

FEDERAL COMMUNICATIONS COMMISSION**47 CFR Part 24**

[GEN Docket No. 90–314, ET Docket No. 92–100, PP Docket No. 93–253; FCC 00–159]

Narrowband Personal Communications Services; Competitive Bidding

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document adopts a number of modifications to the Commission's existing narrowband Personal Communications Services (PCS) rules. These include the use of Major Trading Areas for future licensing, the establishment of a "substantial service" alternative to the current construction benchmarks, and modifications to certain provisions of the narrowband PCS competitive bidding rules. The Commission also eliminates the narrowband PCS spectrum aggregation limit and adopts partitioning and disaggregation rules. The Commission believes that the rule modifications it adopts will improve the efficiency of spectrum use, reduce the regulatory burden on spectrum users, encourage competition, and promote service to the largest feasible number of users.

DATES: Effective August 7, 2000, except for § 24.104, which contains information collection requirement that has not been approved by the Office of Management and Budget. The FCC will publish a document in the **Federal Register** announcing the effective date for this section. Public and agency comments on the information collection are due on or before July 6, 2000.

FOR FURTHER INFORMATION CONTACT: Alice Elder, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, at (202) 418–0660.

SUPPLEMENTARY INFORMATION: This is a summary of a Second Report and Order (*Second R&O*) in the Commission's narrowband PCS proceeding adopted May 5, 2000, and released May 18, 2000. The complete text of this *Second R&O* is available for inspection and copying during normal business hours in the FCC Reference Center (Room CY–A257), 445 12th Street, SW, Washington, DC. It may also be purchased from the Commission's copy contractor, International Transcription Services, Inc. (ITS, Inc.), 1231 20th Street, NW, Washington, DC 20036, (202) 857–3800.

It is also available on the Commission's web site at <http://www.fcc.gov/wtb/auctions>.

Synopsis of the Second Report and Order

1. The Commission adopts a Second Report and Order (*Second R&O*) in its narrowband PCS proceeding, amending certain rules governing this service. The Commission provided for the operation of narrowband PCS in the 900 MHz band, adopting a spectrum allocation and channelization plan, licensing rules, and technical standards for the service, in 1993. See Amendment of the Commission's Rules to Establish New Narrowband Personal Communications Services, First Report and Order, 58 FR 42681 (August 11, 1993). See also Amendment of the Commission's Rules to Establish New Narrowband Personal Communications Services, Memorandum Opinion and Order, 59 FR 14115 (March 25 1994). In Implementation of Section 309(j) of the Communications Act—Competitive Bidding, Second Report and Order, 59 FR 22980 (May 4, 1994), the Commission determined that, pursuant to section 309(j) of the Communications Act of 1934, as amended, PCS is subject to competitive bidding in the case of mutually exclusive applications, and the Commission adopted general competitive bidding rules for auctionable services. In Implementation of Section 309(j) of the Communications Act—Competitive Bidding, Third Report and Order, 59 FR 26741 (May 24, 1994), the Commission established competitive bidding rules specifically for narrowband PCS. Currently, of the three megahertz of 900 MHz spectrum allocated for narrowband PCS, two one-megahertz blocks have been divided into specific channels for licensing. The remaining one megahertz of narrowband PCS spectrum has been reserved to accommodate future development of narrowband PCS. Thus far, nationwide and regional licenses have been awarded through two auctions, which were held in 1994.

2. This *Second R&O* resolves issues raised in Amendment of the Commission's Rules to Establish New Personal Communications Services, Narrowband PCS, Report and Order and Further Notice of Proposed Rulemaking (*Narrowband PCS R&O/Further Notice*), 62 FR 27507 (May 20, 1997). In response to the *Narrowband PCS R&O/Further Notice*, the Commission received 15 comments and 16 reply comments.

3. *Service Area Reallocation.* In this *Second R&O*, the Commission amends its current allocation of narrowband PCS spectrum to eliminate Basic

Trading Areas (BTAs) and license the remaining spectrum, including the response channels, based on Major Trading Areas (MTAs). The Commission finds that MTAs are the most appropriate geographic area for licensing the remaining narrowband PCS spectrum because they will serve the needs of a wide range of entities, including both large and small service providers. The Commission does not believe that using MTAs will compromise the goal of ensuring entry for small businesses or undermine the confidence of either incumbent and potential licensees or the investment community.

4. Finally, the Commission notes that the use of MTAs will avoid any potential problems that might arise from inconsistencies between the boundaries of Major Economic Areas (MEAs) and existing regional licenses based on MTAs. Moreover, Rand McNally & Company, which owns the copyright to MTAs, has granted a blanket license to parties with an interest in this proceeding to use MTAs, and there is therefore no impediment to their use for narrowband PCS.

5. *Spectrum Aggregation Limit.* In this *Second R&O*, the Commission eliminates the narrowband PCS spectrum aggregation limit. Adopted in 1993, this rule provided that a single licensee was permitted to hold licenses for no more than three channels, either paired or unpaired, in any geographic area. The limit was adopted to ensure that narrowband PCS services would be offered on a competitive basis.

6. The Commission recently has concluded that the paging/messaging industry is highly competitive. Moreover, narrowband PCS licensees increasingly compete with other sectors of the wireless industry, including broadband PCS and Specialized Mobile Radio (SMR) that offer the same or similar services. Thus, the Commission finds that the aggregation limit is not needed to prevent an undue concentration of licenses, either through the auctioning of additional narrowband PCS spectrum or post-auction mergers. Moreover, in order to compete with other providers of paging and messaging services, narrowband PCS licensees may need to consolidate and should not be prevented from doing so by the narrowband PCS spectrum aggregation limit.

7. Further, the Commission does not believe that large companies will attempt to acquire licenses merely to foreclose entry by smaller entities, because it is clear that such a strategy would not be successful in limiting competition. Acquiring spectrum for

purposes of withholding its use would be very expensive. In addition, such efforts would be difficult, given the large number of licensees already competing in this market and the fact that narrowband PCS licensees face competition from other wireless sectors. Although the Commission has found that a Commercial Mobile Radio Services (CMRS) spectrum cap is necessary to ensure that the mobile voice market is competitive, the risk of excessive concentration through mergers is far lower in the paging/messaging context. Paging carriers face growing competition from short messaging services and other digital service features offered by an increasing number of mobile voice carriers. In addition, the recent auction of spectrum in the 929 and 931 MHz bands should facilitate further entry or capacity expansion. The Commission notes that it retains the ability to evaluate individual transfer and assignment applications on a case-by-case basis through its review of such applications.

8. *Eligibility for Response Channels.* In order to provide an opportunity for incumbent paging licensees to upgrade their operations, the Commission set aside 100 kilohertz (eight unpaired frequencies) of the three megahertz allocated for narrowband PCS as paging response channels, *i.e.*, channels to be used in paired communications with existing one-way paging frequencies to provide mobile-to-base station communications. The Commission's intent in establishing these channels was to provide a means for one-way (single frequency) paging licensees to obtain a second frequency for the purpose of delivering signals back from their customers' mobile devices.

9. In this *Second R&O*, the Commission lifts all eligibility restrictions on applying for paging response channels, finding that such restrictions unnecessarily exclude potential users of the response channels that are not paging licensees, *e.g.*, narrowband PCS licensees. Thus, eligibility for acquiring narrowband PCS response channels will no longer be limited to existing paging licensees, *i.e.*, those licensed to operate conventional one-way paging base stations under part 22 or part 90 of the Commission's rules as of the application filing deadline for the paging response channels. The Commission finds that lifting the eligibility restrictions will encourage entry of new narrowband PCS providers by providing greater flexibility to new licensees to use these channels in conjunction with other spectrum to provide new services. In keeping with its decision to abolish the limit on

aggregation of narrowband PCS spectrum, as well as its decision to eliminate eligibility restrictions for paging response channels, the Commission also concludes that there should be no limit on the number of response channels a licensee may hold.

10. The Commission will retain the current rule restricting use of the response channels to mobile-to-base transmissions. Several commenters argue that allowing these channels to be used for other purposes would cause harmful interference with current narrowband PCS licensees. The Commission agrees with these commenters and will retain the current rule restricting use of the response channels to mobile-to-base transmissions.

11. *Construction and Coverage Requirements for Narrowband PCS Licensees.* The Commission will maintain its current coverage requirements for narrowband PCS and adopts a substantial service requirement as an alternative. The Commission finds that coverage requirements, including a substantial service standard, encourage the provision of service to areas that would not necessarily receive service expeditiously solely through the operation of market forces. The Commission recognizes that narrowband PCS is a developing service and that there has been a delay in equipment availability. It therefore believes that it would not be appropriate at this time to establish three- and five-year benchmarks for this service, as it has done for the paging services, in lieu of the current benchmarks. The Commission also believes, however, that its five- and ten-year construction benchmarks provide sufficient time for narrowband PCS licensees to construct their systems and that there is no need to alter the current benchmarks. Any problems that individual licensees may have because of difficulties with financing or equipment availability may be addressed by evaluating requests for waiver on a case-by-case basis.

12. The Commission further finds that a substantial service option may be very useful in allowing licensees to use spectrum flexibly to provide new and innovative services uninhibited by a requirement that they meet a specific coverage benchmark or lose their license. In addition, rural areas may be more difficult to serve than urban areas. Permitting licensees to make a substantial service showing may encourage them to build out in rural areas because it would give them the option of satisfying the Commission's construction requirements by serving rural areas without necessarily having to

meet either population or composite area benchmarks. The Commission finds that these advantages outweigh any concerns commenters have regarding potential speculation or anticompetitive conduct.

13. In the past the Commission has offered guidance to licensees in other services with regard to factors that it would consider in evaluating whether the substantial service requirement has been met. The Commission will apply these same factors to evaluations of substantial service showings made by narrowband PCS licensees. Thus, the Commission may consider such factors as whether the licensee is offering a specialized or technologically sophisticated service that does not require a high level of coverage to be of benefit to customers, and whether the licensee's operations serve niche markets. A licensee may also demonstrate that it is providing service to unserved or underserved areas without covering a specific composite area or percentage of the population. Because the substantial service requirement can be met in a variety of ways, the Wireless Telecommunications Bureau (Bureau) will review licensees' showings on a case-by-case basis.

14. Just as it believes that the addition of a substantial service alternative to its rules will be helpful to entities seeking to provide innovative services, the Commission also recognizes that there may be instances in which a flexible approach to its narrowband PCS operational or technical rules would be helpful to such entities and would promote the development of new services. Although the Commission has crafted these rules to generally provide for a wide range of technologies and business plans, there may be instances where particular circumstances render the rules unreasonable or overly burdensome, to the extent the public interest would be harmed by their strict application. The Commission therefore will give expedited treatment to requests for waivers of these operational and technical rules, and, to the extent it finds that such waivers will not harm other licensees and will be in the public interest, it will consider them favorably.

15. *Construction and Coverage Requirements for Nationwide Paging Licensees.* In Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, Memorandum Opinion and Order on Reconsideration and Third Report and Order (*Paging MO&O/Third Report and Order*), 64 FR 33762 (June 24, 1999), the Commission considered the issue of coverage requirements for nationwide geographic area paging

licensees and deferred any decision on the issue until it resolved similar matters in the instant narrowband PCS rulemaking proceeding. In this *Second R&O*, the Commission declines to adopt coverage requirements for nationwide paging licensees that would be in addition to the build-out requirements they have already met.

16. Nationwide paging licensees have already met pre-existing build-out rules, which were imposed in connection with nationwide exclusivity rules prior to the advent of geographic area licensing. Having carefully examined its databases reflecting the extent of construction by nationwide paging licensees, the Commission finds that all of these licensees are already providing sufficient coverage to meet the five-year benchmark applicable to nationwide narrowband PCS licensees, and some of them have met the ten-year benchmark. Thus, while the Commission expects nationwide paging licensees to build out their systems to the same extent as nationwide narrowband PCS licensees, it concludes that the build-out requirements set forth in its previous rules were adequate to promote coverage by nationwide paging licensees that is equivalent to that of nationwide narrowband PCS licensees, which have recently reached their five-year benchmark. In addition, while the Commission anticipates that nationwide paging licensees' build-out in rural areas should increase in the future given that licensees appear to have already constructed in most urban areas, it has no evidence that nationwide paging licensees' build-out in rural areas is deficient. The Commission therefore concludes that it is unnecessary to impose a new layer of regulations on nationwide paging licensees by adopting additional coverage requirements for them. However, if the Commission is presented with evidence that there is a need to impose a requirement equivalent to the ten-year nationwide narrowband PCS benchmark, it will consider revisiting this issue in the future.

17. *Applicability of the Part 1 General Competitive Bidding Rules.* Following the release of the *Narrowband PCS R&O/Further Notice* in April 1997, the Commission adopted an order establishing uniform competitive bidding provisions for all auctionable services. See Amendment of Part 1 of the Commission's Rules—Competitive Bidding Procedures, Third Report and Order and Second Further Notice of Proposed Rule Making (*Part 1 Third Report and Order*), 63 FR 770 (January 7, 1998). Thus, the general competitive bidding rules found in subpart Q of part

1 of the Commission's rules, including provisions adopted in the *Part 1 Third Report and Order*, will serve as the general competitive bidding rules for all future auctions, regardless of whether service-specific rules have previously been adopted. Subpart Q of part 1 of the Commission's rules will apply to narrowband PCS, unless the Commission determines that, with regard to particular matters, the adoption of service-specific rules is warranted. The Balanced Budget Act of 1997 provides that, before the issuance of bidding rules, the Commission must provide adequate time for parties to comment on proposed auction procedures. In response to this statutory requirement, the Commission has directed the Bureau, under its existing delegated authority, to seek comment prior to the commencement of each auction on a variety of auction-specific operational issues. See *Part 1 Third Report and Order* (citing Balanced Budget Act of 1997, section 3002(a)(1)(B)(iv)). Under part 1 and consistent with this approach, matters such as auction design, license grouping, activity rules, minimum opening bids, and reserve prices will be determined by the Bureau pursuant to its delegated authority.

18. The Commission declines to adopt the suggestion that it require applicants to identify each frequency in each market on which they wish to bid and submit upfront payments for each individual license. The Commission believes that its current rules, which require an upfront payment to cover only those licenses on which an applicant intends to bid in any one round, are appropriate because they allow bidders the flexibility to pursue backup strategies during the course of an auction in the event they are unable to obtain their first choice of licenses. Such flexibility is crucial to an efficient auction and optimal license assignment. The Commission also declines to modify its anti-collusion rule to provide a safe harbor for carriers engaged in negotiations regarding mergers or intercarrier agreements. It has declined to create such a safe harbor in the past, and it has not been presented with an adequate justification for departing from that decision with respect to narrowband PCS. Finally, certain commenters urge the Commission to provide auction participants with the identity of all competing bidders. It has generally been the Commission's practice to disclose the identity of all bidders in Commission auctions. If, however, in the case of particular auctions a limit on such information

appears warranted, the Bureau will, consistent with the Balanced Budget Act of 1997 and current practice, seek comment on the issue in a public notice prior to the auction.

19. *Treatment of Designated Entities.* The term "designated entity" refers to small businesses, rural telephone companies, and businesses owned by minorities and/or women. In this *Second R&O*, the Commission declines to offer race- and gender-based designated entity provisions for narrowband PCS at this time. Commenters in this proceeding have submitted no evidence or data on the issue of race- or gender-based auction provisions, and the Commission concludes that it does not have a sufficient record to support such special provisions at this time under current standards of judicial review. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (requiring a strict scrutiny standard of review for Congressionally mandated race-conscious measures) and *United States v. Virginia*, 518 U.S. 515 (1996) (applying an intermediate scrutiny standard of review to a state program containing gender classification).

20. The Commission remains committed to meeting the statutory objectives of promoting economic opportunity and competition, avoiding excessive concentration of licenses, and 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. It believes the bidding credits it adopts for small businesses will assist in meeting these objectives because many minority- and women-owned entities are small businesses and will therefore qualify for these special provisions. The Commission also believes that its standardization of the rules regarding definitions of eligible entities, unjust enrichment, and bidding credits in the *Part 1 Third Report and Order* will assist small and minority- and women-owned businesses because the resulting predictability will facilitate effective business planning and capital accumulation. The Commission's Office of Communications Business Opportunities has initiated several studies to gather information regarding barriers to entry faced by minority- and women-owned firms that wish to participate, or have participated, in Commission auctions. Further, the Commission has recently commenced several new studies to explore additional entry barriers and to seek further evidence of racial and gender

discrimination against potential licensees. In addition, it will continue to track the rate of participation in its auctions by minority- and women-owned firms and evaluate this information with other data gathered to determine whether provisions to promote participation by minorities and women can satisfy judicial scrutiny. If a sufficient record can be adduced, the Commission may consider race- and gender-based auction provisions in the future.

21. The Commission declines to adopt financial preferences designed specifically for rural telephone companies. The Commission is not persuaded by the argument that it should provide special bidding credits for rural telephone companies in order to meet its obligation to ensure that rural telephone companies have the opportunity to participate in spectrum-based services. The Commission has no evidence that large rural telephone companies encounter barriers to capital formation comparable to those faced by other designated entities. Moreover, the vast majority of rural telephone companies that have participated in the Commission's auctions to date have identified themselves as small businesses and have qualified for bidding credits on that basis. Thus, the Commission finds that small business bidding credits are sufficient to ensure that rural telephone companies have opportunities to participate in spectrum-based services.

22. For purposes of narrowband PCS, the Commission will define a small business as an entity with average annual gross revenues not to exceed \$40 million for the preceding three years and a very small business as an entity with average annual gross revenues not to exceed \$15 million for the preceding three years. The Commission declines to adopt different definitions and thresholds for different channel blocks.

23. In the *Part 1 Third Report and Order*, the Commission established a standard schedule of bidding credits for small businesses. While these bidding credits are higher than some previously adopted for specific services, the Commission concluded in the *Part 1 Third Report and Order* that, based on its auction experience and the fact that it had decided to suspend the use of installment payments, the schedule adopted would provide adequate opportunities for small businesses to participate in spectrum auctions. The Commission believes that the levels of bidding credits in this schedule, which are higher than those proposed in the *Narrowband PCS R&O/Further Notice*, are sufficient to promote the

participation of small businesses in the provision of narrowband PCS. The Commission therefore sees no reason to deviate from them here, and declines to adopt higher levels as recommended by certain commenters. Thus, as provided in § 1.2110(e)(2) of the Commission's rules, small and very small businesses will be eligible for bidding credits as follows: Small businesses, *i.e.*, those entities with average annual gross revenues for the preceding three years not exceeding \$40 million, will receive a 15 percent bidding credit. Very small businesses, *i.e.*, those entities with average annual gross revenues for the preceding three years not exceeding \$15 million, will receive a 25 percent bidding credit. These bidding credits will be available on all channels for which licenses are auctioned. Thus, bidding credits will not be restricted to certain channels.

24. The Commission will attribute the gross revenues of the applicant, the applicant's controlling interests, and its affiliates in making determinations regarding small business status. This approach is consistent with the standard proposed in Amendment of Part 1 of the Commission's Rules—Competitive Bidding Procedures, Memorandum Opinion and Order and Notice of Proposed Rule Making, 62 FR 13540 (March 21, 1997), wherein the Commission proposed a "controlling interest" standard as the general attribution rule for all future auctions. Under this standard, eligibility for small business provisions will be determined by attributing the gross revenues of the applicant, its controlling interests, which are defined to include those that exercise either *de jure* or *de facto* control, and its affiliates. Typically, *de jure* control is evidenced by holdings of greater than 50 percent of the voting stock of a corporation or, in the case of a partnership, general partnership interests. *De facto* control is determined on a case-by-case basis, and includes the criteria set forth in a Notice of Hearing Designation Order (*Ellis Thompson Corp.*), 60 FR 1776 (January 5, 1995).

25. The "controlling interest" definition also provides specific guidance on calculation of various types of ownership interests. For purposes of calculating equity held in an applicant, the definition provides for full dilution of certain stock interests, warrants, and convertible debentures. In addition, the definition provides for attribution of partnership and other ownership interests, including stock interests held in trust, non-voting stock, and indirect ownership through intervening corporations. When an applicant cannot

identify controlling interests under the definition, the revenues of all interest holders in the applicant and their affiliates will be counted. For example, if a company is owned by four entities, each of which has 25 percent voting equity and no shareholders' agreement or voting trust gives any one of them control of the company, the revenues of all four entities and their affiliates must be counted. Treating such a corporation in this way is similar to the Commission's treatment of a general partnership—all general partners are considered to have a controlling interest. This rule looks to substance over form in assessing eligibility for small business status.

26. The Commission's intent is to provide flexibility that will enable legitimate small businesses to attract passive financing in a highly competitive and evolving telecommunications marketplace. At the same time, the Commission believes that this controlling interest threshold will function effectively to ensure that only those entities truly meriting small business status are eligible for small business provisions. In particular, the Commission believes that the *de jure* and *de facto* concepts of control used to determine controlling interests in an applicant and the application of its affiliation rules will effectively prevent larger firms from illegitimately seeking status as a small business. The Commission also finds that the controlling interest standard it adopts, along with the definition of "affiliate" set forth in part 1 of its rules (*see* 47 CFR 1.2110(b)(4)), adequately addresses commenters' concerns regarding new business structures and widely held companies.

27. The Commission continues to believe that the obstacles faced by small businesses, including women- and minority-owned small businesses, in raising capital are not necessarily confined to small business principals and affiliates with limited personal net worth. Moreover, personal net worth limits are difficult to apply and enforce. The Commission therefore eliminates the \$40 million individual net worth limitation in its narrowband PCS rules.

28. With respect to payment matters, the Commission declines to adopt installment payment plans for small businesses participating in narrowband PCS auctions in the future. The Commission's experience has demonstrated that installment payments may not be necessary to ensure a meaningful opportunity for small businesses to participate successfully in its auction program. The Commission continues to believe that bidding

credits, coupled with its partitioning and disaggregation policies, are sufficient to overcome barriers faced by small businesses seeking to participate in the narrowband PCS marketplace. As a result of the Commission's decision to suspend installment payments, and its adoption of rules governing late payments and defaults in part 1, subpart Q, issues related to installment payments regarding interest, late payment fees, and payment schedules raised in the *Narrowband PCS R&O/ Further Notice* are now moot. Current licensees paying for their licenses in installments are subject to the late payment and default provisions in part 1.

29. The Commission believes that when a small business entity applies to transfer or partition its license or disaggregate spectrum, unjust enrichment rules are necessary in order to ensure that non-small business entities cannot take indirect advantage of the Commission's small business incentives. However, the Commission does not need to establish a separate unjust enrichment requirement for narrowband PCS because it has adopted a uniform requirement in part 1, subpart Q, of its rules for all services. Accordingly, the unjust enrichment provisions set forth at 47 CFR 1.2111 will apply to narrowband PCS. These provisions address assignments and transfers between entities qualifying for different tiers of bidding credits. Because the Commission will now offer bidding credits only to small businesses, its unjust enrichment rules will apply to any case where a licensee that qualified for a bidding credit seeks to transfer or partition to an entity that is not a small business. In addition, the Commission's revised attribution rules will apply in determining small business status. Finally, the Commission declines to adopt a holding period or transfer restrictions for narrowband PCS licenses that would be in addition to its unjust enrichment rules.

30. *Partitioning and Disaggregation.* The Commission will permit all narrowband PCS licensees, including incumbents, to partition their geographic license area at any time to any entity eligible for a narrowband PCS license. Small businesses and others may face certain barriers to entry into the provision of spectrum-based services, which may be addressed by allowing qualifying entities to acquire a partitioned license. The Commission also believes that the partitioning policy it adopts will allow licensees to use spectrum more efficiently, speed service to underserved areas, and stimulate competition.

31. Partitioning will be permitted based on any geographic area defined by the parties to a partitioning arrangement. Partitionees will hold their licenses for the remainder of the partitioner's ten-year license term. This term is appropriate because a licensee, through partitioning, should not be able to confer greater rights than it was awarded under the terms of its license grant.

32. Parties to a partitioning arrangement will have two options for meeting the applicable narrowband PCS construction requirements. Under the first option, the partitionee may certify that it will satisfy the same construction requirements as the original licensee, with the partitionee meeting the requirements in its partitioned area and the partitioner responsible for satisfying the requirements in the area it has retained. Under the second option, the original licensee may certify that it has already met or will meet its five-year construction requirement and that it will meet the 10-year requirement for the entire market involved. All parties should understand that, under the first option, both the partitioner and partitionee are individually responsible for meeting the coverage requirements for their respective areas. Failure by either party to meet its coverage requirements will result in the automatic cancellation of its license without further Commission action. Under the second option, only the partitioner's license will be cancelled if it fails to meet the coverage requirements for the entire geographic area. The partitionee will not be subject to coverage requirements except for those necessary to obtain license renewal.

33. Partitioning applicants will be required to submit, as separate attachments to the partial assignment application, a description of the partitioned service area and a calculation of the population of the partitioned service area. The partitioned service area must be defined using counties, FCC-defined service areas (e.g., Economic Areas), or the boundaries of the area described in terms of latitude and longitude. When partitioning counties or FCC-defined service areas, the applicant need only supply the county and state, or market number. When describing the boundary of an area, however, the applicant must supply sets of coordinates (latitude and longitude referenced to the North American Datum of 1983—NAD83) along the boundary sufficient to describe the area. An applicant may use as few as three sets of coordinates, up to a maximum of 120 sets of coordinates

in order to describe an area. Applicants are free to aggregate several areas described by coordinates in order to accurately describe the boundary of the partitioned area.

34. The Commission will also permit all narrowband PCS licensees, including nationwide licensees to disaggregate portions of their spectrum in the same general manner as it has for licensees in other CMRS services where it has adopted disaggregation. The Commission concludes that marketplace forces should determine whether it is technically feasible to disaggregate narrowband spectrum. Allowing narrowband PCS spectrum disaggregation could potentially expedite the introduction of service to underserved areas and provide increased flexibility to licensees. The Commission also believes that disaggregation combined with bidding credits and geographic partitioning will facilitate the acquisition of narrowband PCS spectrum by small businesses.

35. The Commission finds that it is unnecessary to require a party that wishes to disaggregate to retain a minimum amount of spectrum. Thus, the Commission will allow disaggregating parties to negotiate channelization plans among themselves as a part of their disaggregation agreements. Parties will be permitted to disaggregate spectrum in any increments as long as such disaggregation is otherwise consistent with the Commission's rules. Disaggregates will be authorized to hold licenses for the remainder of the disaggregator's original ten-year term. As the Commission concluded with respect to partitioners, the disaggregator should not be entitled to confer greater rights than it was awarded under the initial license grant.

36. With respect to meeting construction requirements, disaggregating parties will be permitted to choose between two options: Under the first option, the parties may agree that either the disaggregator or the disaggregatee will be responsible for meeting the coverage requirements for the geographic service area. Under the second option, the disaggregator and disaggregatee may certify that they will share the responsibility for meeting the coverage requirements for the entire geographic area. Under the first option, if the certifying party fails to meet the coverage requirements for the entire geographic area, that party's license will be subject to cancellation, but the non-certifying party's license will not be affected. However, if the parties to a disaggregation agreement select the second option and jointly fail to satisfy

the coverage requirements for the entire geographic area, both parties' licenses will be subject to cancellation. Parties seeking Commission approval of a disaggregation agreement will be required to include a certification as to which party or parties will be responsible for meeting the construction requirements.

37. Combined partitioning and disaggregation will be permitted. This will allow narrowband PCS licensees the flexibility to design the types of agreements they desire, and will advance the goals of providing competitive service offerings and encouraging new market entrants. In the event that there is a conflict in the application of the partitioning and disaggregation rules, the partitioning rules will prevail. When a combination of partitioning and disaggregation is proposed, the Commission will use both the population of the partitioned area and the amount of spectrum disaggregated to calculate unjust enrichment payments.

38. The Commission has adopted a general rule that determines the amount of unjust enrichment payments assessed for all current and future licensees that engage in partitioning and disaggregation. Specifically, the rules adopted in the *Part 1 Third Report and Order* indicate that if a licensee seeks to partition any portion of its geographic area, the amount of the unjust enrichment payment will be calculated based on the ratio of the population in the partitioned area to the overall population of the license area. In the event of disaggregation, the amount of the unjust enrichment payment will be based upon the ratio of the amount of spectrum disaggregated to the amount of spectrum held by the disaggregating licensee. See 47 CFR 1.2111(e). The unjust enrichment provisions adopted in the *Part 1 Third Report and Order* will apply to any narrowband PCS licensee that receives a bidding credit and later elects to partition or disaggregate its license. When combined partitioning and disaggregation is proposed, the Commission will use a combination of both population of the partitioned area and amount of spectrum disaggregated to make these pro rata calculations.

39. Installment payments have been suspended as a means of financing small businesses and other designated entities seeking to secure spectrum licenses. Nonetheless, there are a small number of current narrowband licensees that qualified as small businesses for installment payment plans. If such a licensee sought to partition or disaggregate its license to another small

business, the partitionee or disaggregatee would be permitted to pay its portion of the remaining obligation on the license in installments. If, however, such a licensee sought to partition or disaggregate its license to a non-small business, the Commission's part 1 unjust enrichment rules would apply.

40. Because the Commission has suspended its installment payment program, the issue of default obligations for parties entering into partitioning and disaggregation agreements is moot with respect to future licensees. With respect to current small business licensees that may partition or disaggregate to other small businesses, the Commission concludes that a default on one party's payment obligation should not affect the other party's license.

41. *Ownership Disclosure Requirements.* The Commission believes that requiring detailed ownership information is necessary to ensure that all applicants claiming small business status qualify for such status. Disclosure of ownership information also aids bidders by providing them with information about their auction competitors and alerting them to entities subject to the Commission's anti-collusion rules. The Commission has adopted uniform ownership disclosure requirements in part 1, subpart Q, of its rules for all services. See 47 CFR 1.2112. These rules require all auction applicants to disclose the real party or parties in interest by including as an exhibit to their short-form applications detailed ownership information. Moreover, they require that applicants list controlling interests as well as all parties holding a 10 percent or greater interest in the applicant and any affiliates of these interest holders. These rules, combined with the controlling interest standard the Commission adopts in this *Second R&O* and its definition of "affiliate," will help to ensure that only qualifying applicants obtain the benefits of the Commission's small business provisions, without being unduly burdensome.

42. *Construction Prior to Grant of Licenses for Narrowband and Broadband PCS.* The Commission will apply its part 1 rules, which permit applicants for all licenses awarded by competitive bidding to begin construction of facilities prior to the grant of their applications. See 47 CFR 1.2113. The Commission believes that allowing pre-grant construction furthers the statutory objective of rapidly deploying new technologies, products, and services for the benefit of the public. Pre-grant construction will be subject to any narrowband PCS service

restrictions, including but not limited to antenna restrictions, environmental requirements, and international coordination. Any applicant engaging in pre-grant construction does so entirely at its own risk, and the Commission will not take such activity into account in ruling on any petition to deny.

Procedural Matters

A. Regulatory Flexibility Analysis

43. A Final Regulatory Flexibility Analysis, pursuant to the Regulatory Flexibility Act, 5 U.S.C. 604, is incorporated in this document.

B. Paperwork Reduction Act Analysis

44. This *Second R&O* contains a modified information collection. As part of its continuing effort to reduce paperwork burdens, the Commission invites the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the information collection contained in this *Second R&O*, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. Public and agency comments are due on or before July 6, 2000. Written comments must be submitted by OMB on the modified information collection on or before August 7, 2000. Comments should address: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

OMB Control Number: 3060-0625.

Title: Amendment of the Commission's Rules to Establish New Personal Communications Services, Narrowband PCS.

Form Number: N/A.

Type of Review: Revision of existing collection.

Respondents: Business or other for-profit; Individuals or households; Not-for-profit institutions; Federal Government; and State, Local or Tribal Government.

Number of Respondents: 1,500.

Estimate Time Per Response: 3.5 hrs. (avg.).

Frequency of Response: On occasion.

Total Annual Burden: 5,250 hours.

Total Annual Costs: \$1,050,000.

Needs and Uses: The amendments to the Commission's narrowband Personal

Communications Services rules adopted in this proceeding will improve the efficiency of spectrum use, reduce the regulatory burden on spectrum users, encourage competition, and promote service to the largest feasible number of users.

45. In addition to filing comments with the Secretary, a copy of any comments on the information collection(s) contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 1-C804, 445 12th Street, SW., Washington, DC 20554, or via the Internet to jboley@fcc.gov and to Edward Springer, OMB Desk Officer, 10236 NEOB, 725 17th Street, NW., Washington, DC 20503 or via the Internet to edward.springer@omb.eop.gov.

E. Ordering Clauses

46. Authority for issuance of this *Second R&O* is contained in 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).

47. Accordingly, it is ordered that part 24 of the Commission's rules is amended as specified, effective August 7, 2000, except § 24.104, which shall be effective upon OMB approval.

48. It is further ordered that the Commission's Consumer Information Bureau, Reference Information Center, shall send a copy of this *Second R&O*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

Final Regulatory Flexibility Analysis

49. As required by the Regulatory Flexibility Act (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Narrowband PCS R&O/Further Notice* in this proceeding. The Commission sought written public comment on the proposals in the *Narrowband PCS R&O/Further Notice*, including comment on the IRFA. No commenter raised an issue concerning the IRFA. The Commission's Final Regulatory Flexibility Analysis (FRFA) in this *Second R&O* conforms to the RFA.

i. Need for and Purpose of this Action

50. This *Second R&O* amends the Commission's rules for narrowband PCS. The amendments adopted promote efficient licensing of narrowband PCS and enhance the service's competitive potential in the Commercial Mobile Radio Service marketplace. The *Second R&O* also makes the competitive bidding rules for narrowband PCS, which previously provided preferences

for minority- and women-owned businesses, race- and gender-neutral. The Commission deems the latter changes necessary in light of the Supreme Court's decisions in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (requiring a strict scrutiny standard of review for Congressionally mandated race-conscious measures) and *United States v. Virginia*, 518 U.S. 515 (1996) (applying an intermediate scrutiny standard of review to a state program containing gender classification). By applying the Commission's standardized part 1 competitive bidding rules to narrowband PCS and eliminating most of the service-specific competitive bidding rules previously applied, the *Second R&O* also simplifies and reduces the regulatory burden on applicants and licensees.

ii. Summary of Issues Raised by the Public in Response to the IRFA

51. No party filed comments responding to the IRFA. The Commission has, however, taken small business concerns into account in the *Second R&O*, as discussed in Sections v and vi of this FRFA.

iii. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply

52. The rules adopted in the *Second R&O* will affect small businesses that hold or seek to acquire narrowband PCS licenses. These entities include small businesses that obtain nationwide, regional or MTA geographic area licenses through auction, assignment, or transfer and small businesses that acquire partitioned and/or disaggregated MTA, regional, or nationwide geographic area licenses.

53. To date, two auctions of narrowband PCS licenses have been conducted. Through these auctions, the Commission has awarded a total of 41 licenses, out of which 11 were obtained by small businesses. For purposes of the two auctions that have already been held, small businesses were defined as entities with average gross revenues for the prior three calendar years of \$40 million or less. To ensure meaningful participation of small business entities in the auctions, the Commission adopts a two-tiered definition of small businesses in the *Second R&O*. A small business is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$40 million. A very small business is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of

not more than \$15 million. In December 1998, the Small Business Administration approved this two-tiered definition, which had been proposed in the *Narrowband PCS R&O/Further Notice*. Letter of December 2, 1998, to Amy J. Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, from Aida Alvarez, Administrator Small Business Administration.

54. Without this definition, the Commission would utilize the SBA definition applicable to radiotelephone companies, *i.e.*, an entity employing fewer than 1,500 persons. See 13 CFR 121.201, Standard Industrial Classification Code 4812. Nearly all radiotelephone companies have fewer than 1,000 employees. The 1992 Census of Transportation, Communications, and Utilities, conducted by the Bureau of the Census, shows that only 12 radiotelephone firms out of a total of 1,178 such firms that operated during 1992 had 1,000 or more employees. U.S. Bureau of the Census, U.S. Department of Commerce, 1992 Census of Transportation, Communications, and Utilities, UC92-S-1, Subject Series, Establishment and Firm Size, Table 5, Employment Size of Firms: 1992, SIC Code 4812 (issued May 1995).

55. In the future, the Commission will auction 459 licenses to serve MTAs and 408 response channel licenses. There is also one megahertz of narrowband PCS spectrum that has been held in reserve and that the Commission has not yet decided to release for licensing. The Commission cannot predict accurately the number of licenses that will be awarded to small entities in future auctions. However, 4 of the 16 winning bidders in the two previous narrowband PCS auctions were small businesses, as that term was defined under the Commission's rules. The Commission assumes, for purposes of the evaluations and conclusions in this FRFA, that a large portion of the remaining narrowband PCS licenses will be awarded to small entities. The Commission also assumes that at least some small businesses will acquire narrowband PCS licenses by means of the Commission's partitioning and disaggregation rules.

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

56. The rules adopted in the *Second R&O* impose reporting and recordkeeping requirements on small businesses, as well as others, seeking to obtain or transfer licenses through partitioning and disaggregation. The information requirements will be used

to determine whether the proposed partitionee or disaggregatee is an entity qualified to obtain a partitioned license or disaggregated spectrum. The information will be a one-time filing by an applicant requesting such a license. The information can be submitted on FCC Form 603 for part 24 narrowband PCS services. The Commission estimates that the average burden on the applicant is three hours for the information necessary to complete these forms. The Commission estimates that 75 percent of the respondents, which may include small businesses, will contract out the burden of responding. The Commission estimates that it will take approximately 30 minutes to coordinate information with those contractors. The remaining 25 percent of respondents, which may include small businesses, are estimated to employ in-house staff to provide the information. Applicants filing electronically, including small businesses will not incur any per minute on-line charge. The Commission estimates that applicants contracting out the information would use an attorney or engineer (average of \$200 per hour) to prepare the information.

57. Narrowband PCS applicants and licensees, including small businesses, will be subject to the reporting and recordkeeping requirements already contained in the Commission's part 1 competitive bidding rules, which apply to all auctionable services. These part 1 rules include the unjust enrichment rule set forth at 47 CFR 1.2111, which includes a reporting requirement for applicants seeking approval of a transfer of control or assignment of license within three years of receiving a new license through competitive bidding. The part 1 rules also include the uniform ownership disclosure requirements of 47 CFR 1.2112, which require all auction applicants to disclose the real party or parties in interest by including as an exhibit to their short-form applications detailed ownership information. The Commission finds that these rules, combined with its controlling interest standard and definition of "affiliate," will help to ensure that only qualifying applicants obtain the benefits of its small business provisions, without being unduly burdensome. In addition, narrowband PCS licensees that qualify as designated entities will be required to maintain at their facilities or by a designated agent, for the term of the license, information relevant to their eligibility for designated entity status. This requirement will further help to ensure that only qualifying applicants obtain

the benefits of the Commission's small business provisions.

v. Steps Taken To Minimize Burdens on Small Entities

58. The rules adopted in the *Second R&O* are designed to implement Congress' goal of giving small businesses, as well as other entities, the opportunity to participate in the provision of spectrum-based services. The rules are also consistent with the Communications Act's mandate to identify and eliminate market entry barriers for entrepreneurs and small businesses in the provision and ownership of telecommunications services. See generally 47 U.S.C. 257, 309(j).

59. *Service Areas.* The Commission finds that MTAs, rather than nationwide and regional geographic areas, are the most appropriate geographic area for licensing the remaining narrowband PCS spectrum because they will serve the needs of a wide range of entities, including both large and small service providers. Certain commenters argued that any additional nationwide or regional licenses would be too costly for small businesses to acquire and build out. MTAs, however, are not too large to preclude the entry of small businesses, and those interested in service areas larger than MTAs will be able to create such areas by aggregating licenses.

60. *Bidding Credits.* To ensure meaningful participation of small business entities in the auctions, the Commission adopts a two-tiered definition of small businesses in the *Second R&O*. A small business is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$40 million. A very small business is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$15 million. Small businesses are eligible for a 15 percent bidding credit. Very small businesses are eligible for a 25 percent bidding credit. In contrast to the Commission's previous rules, bidding credits will now be applicable to narrowband PCS licenses on all channels.

61. *Partitioning and Disaggregation.* The *Second R&O* adopts rules permitting narrowband PCS licensees to partition portions of their geographic areas, or disaggregate portions of the spectrum for which they hold a license, to other entities qualified to be licensees. Such partitioning and disaggregation will facilitate market entry by parties that may lack the financial resources to participate in

auctions, including small businesses. Partitioning and disaggregation are expected to enable small businesses to obtain licenses for areas smaller than nationwide, regional or MTA areas, or smaller amounts of spectrum, at costs they will be able to afford. The Commission's decision to allow parties to partitioning or disaggregation agreements to choose between two options to meet their coverage requirements will provide small businesses with more flexibility in managing their resources.

62. *Substantial Service Option.* The *Second R&O* allows narrowband PCS licensees to demonstrate "substantial service" as an alternative to meeting the coverage requirements set forth in the existing rules. The Commission finds that a substantial service option may be very useful in allowing licensees, including small businesses, to use spectrum flexibly to provide new and innovative services uninhibited by a requirement that they meet a specific coverage benchmark or lose their license.

63. *Application of Part 1 Standardized Rules.* The Commission believes that its application of the part 1 standardized rules regarding eligible entities, unjust enrichment, and bidding credits will assist small businesses because the resulting predictability will facilitate the business planning and capital fundraising process.

vi. Significant Alternatives Considered

64. The Commission considered and rejected the following alternative proposals concerning service areas, spectrum aggregation, response channels, coverage requirements, nationwide paging licensees, competitive bidding rules, installment payments, and disaggregation.

65. *Service Areas.* The Commission declined to adopt Metrocall's, Celpage's and Benbow's recommendation that it use a combination of regional and MTA service areas for future licensing of narrowband PCS. Similarly, the Commission declined to adopt Arch's proposal that it allocate one of the two remaining 50 kHz paired channels as a nationwide license. Taking into consideration other commenters' argument that it would be too costly for small businesses to acquire and build out nationwide and regional licenses, the Commission decided to use MTAs for future licensing. The Commission also declined to adopt several commenters' recommendation that it use BTA-based licenses to license narrowband PCS spectrum. The Commission concluded that using MTAs rather than BTAs would not

compromise the goal of ensuring entry for small businesses.

66. *Spectrum Aggregation.* In the *Second R&O*, the Commission considered the argument that it should maintain the narrowband PCS spectrum aggregation limit, which was originally adopted to ensure that narrowband PCS services would be offered on a competitive basis. The Commission decided to eliminate the narrowband PCS aggregation limit, finding that the aggregation limit is not needed to prevent an undue concentration of licenses and that it may be harmful if it disadvantages narrowband PCS licensees in competing against other services.

67. *Response Channels.* In the *Second R&O*, the Commission considered and rejected its tentative conclusion that the response channels should not be restricted to mobile-to-base transmissions, provided that licensees comply with the relevant rules regarding maximum transmitter power and interference. The Commission agreed with commenters Arch, Benbow, and PCIA that allowing these channels to be used for other purposes would cause harmful interference with current narrowband PCS licensees and determined that it would retain the current rule restricting use of the response channels to mobile-to-base transmissions.

68. *Construction and Coverage Requirements.* The Commission declined to adopt recommendations by certain commenters that it modify its current construction benchmarks. It declined, for example, to adopt Arch's and Benbow's suggestion that it eliminate the five-year construction requirement and allow both existing and new narrowband PCS licensees to meet a 37.5 percent population benchmark by the tenth year of their license terms. The Commission found that its five- and ten-year construction benchmarks provide sufficient time for narrowband PCS licensees to construct their systems. The nationwide narrowband PCS licensees that have reached their five-year buildout benchmarks have all represented that they met the requirement, and none requested a waiver. The Commission found that there is no need to alter the current benchmarks, and that it is best to address any problems that individual licensees may have because of difficulties with financing or equipment availability by evaluating requests for waiver on a case-by-case basis.

69. Several commenters opposed the adoption of a "substantial service" requirement on the grounds that replacing the existing coverage

requirements with a substantial service test would encourage speculation, fraud, and anticompetitive behavior. In considering and rejecting this argument, the Commission concluded that coverage requirements, including a substantial service standard, encourage the provision of service to areas that would not necessarily receive service expeditiously solely through the operation of market forces. The Commission found that the substantial service option may be very useful in allowing licensees to use spectrum flexibly to provide new and innovative services uninhibited by a requirement that they meet a specific coverage benchmark or lose their license. The Commission also concluded that permitting licensees to make a substantial service showing may encourage them to build out in rural areas. The Commission also declined to adopt Ameritech's recommendation that substantial service be defined as "service that is sound, favorable, and reasonably capable of meeting an appropriate portion of the public demand for one or more of the communications services of which the system is capable under the Commission's rules." In the past the Commission has offered guidance to licensees in other services with regard to factors that it would consider in evaluating whether the substantial service requirement has been met, and it will maintain this practice with respect to narrowband PCS.

70. *Nationwide Paging Licenses.* In the *Paging MO&O/Third Report and Order*, the Commission considered the issue of coverage requirements for nationwide geographic area paging licensees and deferred any decision on the issue until it resolved similar matters in the instant narrowband PCS rulemaking proceeding. In the *Second R&O*, the Commission found that all nationwide paging licensees are already providing sufficient coverage to meet the five-year benchmark applicable to nationwide narrowband PCS licensees, and some of them have met the ten-year benchmark. Thus, the Commission concluded that the build-out requirements imposed on nationwide paging licensees under its previous rules were adequate to promote coverage equivalent to that of nationwide narrowband PCS licensees, and therefore it is not necessary to adopt coverage requirements for nationwide paging licensees that would be in addition to the build-out requirements they have already met.

71. *Competitive Bidding Rules.* The Commission declined to adopt certain commenters' recommendation that it

require applicants to identify each frequency in each market on which they wish to bid and submit upfront payments for each individual license. The Commission found that its current rules, which require an upfront payment to cover only those licenses on which an applicant intends to bid in any one round, are appropriate because they allow bidders the flexibility to pursue backup strategies during the course of an auction in the event they are unable to obtain their first choice of licenses. The Commission also declined to modify its anti-collusion rule to provide a safe harbor for carriers engaged in negotiations regarding mergers or intercarrier agreements, as requested by PCIA. The Commission has declined to create such a safe harbor in the past, and it has not been presented with an adequate justification for departing from that decision here. Finally, several commenters requested that the Commission provide auction participants with the identity of all competing bidders. It has generally been the Commission's practice to disclose the identity of all bidders in Commission auctions. If, in the case of particular auctions, a limit on such information appears warranted, the Wireless Telecommunications Bureau will, consistent with the Balanced Budget Act of 1997 and current practice, seek comment on the issue in a public notice prior to the auction.

72. *Installment Payments.* The Commission declined to adopt installment payment plans for small businesses participating in narrowband PCS auctions. This action is consistent with the Commission's policy set forth in the *Part 1 Third Report and Order*, where the Commission noted that its experience has demonstrated that installment payments may not be necessary to ensure a meaningful opportunity for small businesses to participate successfully in its auction program.

73. *Bidding Credits.* The Commission decided to adopt a 15 percent bidding credit for small businesses and a 25 percent bidding credit for very small businesses. A small business is an entity with average annual gross revenues not to exceed \$40 million for the preceding three years, and a very small business is an entity with average annual gross revenues not to exceed \$15 million for the preceding three years. The Commission declined to adopt higher bidding credits, as Merlin and RTG recommend. The bidding credits adopted are those provided for in the Commission's part 1 standardized competitive bidding rules. The Commission believes that these levels of

bidding credits, which are higher than those proposed in the *Narrowband PCS R&O/Further Notice*, are sufficient to promote the participation of small businesses in the provision of narrowband PCS, and that there is no reason to deviate from the standard schedule of bidding credits here.

74. *Bidding Credits for Rural Telephone Companies.* The Commission declined to adopt RTG's and NTCA's recommendation that it provide special bidding credits for rural telephone companies in order to meet its obligation to ensure that rural telephone companies have the opportunity to participate in spectrum-based services. The Commission has no evidence that large rural telephone companies encounter barriers to capital formation comparable to those faced by other designated entities. In addition, the vast majority of rural telephone companies that have participated in the Commission's auctions to date have identified themselves as small businesses and have qualified for bidding credits on that basis. Thus, the Commission believes that small business bidding credits are sufficient to ensure that rural telephone companies have the ability to participate in spectrum-based services, and it does not believe that rural telephone companies will be unable to compete in narrowband PCS auctions or the messaging marketplace without special financial preferences.

75. *Attribution.* The Commission declined to adopt Merlin's recommendations regarding amending its rules to adapt to various business structures. Merlin suggests, for example, that, for purposes of defining whether a company is widely held, whatever its form of business organization, the Commission should formulate its rules to state that a widely held company is one in which no single equity holder has 15 percent or more of the equity of the applicant. The Commission found that the controlling interest standard adopted in the *Second R&O*, along with the definition of "affiliate" set forth in part 1 of the Commission's rules, adequately addresses Merlin's concerns.

76. *Disaggregation.* Some commenters stated that disaggregation is not technically feasible and therefore it is unnecessary for the Commission to address the issue at this time. In considering and rejecting such arguments, the Commission concluded that marketplace forces should determine whether it is technically feasible to disaggregate narrowband spectrum. The Commission also concluded that allowing narrowband PCS spectrum disaggregation could

potentially expedite the introduction of service to underserved areas and provide increased flexibility to licensees. Finally, the Commission found that disaggregation combined with bidding credits and geographic partitioning will facilitate the acquisition of narrowband PCS spectrum by small businesses.

77. *Report to Congress.* The Commission will send a copy of the *Second R&O*, including this FRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996. See 5 U.S.C. 801(a)(1)(A). In addition, the Commission will send a copy of the *Second R&O*, including FRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Part 24

Communications common carriers, Personal communications services, Radio, Reporting and recordkeeping requirements.

Federal Communications Commission.

William F. Caton,

Deputy Secretary.

Rule Changes

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 24 as follows:

PART 24—PERSONAL COMMUNICATIONS SERVICES

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

Authority: 47 U.S.C. 154, 301, 302, 303, 309 and 332.

§ 24.101 [Removed and Reserved]

2. Remove and reserve § 24.101.

3. Section 24.102 is amended by removing paragraph (d) and by revising the introductory text to read as follows:

§ 24.102 Service areas.

Narrowband PCS service areas are nationwide, regional, and Major Trading Areas (MTAs), as defined in this section. MTAs are based on the Rand McNally 1992 Commercial Atlas & Marketing Guide, 123rd Edition, at pages 38–39 (MTA Map). Rand McNally organizes the 50 States and the District of Columbia into 47 MTAs. The MTA Map is available for public inspection in the FCC's Library, Room TW–B505, 445 12th Street SW, Washington, D.C.

* * * * *

4. Section 24.103 is amended by removing the Note and by revising paragraph (a), (b), (c), (d), introductory text of paragraph (e), and (f) to read as follows:

§ 24.103 Construction requirements.

(a) Nationwide narrowband PCS licensees shall construct base stations that provide coverage to a composite area of 750,000 square kilometers or serve 37.5 percent of the U.S. population within five years of initial license grant date; and, shall construct base stations that provide coverage to a composite area of 1,500,000 square kilometers or serve 75 percent of the U.S. population within ten years of initial license grant date. Licensees may, in the alternative, provide substantial service to the licensed area as provided in paragraph (d) of this section.

(b) Regional narrowband PCS licensees shall construct base stations that provide coverage to a composite area of 150,000 square kilometers or serve 37.5 percent of the population of the service area within five years of initial license grant date; and, shall construct base stations that provide coverage to a composite area of 300,000 square kilometers or serve 75 percent of the service area population within ten years of initial license grant date. Licensees may, in the alternative, provide substantial service to the licensed area as provided in paragraph (d) of this section.

(c) MTA narrowband PCS licensees shall construct base stations that provide coverage to a composite area of 75,000 square kilometers or 25 percent of the geographic area, or serve 37.5 percent of the population of the service area within five years of initial license grant date; and, shall construct base stations that provide coverage to a composite area of 150,000 square kilometers or 50 percent of the geographic area, or serve 75 percent of the population of the service area within ten years of initial license grant date. Licensees may, in the alternative, provide substantial service to the licensed area as provided in paragraph (d) of this section.

(d) As an alternative to the requirements of paragraphs (a), (b), and (c) of this section, narrowband PCS licensees may demonstrate that, no later than ten years after the initial grant of their license, they provide substantial service to their licensed area. Licensees choosing this option must notify the FCC by filing FCC Form 601, no later than 15 days after the end of the five year period following the initial grant of their license, that they plan to satisfy the alternative requirement to provide substantial service. "Substantial service" is defined as service that is sound, favorable, and substantially above a level of mediocre service that would barely warrant renewal.

(e) In demonstrating compliance with the construction requirements set forth in this section, licensees must base their calculations on signal field strengths that ensure reliable service for the technology utilized. Licensees may determine the population of geographic areas included within their service contours using either the 1990 census or the 2000 census, but not both.

* * * * *

(f) Upon meeting the five and ten year benchmarks in paragraphs (a), (b), and (c) of this section, or upon meeting the substantial service alternative in paragraph (d), licensees shall notify the Commission by filing FCC Form 601 and including a map and other supporting documentation that demonstrate the required geographic area coverage, population coverage, or substantial service to the licensed area. The notification must be filed with the Commission within 15 days of the expiration of the relevant period.

* * * * *

5. Section 24.104 is added to read as follows:

§ 24.104 Partitioning and disaggregation.

Nationwide, regional, and MTA licensees may apply to partition their authorized geographic service area or disaggregate their authorized spectrum at any time following grant of their geographic area authorizations.

(a) *Application required.* Parties seeking approval for partitioning and/or disaggregation shall apply for partial assignment of a license pursuant to § 1.948 of this chapter.

(b) *Partitioning.* In the case of partitioning, applicants and licensees must file FCC Form 603 pursuant to § 1.948 of this chapter and describe the partitioned service area on a schedule to the application. The partitioned service area shall be defined by up to 120 sets of geographic coordinates at points at every 3 degrees azimuth from a point within the partitioned service area along the partitioned service area boundary unless either an FCC-recognized service area is used (e.g., MEA or EA) or county lines are followed. The geographical coordinates must be specified in degrees, minutes, and seconds to the nearest second latitude and longitude, and must be based upon the 1983 North American Datum (NAD83). In the case where FCC-recognized service areas or county lines are used, applicants need only list the specific area(s) through use of FCC designations or county names that constitute the partitioned area.

(c) *Disaggregation.* Spectrum may be disaggregated in any amount.

(d) *Combined partitioning and disaggregation.* Licensees may apply for partial assignment of authorizations that propose combinations of partitioning and disaggregation.

(e) *License term.* The license term for a partitioned license area and for disaggregated spectrum shall be the remainder of the original licensee's license term as provided for in § 1.955 of this chapter.

(f) *Coverage requirements for partitioning.* (1) Parties to a partitioning agreement must satisfy at least one of the following requirements:

(i) The partitionee must satisfy the applicable coverage requirements set forth in § 24.103 for the partitioned license area; or

(ii) The original licensee must meet the coverage requirements set forth in § 24.103 for the entire geographic area. In this case, the partitionee must meet only the requirements for renewal of its authorization for the partitioned license area.

(2) Parties seeking authority to partition must submit with their partial assignment application a certification signed by both parties stating which of the options they select.

(3) Partitionees must submit supporting documents showing compliance with their coverage requirements as set forth in § 24.103.

(4) Failure by any partitionee to meet its coverage requirements will result in automatic cancellation of the partitioned authorization without further Commission action.

(g) *Coverage requirements for disaggregation.* (1) Parties to a disaggregation agreement must satisfy at least one of the following requirements:

(i) Either the disaggregator or disaggregatee must satisfy the coverage requirements set forth in § 24.103 for the entire license area; or

(ii) Parties must agree to share responsibility for meeting the coverage requirements set forth in § 24.103 for the entire license area.

(2) Parties seeking authority to disaggregate must submit with their partial assignment application a certification signed by both parties stating which of the requirements they select.

(3) Disaggregates must submit supporting documents showing compliance with their coverage requirements as set forth in § 24.103.

(4) Parties that accept responsibility for meeting the coverage requirements and later fail to do so will be subject to automatic license cancellation without further Commission action.

6. Section 24.129 is amended by revising the introductory text and

paragraph (c), removing paragraph (d) and removing the “*” whenever it appears to read as follows:

§ 24.129 Frequencies.

The following frequencies are available for narrowband PCS.

* * * * *

(c) Nine frequencies are available for assignment on an MTA basis as follows:

(1) Two 50 kHz channels paired with 50 kHz channels:

Channel 18: 940.35–940.40 and 901.35–901.40 MHz; and,

Channel 19: 940.40–940.45 and 901.40–901.45 MHz.

(2) Five 50 kHz channels paired with 12.5 kHz channels:

Channel 20: 930.75–930.80 and 901.8375–901.8500 MHz;

Channel 21: 930.80–930.85 and 901.8500–901.8625 MHz;

Channel 22: 930.85–930.90 and 901.8625–901.8750 MHz;

Channel 25: 930.90–930.95 and 901.8750–901.8875 MHz; and,

Channel 26: 930.95–931.00 and 901.8875–901.9000 MHz.

(3) Two 50 kHz unpaired channels:

Channel 23: 940.90–940.95 MHz; and

Channel 24: 940.95–941.00 MHz.

* * * * *

7. Section 24.130 is revised to read as follows:

§ 24.130 Paging response channels.

The following eight 12.5 kHz unpaired channels are available for assignment on an MTA basis and shall be used only to provide mobile-to-base station communications:

A: 901.9000–901.9125 MHz;

B: 901.9125–901.9250 MHz;

C: 901.9250–901.9375 MHz;

D: 901.9375–901.9500 MHz;

E: 901.9500–901.9625 MHz;

F: 901.9625–901.9750 MHz;

G: 901.9750–901.9875 MHz; and

H: 901.9875–902.0000 MHz.

8. Section 24.132 is amended by revising paragraph (e) to read as follows:

§ 24.132 Power and antenna height limits.

* * * * *

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

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

PW is effective radiated power in watts

dkm is distance in kilometers

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

* * * * *

§§ 24.302 through 24.309 [Removed and Reserved]

9. Remove and reserve §§ 24.302 through 24.309.

§ 24.320 [Removed and Reserved]

10. Section 24.320 is removed and reserved.

11. Section 24.321 is added to read as follows:

§ 24.321 Designated entities.*(a) Eligibility for small business provisions.*

(1) A small business is an entity that, together with its controlling interests and affiliates, has average gross revenues not exceeding \$40 million for the preceding three years.

(2) A very small business is an entity that, together with its controlling interests and affiliates, has average gross revenues not exceeding \$15 million for the preceding three years.

(3) For purposes of determining whether an entity meets either of the definitions set forth in paragraphs (a)(1) and (a)(2) of this section, the gross revenues of the entity, its controlling interests and affiliates shall be considered on a cumulative basis and aggregated. An applicant seeking status as a small business or very small business under this section must disclose on its short- and long-form applications, separately and in the aggregate, the gross revenues of the applicant (or licensee), its controlling interests and affiliates for each of the previous three years.

(4) 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 § 1.2110(b)(4)(iii) of this chapter 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 requirements of this section.

(5) Where an applicant (or licensee) cannot identify controlling interests under the standards set forth in this section, the gross revenues of all interest holders in the applicant, and their affiliates, will be attributable.

(6) A consortium of small businesses (or a consortium of very small businesses) is a conglomerate organization formed as a joint venture between or among mutually independent business firms, each of which individually satisfies the definition in paragraph (a)(1) of this section (or each of which individually satisfies the definition in paragraph (a)(2) of this section). Where an applicant or licensee is a consortium of small businesses (or very small businesses), the gross revenues of each

small business (or very small business) shall not be aggregated.

(7) Designated entities must describe on their long-form applications how they satisfy the requirements for eligibility for designated entity status, and must list and summarize on their long-form applications all agreements that affect designated entity status such as partnership agreements, shareholder agreements, management agreements and other agreements, including oral agreements, establishing, as applicable, *de facto* or *de jure* control of the entity. Such information must be maintained at the licensee's facilities or by its designated agent for the term of the license in order to enable the Commission to audit designated entity eligibility on an ongoing basis.

(b) *Controlling interest.* (1) For purposes of this section, a controlling interest includes individuals or entities with either *de jure* or *de facto* control of the applicant. *De jure* control is evidenced by holdings of greater than 50 percent of the voting stock of a corporation, or in the case of a partnership, general partnership interests. *De facto* control is determined on a case-by-case basis. An entity must disclose its equity interest and demonstrate at least the following indicia of control to establish that it retains *de facto* control of the applicant:

(i) The entity constitutes or appoints more than 50 percent of the board of directors or management committee;

(ii) The entity has authority to appoint, promote, demote, and fire senior executives that control the day-to-day activities of the licensee; and

(iii) The entity plays an integral role in management decisions.

(2) The following rules apply for the calculation of certain interests.

(i) 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.

(ii) Partnership and other ownership interests and any stock interest equity, or outstanding stock, or outstanding voting stock shall be attributed as specified in this paragraph (b).

(iii) Stock interests held in trust shall be attributed to 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. If the trustee has a familial, personal, or extra-trust business relationship to the grantor or the beneficiary, the stock interests held in trust will be attributed

to the grantor or beneficiary, as appropriate.

(iv) Non-voting stock shall be attributed as an interest in the issuing entity.

(v) Limited partnership interests shall be attributed to limited partners and shall be calculated according to both the percentage of equity paid in and the percentage of distribution of profits and losses.

(vi) Officers and directors of an entity shall be considered to have a controlling interest in the entity. The officers and directors of an entity that controls a licensee or applicant shall be considered to have a controlling interest in the licensee or applicant.

(vii) Ownership interests that are held indirectly by any party through one or more intervening corporations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, except that if the ownership percentage for an interest in any link in the chain exceeds 50 percent or represents actual control, it shall be treated as if it were a 100 percent interest.

(viii) Any person who manages the operations of an applicant or licensee pursuant to a management agreement shall be considered to have a controlling interest in such applicant or licensee if such person, or its affiliate, has authority to make decisions or otherwise engage in practices or activities that determine, or significantly influence:

(A) The nature or types of services offered by such an applicant or licensee;

(B) The terms upon which such services are offered; or

(C) The prices charged for such services.

(ix) Any licensee or its affiliate who enters into a joint marketing arrangement with an applicant or licensee, or its affiliate, shall be considered to have a controlling interest, if such applicant or licensee, or its affiliate, has authority to make decisions or otherwise engage in practices or activities that determine, or significantly influence:

(A) The nature or types of services offered by such an applicant or licensee;

(B) The terms upon which such services are offered; or

(C) The prices charged for such services.

(c) *Bidding credits.* (1) After August 7, 2000, a winning bidder that qualifies as a small business or a consortium of small businesses as defined in this section may use the bidding credit specified in § 1.2110(e)(2)(iii) of this

chapter. A winning bidder that qualifies as a very small business or a consortium of very small businesses as defined in this section may use the bidding credit specified in § 1.2110(e)(2)(ii) of this chapter.

(2)(i) Businesses owned by members of minority groups and women, including small businesses owned by members of minority groups and women, that are winning bidders on nationwide licenses on Channel 5, Channel 8, and Channel 11 prior to [effective date of rules] will be eligible for a twenty-five (25) percent bidding credit.

(ii) Businesses owned by members of minority groups and women, including small businesses owned by members of minority groups and women, that are winning bidders on regional licenses on Channel 13 and Channel 17 prior to August 7, 2000 will be eligible for a forty (40) percent bidding credit.

(d) Installment payments. Small businesses, including small businesses owned by members of minority groups and women, that are winning bidders on any regional license prior to August 7, 2000 will be eligible to pay the full amount of their winning bids in installments over the term of the license pursuant to the terms set forth in § 1.2110(f) of this chapter.

12. Section 24.404 is amended by revising paragraph (a)(1) to read as follows:

§ 24.404 Eligibility.

(a) * * *

(1) The applicant is qualified under the applicable laws and the regulations, policies and decisions issued under the laws, including § 24.12;

* * * * *

§ 24.430 [Amended]

13. Section 24.430 is amended by removing paragraph (a)(4), redesignating paragraph (a)(5) as paragraph (a)(4) and adding the word "and" at the end of paragraph (a)(3)."

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 635

I.D. 052500B

Atlantic Highly Migratory Species (HMS) Fisheries; Large Coastal Shark, Small Coastal Shark, and Pelagic Shark Species

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and

Atmospheric Administration (NOAA), Commerce.

ACTION: Quota adjustment and fishing season notification.

SUMMARY: NMFS announces that the landings of large coastal sharks (LCS) in the Atlantic Ocean, Gulf of Mexico, and Caribbean Sea totaled 742.7 metric tons (mt) dressed weight (dw) during the first semiannual 2000 season. Because this constitutes an overharvest of 100 mt dw, the second semiannual 2000 LCS quota is reduced accordingly. NMFS also notifies eligible participants of the opening and closing of fishing seasons for Atlantic LCS, small coastal sharks (SCS), and pelagic sharks.

DATES: The fishery opening for LCS is effective July 1, 2000; the LCS closure is effective from 11:30 p.m. local time August 7, 2000, through December 31, 2000. The fishery opening for SCS and pelagic sharks are July 1, 2000; no closure dates for these fisheries are included in this document.

FOR FURTHER INFORMATION CONTACT: Margo Schulze-Haugen, Karyl Brewster-Geisz or Steve Meyers, 301-713-2347; fax 301-713-1917.

SUPPLEMENTARY INFORMATION: The Atlantic shark fishery is managed under the Fishery Management Plan for Atlantic Tunas, Swordfish, and Sharks (HMS FMP), and its implementing regulations found at 50 CFR part 635 issued under authority of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 *et seq.*).

On June 30, 1999, NMFS received a Court Order from Judge Steven D. Merryday relative to the May 1997 lawsuit challenging commercial harvest quotas for Atlantic sharks. Specifically, the order states: "... the Court hereby preliminarily, and until further order of the Court, expressly ENJOINS the defendant and his designees from enforcing the 1999 regulations, 64 FR 29090 (May, 28, 1999) with respect to Atlantic shark commercial catch quotas and fish-counting methods (including the counting of dead discards and state commercial landings after federal closures) that are different from the quotas and fish counting methods prescribed by the 1997 Atlantic shark regulations, 62 FR 16648 (April 7, 1997)."

As such, the annual 2000 LCS quota continues at the 1997 level of 1,285 mt dw for all species of LCS, (Table 1 of appendix A to part 635), with no minimum size on ridgeback LCS. The SCS and pelagic shark quotas also revert to their annual 1997 levels, of 1,760 and 580 mt dw, respectively. The 1997 prohibited species list includes only five prohibited species: white, basking,

whale, sand tiger and bigeye sand tiger. The limited access provisions for commercial harvests still apply, including trip limits for directed and incidental shark permit holders.

A motion to clarify the terms of the court injunction is pending before the court. If granted, the 1999 prohibited species list would be in effect for the Atlantic commercial shark fishery. NMFS will announce the court's decision with specific details in the **Federal Register** once the court rules on the motion.

Under the terms of the Court injunction, the Assistant Administrator for Fisheries, NOAA (AA), is authorized to adjust the semiannual quota to reflect actual catches during the preceding semiannual period. Harvest data submitted to NMFS indicate that the landings of LCS from January through March 31, 2000, totaled 742.7 mt dw, which is 100.7 mt dw more than the available semiannual quota of 642.5 mt dw. Therefore, the adjusted quota for LCS for the second 2000 semiannual period is decreased from 642.5 mt dw to 542 mt dw. The adjusted quota of 542 mt dw is available for the period July 1 through December 31, 2000.

The second semiannual fishing season of the 2000 fishing year for the commercial fishery for LCS in the Western North Atlantic Ocean, including the Gulf of Mexico and the Caribbean Sea, will open July 1, 2000. Catch rate data from the second semiannual fishing seasons from 1997, 1998, and 1999 for LCS species indicate that the available LCS quota of 542.5 mt dw will be attained within 38 days. Accordingly, the AA has determined, based on these projected catch rates and the adjusted quota, that the quota for the 2000 second semiannual season for LCS in or from the Western North Atlantic Ocean, including the Gulf of Mexico and Caribbean Sea, will be attained as of August 7, 2000. The LCS fishery will close August 7, 2000, at 11:30 p.m. local time.

During a closure, retention of, fishing for, possessing or selling LCS are prohibited for persons fishing aboard vessels issued a limited access permit under § 635.4. The sale, purchase, trade, or barter of carcasses and/or fins of LCS harvested by a person aboard a vessel that has been issued a permit under § 635.4 are prohibited, except for those that were harvested, offloaded, and sold, traded, or bartered prior to the closure and were held in storage by a dealer or processor.

The second semiannual quota for SCS is 880 mt dw. The second semiannual