFA, that all of the current cellular licensees are small entities, as that term is defined by the SBA. Although there are 1,758 cellular licenses, we do not know the number of cellular licensees, since a cellular licensee may own several licenses.

2. *Estimates for Broadband PCS Licensees*

The broadband PCS spectrum is divided into six frequency blocks designated A through F. Pursuant to 47 C.F.R. § 24.720(b), the Commission has defined "small entity" in the auctions for Blocks C and F as a firm that had average gross revenues of less than $40 million in the three previous calendar years. This regulation defining "small entity" in the context of broadband PCS auctions has been approved by the SBA.[317]

The Commission has auctioned broadband PCS licenses in Blocks A through F. We do not have sufficient data to determine how many small businesses bid successfully for licenses in Blocks A and B. For the C Block auction, a total of 255 qualified bidders participated in the auction. Of the qualified bidders, all were entrepreneurs --defined for this auction as entities together with affiliates, having gross revenues of less than $125 million and total assets of less than $500 million at the time the FCC Form 175 application was filed. Of the 255 qualified bidders, 253 were "small businesses"--defined for this auction as entities together with affiliates, having gross revenues of less than $40 million at the time the FCC Form 175 application was filed. After a total of 184 rounds, the number of winning bidders totalled 89, all of whom were small business entrepreneurs, who won a total of 493 licenses. To date, two of the winning bidders defaulted on 18 of the licenses. Those licenses were reauctioned in Auction #10. For the D, E, and F Block auction, the D and E blocks were open to all licensees; the F block was open to bidders who qualified as an entrepreneur--defined for this auction as entities, together with affiliates, having gross revenues of less than $125 million and total assets of less than $500 million at the time the FCC Form 175 application was filed. Of the 153 initial bidders for the three blocks, 105 qualified as entrepreneurs. The D, E, and F Block auction ended with 125 bidders winning 1472 licenses and the FCC holding 7 licenses as a result of bid withdrawals. For the D, E, and F Block auction, 93 of the winning bidders qualified as small entities as defined for that auction. Accordingly, we estimate that 48% of the winning bidders for the auction of broadband PCS licenses in Blocks A through F are small businesses.

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[315] U.S. Small Business Administration 1992 Economic Census Employment Report, Bureau of the Census, U.S. Department of Commerce, SIC Code 4812 (radiotelephone communications industry data adopted by the SBA Office of Advocacy).

U.S. Bureau of the Census, U.S. Department of Commerce, 1992 Census of Transportation, Communications, and Utilities, UC92-S-1, Subject Series, Establishment and Firm Size, Table 5, Employment Size of Firms: 1992, SIC Code 4812 (issued May 1995).

See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, *Fifth Report and Order*, 9 FCC Rcd 5532, 5581-84 (1994).

3. *Estimates for Point-to-Point or Point-to-Multipoint Entities*

The rules adopted in this *Report and Order* will apply to any current licensee or any company which chooses to apply for a license in the 39 GHz band. The Commission has not developed a definition of small entities applicable to such licensees. The SBA definitions of small entity for 39 GHz band licensees are the definitions applicable to radiotelephone companies. The definition of radiotelephone companies provides that a small entity is a radiotelephone company employing fewer than 1,500 persons.[318] Since the Regulatory Flexibility Act amendments were not in effect until the record in this proceeding was closed, the Commission was unable to request information regarding the potential number of small businesses interested in the 39 GHz frequency band and is unable at this time to determine the precise number of potential applicants which are small businesses.

The size data provided by the SBA does not enable us to make a meaningful estimate of the number of telecommunications providers which are small entities because it combines all radiotelephone companies with 500 or more employees.[319] We therefore used the 1992 Census of Transportation, Communications, and Utilities, conducted by the Bureau of the Census, which is the most recent information available. This document shows that only 12 radiotelephone firms out of a total of 1,178 such firms which operated during 1992 had 1,000 or more employees.[320] Therefore, a majority of 39 GHz entities providing radiotelephone services could be small businesses under the SBA's definition.

However, in the *NPRM*,[321] we proposed to define a small business as an entity that, together with affiliates and attributable investors, has average gross revenues for the three preceding years of less than $40 million. We have not yet received approval by the SBA for this definition. We assume, for purposes of our evaluations and conclusions in this FRFA, that nearly all of the 39 GHz licensees will be small entities, as that term is defined by the SBA.

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13 C.F.R. § 121.201, Standard Industrial Classification (SIC) Code 4812.

U.S. Small Business Administration 1992 Economic Census Employment Report, Bureau of the Census, U.S. Department of Commerce, SIC Code 4812 (radiotelephone communications industry data adopted by the SBA Office of Advocacy).

U.S. Bureau of the Census, U.S. Department of Commerce, 1992 Census of Transportation, Communications, and Utilities, UC92-S-1, Subject Series, Establishment and Firm Size, Table 5, Employment Size of Firms: 1992, SIC Code 4812 (issued May 1995).

NPRM and Order, 11 FCC Rcd at 4971-72.

E. Summary of Projected Reporting, Recordkeeping and Other Compliance Requirements

SERVICE RULES

There are some reporting requirements imposed by the *Report and Order*. In most instances, it is likely that the entities filing will require the services of persons with technical or engineering expertise to prepare reports. In order to facilitate operation in the 39 GHz band, we are not imposing separate regulatory burdens that may affect small businesses. Generally, all applicants will be required to file applications for authorization to construct and operate and to adhere to the technical criteria set forth in the final rules.

AUCTION RULES

All license applicants will be subject to reporting and record keeping requirements to comply with the competitive bidding rules. Specifically, applicants will apply for 39 GHz license auctions by filing a short-form application and will file a long-form application at the conclusion of the auction. Additionally, entities seeking treatment as "small businesses" will need to submit information pertaining to the gross revenues of the small business applicant, its affiliates, and certain investors in the applicant.

F. Steps Taken to Minimize the Economic Impact on Small Entities

SERVICE RULES

The Commission adopts service and technical rules that facilitate the accommodation of all proposed and existing systems in the 39 GHz band. We believe these rules are a reasonable accommodation of all competing interests in this band, including small entities. The plans for the 39 GHz band provide both small entities and larger businesses the same opportunity to develop and operate viable systems within the band, and initiate competitive services.

AUCTION RULES

Section 309 (j)(3)B) of the Communications Act of 1934, as amended, provides that in establishing eligibility criteria and bidding methodologies the Commission shall, *inter alia*, "promote[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women.[322] Section 309(j)(4)(A) provides that in order to promote such objectives, the Commission shall "consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, or other schedules or methods . . . and combinations of such schedules and methods."[323] Section 309(j)(4)(D) also requires the Commission to "ensure that small business, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity

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322 47 U.S.C. § 309(j)(3)(B).

323 47 U.S.C. § 309(j)(4)(A).

to participate in the provision of spectrum-based services."[324] Therefore, it is appropriate to establish special provisions in the 39 GHz band for competitive bidding by small businesses.

The Commission notes that Congress made specific findings with regard to access to capital in the Small Business Credit and Business Opportunity Enhancement Act of 1992, that small business concerns, which represent higher degrees of risk in financial markets than do large businesses, are experiencing increased difficulties in obtaining credit.[325] The Commission believes that small businesses applying for 39 GHz band licenses should be entitled to some type of bidding credits. In awarding licenses, the Commission is committed to meeting the statutory objectives of promoting economic opportunity and competition, of avoiding excessive concentration of licenses, and of ensuring access to new and innovative technologies by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women. The Commission concludes that special provisions for small businesses are appropriate for awarding licenses because construction of systems may require a significant amount of capital, and minority- and women-owned businesses will be able to take advantage of specific provisions that we adopt for small businesses.

The Commission has adopted various special provisions to encourage and facilitate participation by small entities in the auctions. In particular, small businesses with revenues of not more than $40 million are eligible for a 25 percent bidding credit, and small businesses with average annual gross revenues of not more than $15 million are eligible for a 35 percent bidding credit on all 39 GHz licenses. These bidding credits are not cumulative.

In addition, the Commission has extended partitioning to all entities eligible to be licensees in the 39 GHz band. The Commission also concluded here to allow all 39 GHz licensees to disaggregate their spectrum blocks. These provisions should help facilitate market entry by small entities who may lack the financial resources to participate in the auction alone. These entities will be able to participate in the provision of services by purchasing a portion of a license.

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[324] 47 U.S.C. § 309(j)(4)(D).

[325] Small Business Credit and Business Opportunity Enhancement Act of 1992, Pub. L. No. 102-366, 331(a)(3), 106 Stat. 1007.

G. Significant Alternatives Considered and Rejected:

SERVICE RULES

The Commission considered and rejected several alternatives to the licensing plan and competitive bidding rules we adopted. In response to a Petition for Rule Making filed by the Telecommunications Industry Association (TIA), the Commission initiated this proceeding. This Report and Order does not provide direct relief requested by TIA in particular areas. For example, the Commission rejected the individual link licensing alternative which was suggested by TIA. The Commission also considered and rejected proposals to license spectrum on an MTA or Rectangular Service Area basis because it determined that BTA licensing would further spectrum management and better serve the 39 GHz band because the wide variety of services proposed by commenters relate to PCS systems or are local in nature. In addition, BTAs which are smaller than MTAs, will facilitate the ability of smaller systems to participate in geographic area licensing. Therefore, based on the record in this proceeding, the Commission believes that BTAs would be more appropriate for licensing the 39 GHz band.

The Commission also considered various proposals by entities relating to the disposition of pending 39 GHz applications. The processing procedures which we adopted are based on some proposed alternative. Other proposals were rejected, such as the suggestion that the Commission process pending mutually exclusive applications. We determined that pending mutually exclusive applications will be dismissed without prejudice, and all applicants, including small business entities, would be permitted to submit new applications under the competitive bidding rules established in this proceeding. Because applicants had ample opportunity to file amendments prior to the onset of this rule making, in order to avoid mutual exclusivity, we believe the above procedure is the best approach. We also considered various divergent proposals made in response to our build-out plan for incumbents and for new 39 GHz licensees. With the goal of accommodating various entities, we developed specific construction requirements and implemented a "substantial service" showing for these entities. By rejecting such build-out alternatives which required the construction of significant amounts of links within a short time frame, the Commission adopts an alternative which takes into consideration concerns raised by commenters, including small business entities, regarding establishing services which are specialized and do not lend to traditional construction requirements.

AUCTION RULES

The Commission considered and rejected several significant alternatives with respect to the auction rules. The Commission rejected the use of any type of licensing method in favor of competitive bidding as the method of awarding 39 GHz licenses. The Commission concluded that awarding 39 GHz licenses by auction meets the congressional criteria in Section 309(j) of the Communications Act, and will likely promote the Act's objectives. The Commission also rejected a sequential or other auction design in favor of a simultaneous multiple round auction design because the licenses are interdependent. As to designated entities that may be entitled to special provisions, the Commission determined that based upon the record it only would extend such special provisions to small businesses. The Commission rejected offering reduced upfront or down payments and payment by installment payments and, instead, adopted tiered bidding credits for small businesses. The Commission adopted a small business definition of an entity with not more than $40 million in average gross revenues for the preceding three years. The Commission held that this definition of small business will accommodate the broadest cross-section of small businesses because it will include, at a minimum, all those entities recognized as small businesses in the CMRS contests for which the Commission has adopted or proposed small businesses definitions. Since the Commission rejected a straight across-the-board 10 percent bidding credit for qualified small businesses

and, based upon the record, adopted tiered bidding credits for the 39 GHz service, small businesses with average gross revenues of not more than $40 million for the preceding three years will receive a 25 percent bidding credit and smaller businesses with average gross revenues of not more than $15 million for the preceding three years will receive a 35 percent bidding credit.

H. Report to Congress

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

II. Initial Regulatory Flexibility Analysis

Further Notice of Proposed Rule Making

As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the policies and rules proposed in the *Further Notice of Proposed Rule Making*. Written public comments are requested on the IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Further Notice of Proposed Rule Making* provided above in Section VII(C).

A. Reason for Action

In the companion *Report and Order*, the Commission expanded the Commission's geographic partitioning provisions to al 39 GHz licensees and permitted spectrum disaggregation. The Commission seeks further comment on: the use of partitioning and disaggregation by parties taking advantage of bidding credits under our competitive bidding licensing rules, and certain technical rules.

B. Objectives

The expansion of the partitioning and disaggregation rules in the *Report and Order* to include all 39 GHz licensees implements, in part, the requirements of Section 257 of the Telecommunications Act of 1996 which requires that we eliminate entry barriers into the telecommunications market for small businesses. In the *Further Notice of Proposed Rule Making* the Commission tentatively concludes that unjust enrichment provisions should apply when a licensee has benefitted from the small business provisions (*i.e.*installment plans and bidding credits) in the auction rules and then partitions a portion of the license area to another entity that would not qualify for such benefits or would not qualify for the same level of benefits. The Commission seeks comment on how such unjust enrichment should be calculated under each scenario. The Commission further seeks comments on what the respective obligations of the participants in partitioning transfer should be.

C. Legal Basis

The proposed action is authorized under Sections 4(i), 257, 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 257, 303(r), and 309(j).

D. Reporting, Recordkeeping, and Other Compliance Requirements

1. Geographic Partitioning and Spectrum Disaggregation

The proposals in the *Further Notice of Proposed Rule Making* do not include the possibility of imposing additional reporting and/or recordkeeping requirements in connection with businesses obtaining licenses through the partitioning and disaggregation rules. The information requirements placed on businesses seeking to obtain licenses through partitioning or disaggregation will be used to determine if the licensee is a qualifying entity to obtain a partitioned license or disaggregated spectrum. Those reporting requirements are stated in the companion Final Regulatory Flexibility Act. Those reporting requirements also will likely be used to ensure that a licensee is not unjustly enriched by a partitioning or disaggregation arrangement.

E. Federal Rules which Overlap, Duplicate or Conflict with These Rules

None.

F. Description and Number of Small Entities Involved

1. Geographic Partitioning and Spectrum Disaggregation

The unjust enrichment proposals with respect to partitioning and disaggregation will affect all small businesses that avail themselves of partitioning and/or disaggregation including small businesses currently holding 39 GHz licenses who choose to partition and/or disaggregate and small businesses who may acquire licenses through partitioning and/or disaggregation. The Commission is required to estimate in its Final Regulatory Flexibility Analysis the number of small entities to which a rule will apply, provide a description of such entities, and assess the impact of the rule on such entities. To assist the Commission in this analysis, commenters are requested to provide information regarding how many total entities, existing and potential, would be affected by the proposed rules in the *Further Notice of Proposed Rule Making*. In particular, we seek estimates of how many such entities will be considered small businesses. As explained in the Final Regulatory Flexibility Analysis in the *Report and Order*, we are utilizing the

SBA definition applicable to radiotelephone companies, *i.e.*, an entity employing less than 1,500 persons.[326] We seek comment on whether this definition is appropriate for 39 GHz licensees in this context. Additionally, we request each commenter to identify whether it is a "small business" under this definition. If a commenter is a subsidiary of another entity, this information should be provided for both the subsidiary and the parent corporation or entity.

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

In the *Further Notice of Proposed Rule Making*, the Commission tentatively concludes that unjust enrichment provisions should apply when a licensee has benefitted from the small business provisions in the auctions rules and partitions a portion of the license area to another entity that would not qualify for such benefits. The alternative to applying the unjust enrichment provisions would be to allow an entity who had benefitted from the special bidding provisions for small businesses to become unjustly enriched by partitioning a portion of their license area to parties that do not qualify for such benefits.

The *Further Notice of Proposed Rule Making* solicits comment on a variety of alternatives discussed herein. Any significant alternatives presented in the comments will be considered.

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13 C.F.R. § 121.201, Standard Industrial Classification Code 4812.

APPENDIX C

FINAL RULES

A. Part 1 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 1 - PRACTICE AND PROCEDURE

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

Authority: Secs. 4, 303, 48 Stat. 1066, 1082, as amended: 47 U.S.C. 154, 303: Implement, 5 U.S.C. 552 and 21 U.S.C. 853a, unless otherwise noted.

2. Add paragraph (a)(9) to Section 1.2102 and revise paragraph (b)(4) of Section 1.2102 to read as follows:

§ 1.2102 Eligibility of applications for competitive bidding.

(a) * * *

(9) Basic trading area licenses in the 38.6-40.0 GHz band.

(b) * * *

(4) Applications for channels in all frequency bands, except those listed in paragraph (a)(9), which are used as an intermediate link or links in the provision of continuous, end-to-end service where no service is provided directly to subscribers over the frequencies. Examples of such intermediate links are:

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B. Part 101 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 101 FIXED MICROWAVE SERVICES

1. The authority citation for Part 101 continues to read as follows:

Authority: Sec. 4 and 303 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 524 and 303, unless otherwise noted.

2. In §101.13(d), amend to except renewal applications in the 38.6-40.0 GHz band and to specify that renewal applications must be filed eighteen months prior to the end of the license term:

§101.13 Application forms and requirements for private operational fixed stations.

* * *

(d) Application for renewal of station licenses must be submitted on such form as the Commission may designate by public notice. Applications for renewal must be made during the license

term and, except for renewal applications in the 38.6-40.0 GHz band, should be filed within 90 days, but not later than 30 days, prior to the end of the license term. Renewal applications in the 38.6-40.0 GHz band must be filed eighteen months prior to the end of the license term. See Section 101.17 for renewal requirements for the 38.6-40.0 GHz frequency band. When a licensee submits a timely application for renewal of a station license, the existing license for that station will continue as a valid authorization until the Commission has made a final decision on the application. Whenever a group of station licenses in the same radio service are to be renewed simultaneously, a single "blanket" application may be filed to cover the entire group if the application identifies each station by call sign and station location. Applicants should note also any special renewal requirements under the rules for such radio station(s).

3. In §101.15(c), amend to specify that authorizations in the 38.6-40.0 GHz band must be filed eighteen months prior to the end of the license term:

§101.15 Application forms for common carrier fixed stations

* * *

(c) Renewal of station license. Except for renewal of special temporary authorizations and authorizations in the 38.6-40.0 GHz band, FCC Form 405 ("Application for Renewal of Station License") must be filed by the licensee between thirty (30) and sixty (60) days prior to the expiration date of the license sought to be renewed. For authorizations in the 38.6-40.0 GHz band, the licensee must file FCC Form XXX eighteen months prior to the expiration date of the license sought to be renewed. See Section 101.17 for renewal requirements for the 38.6-40.0 GHz frequency band. Whenever a group of station licenses in the same radio service are to be renewed simultaneously, a single "blanket" application may be filed to cover the entire group if the application identifies each station by call sign and station location. Applicants sould note also any special renewal requirements under the ruels for each radio service. When a licensee submits a timely application for renewal of a station license, the existing license continues in effect until the Commission has rendered a decision on the renewal application.

4. Add new §101.17 to read as follows:

§101.17 Performance Requirements for the 38.6-40.0 GHz frequency band.

(a) All 38.6-40.0 GHz band licensees must demonstrate substantial service at the time of license renewal. A licensee's substantial service showing should include, but not be limited to, the following information for each channel for which they hold a license, in each BTA or portion of a BTA covered by their license, in order to qualify for renewal of that license. The information provided will be judged by the Commission to determine whether the licensee is providing service which rises to the level of "substantial."

(1) A description of the 38.6-40.0 GHz band licensee's current service in terms of geographic coverage;

(2) A description of the 38.6-40.0 GHz band licensee's current service in terms of population served (as well as any additional service provided during the five-year build-out period);

(3) A description of the 38.6-40.0 GHz band licensee's investments in its system(s) (type of facilities constructed and their operational status is required);

(b) Any 38.6-40.0 GHz band licensees adjudged not to be providing substantial service will not have their licenses renewed.

5. In §101.45(d), amend to clarify that mutually exclusive applications in the 38.6-40.0 GHz band are subject to competitive bidding procedures.

§101.45 Mutually exclusive applications

* * *

(d) Except for applications in the 38.6-40.0 GHz band, private operational fixed point-to-point microwave applications for authorization under this Part will be entitled to be included in a random selection process or to comparative consideration with one or more conflicting applications in accordance with the provisions of §1.227.(b)(4) of this chapter. Applications in the 38.6-40.0 GHz band are subject to competitive bidding procedures in §§101.XXX-XXX.

6. In § 101.51(a), amend to include applications subject to competitive bidding.

§ 101.51 Comparative evaluation of mutually exclusive applications

* * *

(a) In order to expedite action on mutually exclusive applications in services under this rules part where neither competitive bidding nor the random selection processes apply, the applicants may request the Commission to consider their applicatinos without a formal hearing in accordance with the summary procedure outlined in paragraph (b) in this section if:

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7. In § 101.53, amend to require assignees to meet assignors construction requirements.

§ 101.53 Assignment or transfer of station authorization.

(g) Assignees receiving Commission authority to acquire a 38.6-40.0 GHz license pursuant to this paragraph must meet the assignors' construction requirment dates. *See* §§ 101.63 and 64 in this chapter.

8. In § 101.55(a), amend to except licenses authorized pursuant to competitive bidding procedures.

§ 101.55 Considerations involving assignment or transfer applications

* * *

(a) Licenses not authorized pursuant to competitive bidding procedures may not be assigned or transferred prior to completion of construction of the facility. However, consent to the assignment or transfer of control of such a license may be given prior to the completion of construction where:

(1) The assignment or transfer does not involve a substantial change in or ownership or control of the authorized facilities; or in

(2) The assignment or transfer of control is involuntary due to the licensee's bankruptcy, death, or legal disability.

(b) The Commission will review a proposed transaction to determine if the circumstances indicate "trafficking" in licenses whenever applications (except those involving *pro forma* assignment or transfer of control) for consent to assignment of a license, or for transfer of control of a license, involve facilities:

* * *

(2) that have not been constructed, unless the authorizations were granted pursuant to a competitive bidding procedure; or

* * *

9. Add a new rule §101.56 as follows:

§ 101.56 Partitioned Service Areas (PSAs) and Disaggregated Spectrum

(a)(1) The holder of an BTA authorization to provide service in the 38.6-40 GHz band pursuant to the competitive bidding process may enter into agreements with eligible parties to partition any portion of its service area according to county boundaries, or according to other geopolitical subdivision boundaries. Alternatively, licensees may enter into agreements or contracts to disaggregate portions of spectrum, provided acquired spectrum is disaggregated according to frequency pairs.

(2)(i) Contracts must be filed with the Commission within 30 days of the date that such agreements are reached.

(ii) The contracts must include descriptions of the areas being partitioned or spectrum disaggregated. The partitioned service area shall be defined by coordinate points at every 3 seconds along the partitioned service area unless an FCC recognized service area is utilized (i.e., Metropolitan Service Area or Rural Service Area) or county lines are followed. If geographic coordinate points are used, they must be specified in degrees, minutes, and seconds to the nearest second of latitude and longitude and must be based upon the 1927 North American Datum (NAD27). Applicants may supply geographical coordinates based on 1983 North American Datum (NAD83) in addition to those required (NAD27). In the case where an FCC recognized service area or county lines are utilized, applicants need only list the specific area(s) (through use of FCC designations or county names) that constitute the partitioned area.

(3) Parties to partitioning and spectrum disaggregation contracts must file concurrently with such contracts the following:

(i) an application FCC Form 494 or 402, as applicable, for authority to operate a 38.6-40 GHz service facility.

(ii) application for assignment to operate in the market area being partitioned or to operate in the market area covered by the disaggregated spectrum.

(iii) a completed FCC Form 430, where applicable, if not already on file at the Commission..

(b) The eligibility requirements applicable to BTA authorization holders also apply to those individuals and entities seeking partitioned or disaggregated spectrum authorizations.

(c) Subsequent to issuance of the authorization for a partitioned service area, the partitioned area will be treated as a separate protected service area.

(d)(1) When any area within a BTA becomes a partitioned service area, the remaining counties and geopolitical subdivision within that BTA will be subsequently treated and classified as a partitioned service area.

(d)(2) At the time a BTA is partitioned, the Commission shall cancel the BTA authorization initially issued and issue a partitioned service area authorization to the former BTA authorization holder.

(f) The duties and responsibilities imposed upon BTA authorization holders in this part, apply to those licensees obtaining authorizations by partitioning or spectrum disaggregation.

(g) The build-out requirements for the partitioned service area or disaggregated spectrum shall be the same as applied to the BTA authorization holder.

(h) The license term for the partitioned service area or disaggregated spectrum shall be the remainder of the period that would apply to the BTA authorization holder.

(i) Licensees, except those using bidding credits in a competitive bidding procedure, shall have the authority to partition service areas or disaggregate spectrum.

10. Add new section § 101. 64 to read as follows:

§ 101.64 Service areas.

Service areas for 38.6-40.0 GHz service are Basic Trading Areas (BTAs) as defined below. BTAs are based on the Rand McNally 1992 Commercial Atlas & Marketing Guide, 123rd Edition, at pages 40-44 ("BTA"). Rand McNally organizes the 50 States and the District of Columbia into 487 BTAs. The BTA Map is available for public inspection at the Wireless Telecommunications Bureau, Room 5322, 2025 M Street, NW., Washington, DC.

The BTA service areas are based on the Rand McNally 1995 Commercial Atlas & marketing Guide, 123rd Edition, at pages 40-44, with the following additions licensed separately as BTA-like areas: American Samoa; Guam; Northern Mariana Islands; Mayaguez/Aguadilla-Ponce, Puerto Rico; San Juan, Puerto Rico; and the United States Virgin Islands. The Mayaguez/Aguadilla-Ponce BTA-like service area consists of the following municipios: Adjuntas, Aguada, Aguadilla, Anasco, Arroyo, Cabo Rojo, Coamo, Guanica, Guayama, Guayanilla, Hormigueros, Isabela, Jayuya, Juana Diaz, Lajas, Las Marias, Maricao, Maunabo, Mayaguez, Moca, Patillas, Penuelas, Ponce, Quebradillas, Rincon, Sabana Grande, Salinas, San German, Santa Isabel, Villalba, and Yauco. The San Juan BTA-like service area consists of all other municipios in Puerto Rico.

11. In § 101.103, paragraph is added and reads as follows:

§ 101.103 Frequency coordination procedures.

* * * * *

(i)(i) When the licensed facilities are to be operated in the band 38,600 MHz to 40,000 MHz and the facilities are located within 16 kilometers of the boundaries of a Basic Trading Area, each licensee must complete the frequency coordination process of subsection 101.103(d) with respect to neighboring BTA licensees and existing licensees within its BTA service area that may be affected by its operation prior to

initiating service. In addition to the technical parameters listed in subsection 101.103(d), the coordinating licensee must also provide potentially affected parties technical information related to its subchannelization plan and system geometry.

(ii) Response to notification should be made as quickly as possible, even if no technical problems are anticipated. Any response to notification indicating potential interference must specify the technical details and must be provided to the licensee, either electronically or in writing, within 10 days of notification. Every reasonable effort should be made by all licensees to eliminate all problems and conflicts. If no response to notification is received within 10 days, the licensee will be deemed to have made reasonable efforts to coordinate and may commence operation without a response. The beginning of the 10-day period is determined pursuant to subsection 101.103(d)(v).

12. In §101.107 revise the table to add new footnote 9 to read as follows:

§ 101.107 Frequency tolerance

	FREQUENCY TOLERANCE (PERCENT)		
Frequency (MHz)	All fixed and based stations	Mobile stations over 3 watts	Mobile stations 3 watts or less
31,300 to 40.000 (6)	0.03 (9)	0.03	0.03

/9/ Equipment authorized to be operated in the 38,600-40,000 MHz band is exempt from the frequency tolerance requirement noted in the above table.

13. In § 101.109 a new footnote 6 is added to the table to read as follows:

§ 101.109 Bandwidth

Frequency Band (MHz)	Maximum Authorized Bandwidth
38,600 to 40,000	50 MHz /6/

/6/ For channel block assignments in the 38,600-40,000 MHz band, the authorized bandwidth is equivalent to an unpaired channel block assignment or to either half of a symmetrical paired channel block assignment. When adjacent channels are aggregated, equipment is permitted to operate over the full channel block aggregation without restriction.

NOTE: Unwanted emissions shall be suppressed at the aggregate channel block edges based on the same roll-off rate as is specified for a single channel block in paragraphs 101.111(a)(ii) and (iii) of this chapter.

14. In 101.115(c), the frequency "Above 31,300" is removed from the table and the frequency band 38,600 to 40,000 MHz and footnote 13 are added in numerical order to the table as follows:

§ 101.115 Directional antennas

* * * * *

(c) * * *

Antenna Standards										
Frequency (MHz)	Category	Maximum beamwidth to 3 dB points (included angles in degrees)	Minimum antenna gain (dBi)	Minimum radiation suppression to angle in degrees from centerline of main beam in decibels						
				5° to 10°	10° to 15°	15° to 20°	20° to 30°	30° to 100°	100° to 140°	140° to 180°
*	*	*	*	*	*	*	*	*	*	*
38,600 to 40,000(13)	A	n/a	38	25	29	33	26	42	55	55
	B	n/a	38	20	24	28	32	35	36	36

/13/ Stations authorized to operate in the 38,600-40,000 MHz band may use antennas other than those meeting the Category A standard. However, the Commission may require the use of higher performance antennas where interference problems can be resolved by the use of such antennas.

15. In §101.147, paragraph (u) is revised as paragraphs (u)(1) and (u)(2) to read as follows:

§ 101.147 Frequency assignments

* * * * *

(u) (1) Assignments in the band 38,600-40,000 MHz must be according to the following frequency plan:

Channel Group A		Channel Group B	
Channel No.	Frequency band limits (MHz)	Channel No.	Frequency Band limits (MHz)
1-A	38,600-38,650	1-B	39,300-39,350
2-A	38,650-38,000	2-B	39,350-39,400
3-A	38,700-38,750	3-B	39,400-39,450
4-A	38,750-38,800	4-B	39,450-39,500
5-A	38,800-38,850	5-B	39,500-39,550
6-A	38,350-38,900	6-B	39,550-39,600
7-A	38,900-38,950	7-B	39,600-39,650
8-A	38,950-39,000	8-B	39,650-39,700
9-A	39,000-39,050	9-B	39,700-39,750
10-A	39,050-39,100	10-B	39,750-39,800
11-A	39,100-39,150	11-B	39,800-39,850
12-A	39,150-39,200	12-B	39,850-39,900
13-A	39,200-39,250	13-B	39,900-39,950
14-A	39,250-39,300	14-B	39,950-40,000

(2) Channel Blocks 1 through 14 are assigned for use within Basic Trading Areas (BTAs). Applicants are to apprise themselves of any grandfathered links within the BTA for which they seek a license. All of the channel blocks may be subdivided as desired by the licensee and used within its service area as desired without further authorization subject to the terms and conditions set forth in § 101.149.

16. Add a new Subpart N as follows.

Subpart N -- Competitive Bidding Procedures for the 38.6-40.0 GHz Band

Sec.
101.1201 38.6-40.0 subject to competitive bidding.
101.1202 Competitive bidding design for 38.6-40.0 licensing.
101.1203 Competitive bidding mechanisms.
101.1204 Bidding application (FCC Form 175 Short-form).
101.1205 Submission of upfront payments and down payments.
101.1206 Long-form applications.
101.1207 Procedures for filing petitions to deny against long-form applications
101.1208 Bidding credits for small businesses.
101.1209 Definitions.

§ 101.1201 38.6-40.0 GHz subject to competitive bidding.

Mutually exclusive 38.6-40.0 GHz initial applications are subject to competitive bidding. The general competitive bidding procedures found in 47 C.F.R. Part 1, Subpart Q will apply unless otherwise provided in this part.

§ 101.1202 Competitive bidding design for 38.6-40.0 GHz licensing.

The following competitive bidding procedures generally will be used in 38.6-40.0 GHz auctions. Additional, specific procedures may be set forth by public notice. The Commission also may design and test alternative procedures. See 47 C.F.R. §§ 1.2103 and 1.2104. The Commission will employ simultaneous multiple round bidding when choosing from among mutually exclusive initial applications to provide 38.6-40.0 GHz service, unless otherwise specified by the Wireless Telecommunications Bureau before the auction.

§ 101.1203 Competitive bidding mechanisms.

(a) *Sequencing.* The Commission will establish and may vary the sequence in which 38.6-40.0 GHz licenses will be auctioned.

(b) *Grouping.* The Commission will conduct a series of sequential auctions of three channels at a time within each BTA unless the Wireless Telecommunications Bureau announces, by Public Notice prior to the auction, an alternative auction scheme.

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

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

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

§ 101.1204 Bidding application procedures.

All applicants to participate in competitive bidding for 38.6-40.0 GHz licenses must submit applications on FCC Forms 175 pursuant to the provisions of §1.2105 of this Chapter. The Wireless Telecommunications Bureau will issue a Public Notice announcing the availability of 38.6-40.0 GHz licenses and, in the event that mutually exclusive applications are filed, the date of the auction for those licenses. This Public Notice also will specify the date on or before which applicants intending to participate in a 38.6-40.0 auction must file their applications in order to be eligible for that auction, and it will contain information necessary for completion of the application as well as other important information such as the materials which must accompany the forms, any filing fee that must accompany the application or any upfront payment that need to be submitted, and the location where the application must be filed. In addition, each applicant must identify its status as a small business or rural telephone company.

§ 101.1205 Submission of upfront payments and down payments.

(a) Each bidder in the 38.6-40.0 GHz auction will be required to submit an upfront payment. This upfront payment will be based upon a formula established by the Wireless Telecommunications Bureau and announced by Public Notice prior to the auction.

(b) Each winning bidder in the 38.6-40.0 GHz auction shall make a down payment to the Commission in an amount sufficient to bring its total deposits up to 20 percent of its winning bid by a date and time to be specified by Public Notice, generally within ten business days following the close of bidding. Full payment of the balance of the winning bids shall be paid within ten days after Public Notice announcing that the Commission is prepared to award the license. The grant of the application is conditional upon receipt of full payment. The Commission generally will grant the license within a reasonable period of time after receiving full payment.

§ 101.1206 Long-form applications.

Each winning bidder will be required to submit a long-form application. Winning bidders must submit long-form applications within ten (10) business days after being notified by Public Notice that it is the winning bidder. Long-form applications shall be processed under the rules contained in Part 21 and 94 of the Commission's Rules.

§ 101.1207 Procedures for filing petitions to deny against long-form applications

The applicable procedures for the filing of petitions to deny the long-form applications of winning bidders contained in Section 21.30 of the Commission's Rules shall be followed by the applicant (*see* 47 C.F.R. §21.30).

§ 101.1208 Bidding credits for small businesses.

(a) A winning bidder that qualifies as a small business or a consortium of small businesses, (as defined in § 101.1209(b)(1)(i) may use a bidding credit of 25 percent to lower the cost of its winning bid on any of the licenses in this part. A winning bidder that qualifies as a very small business or a consortium of very small businesses, (as defined in §101.1209(b)(1)(ii) may use a bidding credit of 35 percent to lower the cost of its winning bid on any of the licenses in this part.

(b) Unjust Enrichment.

(1) A small business seeking transfer or assignment of a license to an entity that is not a small business under the definitions in § 101.1209(b)(1)(i) and (ii), will be required to reimburse the government for the amount of the bidding credit, plus interest at the rate imposed for installment financing at the time the license was awarded, before transfer will be permitted. The amount of this penalty will be reduced over time as follows: a transfer in the first two years of the license term will result in a forfeiture of 100 percent of the value of the bidding credit: in year three of the license term the penalty will be 75 percent; in year four the penalty will be 50 percent and in year five the penalty will be 25 percent, after which there will be no penalty. These penalties must be paid back to the U.S. Treasury as a condition of approval of the assignment or transfer.

(2) If a small business that utilizes a bidding credit under this section seeks to assign or transfer control of its license to a small business 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.

§ 101.1209 Definitions.

(a) Scope. The definitions in this section apply to §§ 101.1201 through 101.1209, unless otherwise specified in those sections.

(b) Small Business and Very Small Business.

(1)(i) A small business is an entity that together with its affiliates and persons or entities that hold attributable interests in such entity and their affiliates, has average gross revenues that are not more than $40 million for the preceding three years. (ii) A very small business is an entity that together with its affiliates and persons or entities that hold attributable interests in such entity and their affiliates, has average gross revenues that are not more than $15 million for the preceding three years.

(2) For purposes of determining whether an entity meets either the small business or very small business definitions 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.

(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 either definition of a small business in paragraphs (b)(1) and (b)(2) of this section.

(c) *Rural Telephone Company.* A rural telephone company means a local exchange carrier operating entity to the extent that such entity--

(A) provides common carrier service to any local exchange carrier study area that does not include either--

(i) any incorporated place of 10,000 inhabitants or more, or any part therof, based on the most recently available population statistics of the Bureau of the Census;or

(ii) any territory, incorporated or unincorporated, included in an urbanized area, as defined by the Bureau of the Census, as of August 10, 1993;

(B) provides telephone exchange service, including exchange access, to fewer than 50,000 access lines;

(C) provides telephone exchange service to any local exchange carrier study area with fewer than 100,000 access lines; or

(D) has less than 15 per cent of its access lines in communities of more than 50,000 on the date of enactment of the Telecommunications Act of 1996.

(d) *Gross Revenues. Gross revenues* shall mean all income received by an entity, whether earned or passive, before any deductions are made for costs of doing business (*e.g.,* cost of goods sold), as evidenced by audited quarterly financial statements for the relevant number of calendar years preceding January 1, 1996, or, if audited financial statements were not prepared on a calendar-year basis, of the most recently completed fiscal years preceding the filing of the applicant's short-form application (Form 175). For applications filed after December 31, 1995, gross revenues shall be evidenced by audited financial statements for the preceding relevant number of calendar or fiscal years. If an entity was not in existence for all or part of the relevant period, gross revenues shall be evidenced by the audited financial statements of the entity's predecessor-in-interest or, if there is no identifiable predecessor-in-interest, unaudited financial statements certified by the applicant as accurate.

(e) *Affiliate.*

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

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

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

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

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

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

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

Example for paragraph (e)(2)(i). An applicant owning 50 percent of the voting stock of another concern would have negative power to control such concern since such party can block any action of the other stockholders. Also, the bylaws of a corporation may permit a stockholder with less than 50 percent of the voting to block any actions taken by the other stockholders in the other entity. Affiliation exists when the applicant has the power to control a concern while at the same time another person, or persons, are in control of the concern at the will of the party or parties with the power of control.

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

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

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

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

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

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

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

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

(A) The family members are estranged,

(B) The family ties are remote, or

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

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

(4) *Affiliation through stock ownership.*

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

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

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

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

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

Example 2 for paragraph (e)(5). If a large company, BigCo, holds 70% (70 of 100 outstanding shares) of the voting stock of company A, who holds an attributable interest in an SMR 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, and thus the applicant, until SmallCo actually exercises its options to

purchase such shares. In order to prevent BigCo from circumventing the intent of the rule which requires such options to be considered on a fully diluted basis, the option is not considered to have present effect in this case.

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

(6) *Affiliation under voting trusts.*

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

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

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

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

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

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

(10) *Affiliation under joint venture arrangements.*

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

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

(11) *Exclusion from affiliation coverage.* For purposes 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 this section, 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 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.